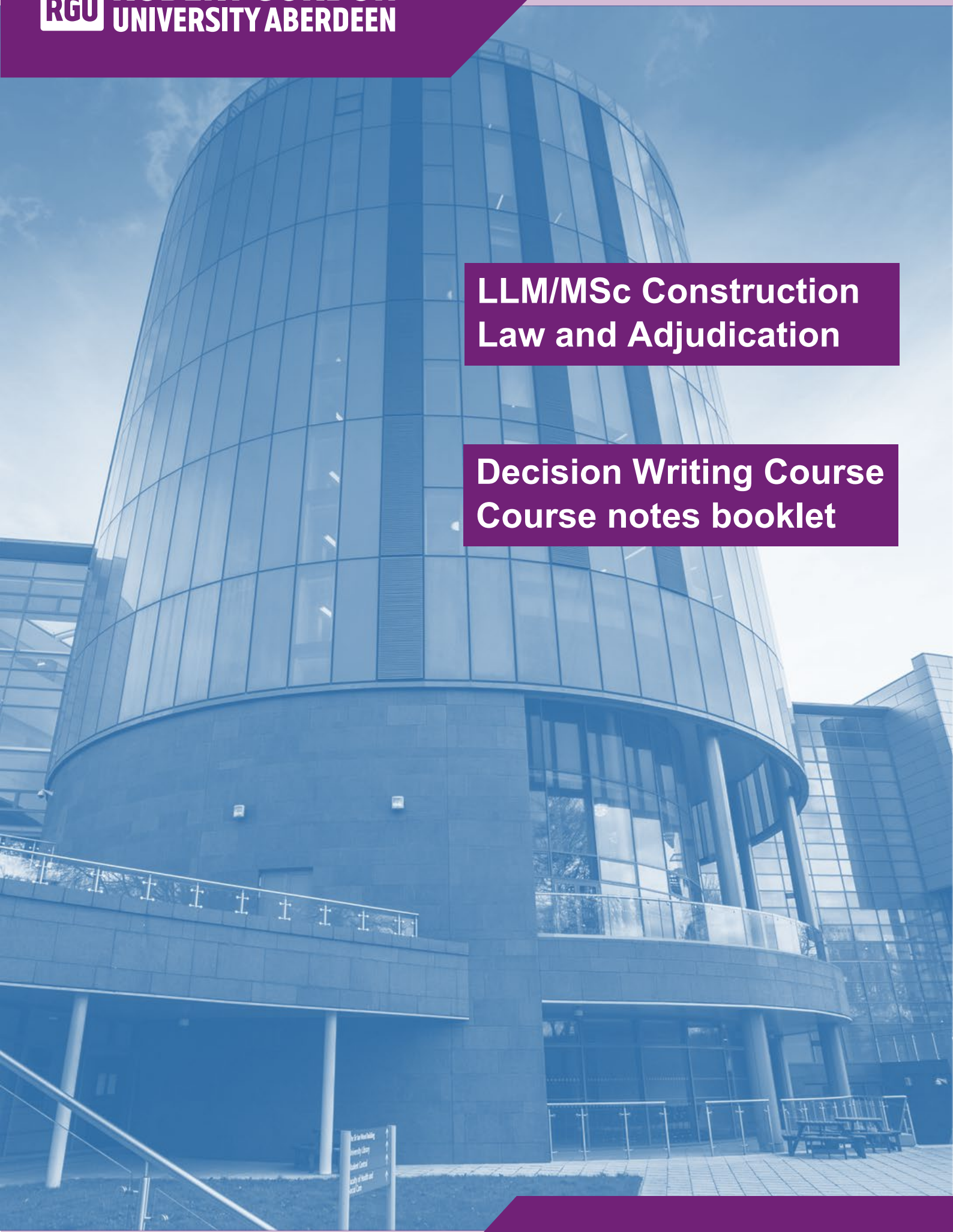
ROBERT GORDON UNIVERSITY ABERDEEN

LLM/MSc Construction Law and Adjudication

Decision Writing Course Course notes booklet



Final – June 2023,
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With thanks and acknowledgment to:
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Contents

Introduction

General:

This decision writing course is to assist candidates who have undertaken the LLM/MSc Construction Law and Adjudication course, to extend their knowledge in the process of adjudication to decision writing. The further objective of the course is to provide a candidate with the theory and knowledge required to analyse, to then consider, and conclude reasoning based on evidence upon which a decision in construction adjudication rests. Candidates will also learn about the principles of decision writing and undertake an examination of understanding and competence in decision writing skills.

Candidates taking this decision writing course will have successfully completed the academic programme in adjudication. Therefore, an understanding of the law of contract and evidence, and of the law, practice and procedure of adjudication is assumed. Candidates undertaking the course should be familiar with the adjudication provisions set out in Part II of the Housing Grants, Construction and Regeneration Act 1996 as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009', supported by the 'Scheme for Construction Contracts (England and Wales) Regulations 1998, amended the Scheme for Construction Contracts (England and Wales) Regulations 1998, (Amendment) (England) Regulations 2011. The notes within this course booklet are set out in accordance with the four topics covered in the adjudication decision writing course, being:

Topic 1 - Drafting in adjudication

Topic 2 - Evidence and witnesses

Topic 3 - Purpose, reasons, and reasoning

Topic 4 - Structure and issue

The four topic areas should be read in order as they follow the adjudication decision process from drafting principles through to the preparation and issue of an adjudicator's decision.

Course structure:

The course is delivered over four lectures, held virtually, where each lecture will cover one of the topics. This course booklet and the accompanying slides provide the core material of the course. The slide presentations for each topic, provide a summary of the subject matter, where this booklet provides further elaboration and detail. The candidate is strongly encouraged to develop further learning through the essential reading in the booklist.

The materials on 'Adjudication Process' and the 'Issues' should be familiar to students of the LLM/MSc Construction Law and Adjudication from their earlier studies. For ease of reference, these materials are available on Moodle within a dedicated section. Please refer to these materials where appropriate as the necessary background.

Assessment:

The course will be assessed in an examination, held virtually, at the end of the lecture programme. The examination, based on an adjudication scenario, will be held over two stages. Stage 1 will comprise of a first issue of case papers. These papers will allow the candidate to gain an overall understanding of the case scenario through background and facts. Stage 2 may comprise of further submissions from the parties and the adjudicator's notes. Using these later submissions and the papers from Stage 1 the candidate will then formulate the necessary findings of law and fact. Finally, the candidate will prepare an adjudicator's decision based upon the findings made. Stage 2 of the assessment will be time limited requiring a decision to be prepared expediently and accurately to reflect the conditions of adjudication. Further information on the course

examination can be found in the relevant Assessment document and on the Adjudication Decision Writing Moodle page.

Successful completion of the Decision Writing course and following examination may entitle candidates to apply for membership of the Chartered Institute of Arbitrators (CIArb). Please consult the Moodle page or contact the Course team to check the availability of an exemption and for details of the current CIArb accreditation arrangements.

Booklist, essential reading:

Sir Peter Coulson, *Coulson on Adjudication* (4th edition, Oxford University Press 2018), ISBN 978-0-19-882211-0.

Martin Cutts, *Oxford Guide to Plain English*, 5th edition (Oxford University Press 2020), ISBN 978-0-19-884461-7.

James Pickavance, *A Practical Guide to Construction Adjudication*, (Wiley Blackwell 2016), ISBN 978-1-118-71795-0.

Booklist, further suggested reading:

Adrian Keane, The Modern Law of Evidence (13th edition, Oxford University Press 2022), ISBN 978-0-19-285593-0.

Ian Dennis, The Law of Evidence (5th edition, Sweet & Maxwell 2013), ISBN 978-0-41-402816-6.

Dominique Rawley, Kate Williams, Merissa Martinez, Peter Land, Construction Adjudication and Payments Handbook (Oxford University Press 2013), ISBN 978-0-19-955159-0.

RICS Professional Guidance, Surveyors Acting as Adjudicators in the Construction Industry, (4th edition, 2017), Royal Institution of Chartered Surveyors (RICS).

Darryl Royce, Adjudication in Construction Law, (2nd edition, Informa 2022), ISBN 978-0-367-55639-6.

Mark Tottenham, The Reliable Expert Witness (Clarus Press Ltd 2021), ISBN 978-1-911611-33-2

Robert Horne and John Mullen, The Expert Witness in Construction (Wiley Blackwell 2013), ISBN 978-1-118656-34-1.

Topic 1 – Drafting in Adjudication

1.1 General

In adjudication, the parties can expect an adjudicator to have the necessary knowledge, expertise, and skill across all aspects of the process and its outcome, which will be the decision. Knowledge required would include the law of contract, tort, and evidence together with the legal framework, adjudication practice and procedure, decision making and finally drafting. This topic deals with drafting, as a pre-requisite skill, in adjudication. At the outset of an adjudication, you will have to take charge and communicate that you have control of the process. This may be initiated verbally at an introduction meeting, but it will invariably require written confirmation. You need to start as you mean to continue, where the adjudication process can be summarised as:

- Applying the substantive law.
- Applying the procedural law.
- Management and administration of the process.
- Managing written communication.

A high standard of written communication is of critical importance to the adjudication process. Unsatisfactory written communication will immediately undermine confidence in you as the adjudicator and in the process. Written communication involves the creation of e-mails, letters, directions, procedural decisions and then the adjudication decision itself.

1.2 What you will learn

Through the learning of this topic, you should be able to understand the importance, relevance, and context of good written drafting as part of the adjudication process. You should also develop an appreciation of the importance of incorporating best practice drafting within your adjudication writing.

1.3 Why is good drafting important?

Adjudication is expedient, since the restriction of time available rarely allows for meetings, other than an introductory meeting that will often be conducted virtually. Whilst an oral hearing can be accommodated within the process, this will be very much the exception, as almost all adjudications are conducted on a 'submission of documents only basis.' It follows that for nearly all adjudications, the parties will never meet you, other than in a brief virtual meeting. As a result, the primary medium of communication will be through writing. It is necessary for a competent adjudicator to be able to create written communication in a comprehensive, clear, and concise manner that includes:

- Being personable, applying attention and always being objective.
- Writing with civility and always being polite.
- Adopting good grammar and use of language.
- Always communicating with both parties together.

The quality and drafting of your written communication, throughout the process and the decision itself, will reflect upon your credibility as an adjudicator. Always remember that your previous communications will influence the reaction of the parties upon the issue of your decision.

1.4 Be aware of your audience

The primary purpose of a decision is to make, and to record, the adjudicator's final and to all intents binding decision on the dispute. Then by publication, or issue, to inform the parties of the decision. It follows that the first and most important audience will be the two parties. For the successful party, the decision should specify the relief to be provided in a manner that can be enforced by the courts, if necessary. For the unsuccessful party, your decision should communicate, through reasoning and explanation, why they have not been successful.

The second audience will be the representatives of the parties, who will advise their clients, on the consequences of the decision. The final audience to be taken into account is the judiciary, should the decision be challenged or where enforcement is sought.

Although this is rare, it does happen, as evidenced by the substantial body of jurisprudence that has evolved in adjudication since it came into force in the UK on 1 May 1998. Your decision must be written to withstand judicial scrutiny.

In most cases, you will be dealing with companies as the parties. However, it is not unusual for one of both or the parties to be individuals, couples, or partnerships. The essential point is that your communications and decision will be directed to real people. As parties in adjudication, they will have a significant interest, financially and emotionally, in the outcome. Whilst your decision is likely only ever to be considered by a limited audience, reflecting confidentiality, it will be an audience that will have a considerable investment in the process and your decision as the outcome.

Bear in mind that in every dispute there will usually be an authority figure within each party. This authority figure will decide on the following action after the issue of your decision. It is often the case that the authority figure will not have been directly or actively involved in the dispute and the adjudication. Be aware that your decision, as a stand-alone, or self-contained, document, will provide an opportunity for the person in authority to have a considered and comprehensive view of the dispute.

In your discussions and written communication, it is important to have empathy, which is not to be confused with sympathy, with both parties. Always be conscious that you have been appointed, or have been chosen, by the parties who have given you the considerable weight of responsibility to resolve a dispute that has arisen between them.

A critical aspect of your approach to adjudication decision making is to have an awareness of Equality, Diversity, and Inclusion (EDI) in all your communications with the parties. The context of adjudication can be broad where there may be differences in culture, background and even representation where a successful adjudicator will have a sensitivity to these issues and act accordingly. The standard with which you approach communication will usually be set out in the Code of Conduct of your original profession and may be supplemented by other codes such as the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct. Awareness of the applicable codes can provide useful guidance to allow you to undertake the role of adjudicator in accordance with the high standards required.

1.5 Approach to drafting

Your overall approach to drafting should communicate that you have a command of the process, and you have the process under control. You need to have a clear strategy as to when to communicate by e-mail only, or when by letter issued under cover of e-mail. It is usual for standard communications, such as those of introduction, your fee proposal, and terms of business, to be in letter form, issued as an attachment to a covering e-mail in ‘PDF’ format. Avoid issuing letters or documents in ‘Word’ format, as your documents can change in structure upon receipt and opening when, for example, the recipient does not have the corresponding text font. Issuing a letter in PDF format, which minimises any change in the opening of the digital file, is more professional.

It is good practice to advise the parties, as part of your first communication, that all e-mail communication will be in the form of a single string, or thread, always copied to the other party. The thread should then commence and continue from your initial e-mail. This simple approach, whilst being practical, communicates that you have done this previously and demonstrates confidence. It avoids what can quickly become a multitude of e-mail strings, and consequent duplication, making it difficult for later reference for you and the parties. A single e-mail string, or thread, also reduces the possibility of one party

inadvertently communicating with you alone, and not copying in the other party.

You should always give yourself enough time to draft any communication, whether this is simply an e-mail, a letter, or the decision. A rushed, or hurried, communication will carry greater risk of including mistakes that may later be regretted. A discipline of drafting, checking, setting aside, then re-considering and finally checking before issue will always reduce mistakes.

Always remember that allowing inadequate time is the enemy of an adjudicator. To conduct part of an adjudication, or more importantly, to write a decision in haste is to neglect your responsibility to the parties to fully consider the process and the following decision.

1.6 Drafting generally

A virtue in writing as an adjudicator is to be able to use clear, plain language. The International Plain Language Federation defines plain language as:

"A communication is in plain language if its wording, structure, and design are so clear that the intended audience can easily find what they need, understand what they find, and use that information."

The desire for plain English is not new. In 1887, AJG Mackay (a Scottish Sherriff) advised in the Law Quarterly Review that *'Good drafting says in the plainest language, with the simplest, fewest, and fittest words, precisely what it means. Most people will say that a quality document is one that is 'clear,' 'brief' and 'easy to follow.'* Readers dislike material that is badly organised because it takes time and patience to understand, which could be used more constructively, in considering what is meant to be said. You need to develop the skill to be able to accurately summarise the full sense of the information available to you in your own words. Everyday words should always be your first choice. You should demonstrate to the parties that you have taken account of all the submissions, the evidence and what has been provided to you.

The vocabulary and the expressions you use should be relevant to the nature of the dispute and the parties. For example, a decision on a dispute between a homeowner and a builder will be significantly different in nature to that between a major employer and a large contractor. Your drafting should reflect these differences. Beware of using, of your own volition, legal terms that have not been used by the parties or their representatives, as there is a risk that they may be taken out of context or misunderstood.

Your writing should always be courteous and decisive with no latitude for ambiguity. It is not unusual for the parties to express themselves using emotive language, particularly in e-mail communications written in the heat of the moment. You should always respond, if required to do so, in objective language without forming or reinforcing conclusions, or adding to the emotion. Always be conscious of the reader and avoid negative commentary unless it is necessary.

It is important to avoid any vague language. Words such as 'maybe,' 'perhaps,' may,' 'could,' and 'might' should not be included in formal decisive writing. You should not use overtly legal language as this only serves to distance you from the parties and can be a barrier to ease of understanding. It is not necessary to draft your communications in a legal style, but only to be legally satisfactory, where they should be:

- Concise and always relevant.
- Clear and intelligible.
- Certain and unambiguous.

There is no mandatory style for the writing of an adjudicator's decision. You should adopt a style, format, sequence, and form of language with which you are comfortable. Your individual style will evolve. Experienced adjudicators, with confidence, may adopt a freer and more liberal style, others will adopt a more concise,

minimalist, or even staccato style, and some will adopt a style that includes extensive legalese.

You should seek to develop a clear, carefully worded style of communication. Sentences should be short and precise. You should avoid long sentences, as readers easily lose the meaning. The easiest method of increasing readability is to reduce sentence length, where you can, to below 20 words. The full stop should be the most common punctuation mark. Clear punctuation is essential. Consider the difference between 'I love cooking my family and my dog' and 'I love cooking, my family, and my dog.' You should remove all words that have no function. Every word should be worthy of being on the page. Avoid the use of double negatives as they can often confuse the reader.

1.7 Think of your reader

It has been said that "When you're writing for busy people, they want to get in, get on and get out. So, you need to give them a clear structure they can see instantly."[1] Most of your time will have been directed towards finding information and assessing evidence. You then need to assimilate this into clear thinking and reasoning to support your decision. The structure of your writing should reflect this clear thinking. You should always be conscious of your reader. The use of 1.5 line spacing allows those with weaker eyesight to read your decision more easily, in addition to permitting adequate space to write notes. Beware of contemporary typefaces as they can look stylised. Whilst there are those who say the Times New Roman font is lacklustre, it is a universally adopted typeface for legal writing, being considered authoritative, classical, and official.

1.8 Headings, paragraphs, and contents

The nomenclature, the formatting and the use of headings should be consistent throughout your decision writing. The introduction of headings to divide your decision into its constituent parts will be of considerable assistance to your readers. Headings can also assist your cross checking against a past decision to ensure that the necessary content has been included. All paragraphs should be numbered, again to assist with later referencing. Paragraphs should be well-structured to set out or explain a point and the related matters. One sentence paragraphs should be avoided, whilst long paragraphs are difficult to read and digest. The paragraphs should be formatted to permit ease or reading and to avoid bunching together of text.

The inclusion of a contents page assists in providing confidence to the reader that the decision is well-structured and considered. The contents page allows the reader to follow your logic and the narrative through the decision whilst allowing ease of finding sections when later referring to your decision. A contents page is not necessary in short decisions, but these will be the exception.

1.9 Use of a template document

You should seek to develop a template or 'boilerplate' decision document with a range of headings that you can delete or include as required of the individual adjudication. All adjudication decisions are bespoke, but they all have a similar content and chronology. They will always comprise an introduction, followed by discussion and the decision itself.

Be prepared to evolve the template through continued improvement. The template will allow you to dedicate your time to the substance of the decision, rather than to how you structure the decision. A template in digital format can allow you to save thoughts and ideas as you

[1] Martin Cutts, *Oxford Guide to Plain English* (5th Ed, OUP 2020) at xxvi.

work through the evidence, to ensure that points are not lost, allowing you to pick these up later. You will be seeking to assimilate a significant amount of information in a brief period, and the digital template will provide an essential tool in managing your thought process.

1.10 Decision writing strategy

Adopt a personal strategy for decision writing that you can develop over time. It may be as simple as starting early. Another approach may be to complete the decision in sections or start writing with a set of bullet points for certain sections, upon which you later elaborate. One example of a more involved approach to drafting is called 'Madman, Architect, Carpenter and Judge.'[2] This approach considers each stage of the writing process as four different personalities to assist in the thinking, structure, and formulation of decision writing. The four personalities are described as:

- The **Madman** is creative, enthusiastic and generates ideas. These are your early thoughts, hand-written notes, and bullet points.
- The **Architect** reviews what the Madman has created and presented. He then uses it to develop the outline of the decision. The role of the Architect is to select the key ideas from the Madman, then to arrange them into a pattern that will form discrete questions to be addressed and identify the cogent arguments.
- The **Carpenter** bonds the key ideas logically. The role of the Carpenter is to write and re-write each sentence so that the adjudicator's decision has clarity and flows elegantly from beginning to end telling the story.
- The **Judge** is a critical authority who will ratify that the tone of the decision is appropriate, that the decision reads well, and that the decision demonstrates balance and fairness. The Judge is responsible for ensuring the use of easily understood language, consistent terminology, fine detail, grammar, punctuation, and spelling.

1.11 Legally defined wording

In the English language there are conventions, terms and phrases that have been defined or tightly construed by law. Best practice in adjudication writing will adopt these conventions and terms for precision, which include:

- **'Can'** means 'is able' or 'is possible.'
- **'May'** means 'is optional' or 'is permitted.'
- **'Shall'** means 'must.'
- **'Will'** denotes in the future.
- **'He'** unless specified otherwise means 'he,' 'she, or 'it' and includes the plural and the singular.

There are construction terms that have also been legally defined by law, including:

'Defence' denotes a pleading served in reply to the referral, statement of claim or particulars of claim. It answers the allegations by admissions or denials.
'Claim' means a demand or assertion, or other right arising out of the contract. A 'claim' is neither the cause of action supporting it, or the grounds on which it may be based.
'Counterclaim' means a claim presented by a responding party in opposition to a referring party's claim (this is its main meaning). A (true) counterclaim is 'a crossclaim brought by a responding party that asserts an independent cause of action. It is not a defence to the claim made in the adjudication by the referring party.'
'Counterclaim' can also be used to mean a deduction from the claim of the referring party, which, if established, will defeat or diminish the referring party's claim. It is important to understand that whilst the word 'counterclaim' mainly means a claim 'as a sword' (first meaning), that is to say a claim that stands in

[2] Originally developed by Betty S. Flowers, "Roles and the writing process" in *Proceedings of the Conference of College Teachers of English* 44 (1979) 7-10 and later developed by Damien Keogh and Niall Lawless, *Adjudication Practice and Procedure in Ireland, Construction Contracts Act 2013* (Routledge 2020) at 323.

its own right and which could have been an initial claim had there been no claim by the opposing party – it may also be used 'as a shield' (second meaning), that is to say as a set-off, as defined here. It is important to understand that you cannot, unless given jurisdiction, deal with a counterclaim which is more in value than a defence to the claim that has been referred.
'**Set-off**' means a crossclaim which is made as a defence which, if successful, will defeat or diminish the referring party's claim. In these circumstances, the adjudicator may not award the responding party the full amount of a crossclaim but may allow a set-off up to the maximum amount of the claim.
'**Difference'** is often expressly included as a sub-category of 'dispute' in construction adjudication legislation (see, for example, s.108 (1) of the Act).
'**Dispute'** in everyday, ordinary usage means a contention, assertion, or allegation with opposing arguments.

There are certain other phrases have been tightly construed by the English courts, including:

'**Arising out of**' has a wide interpretation. Its meanings include 'every dispute,' except where there was never a contract at all, and includes, for example, frustration and non-disclosure.
'**Arising under**' is similar to, but more restrictive than, 'arising out of,' and includes issues of non-disclosure.
'**In connection with**' has been taken to exclude, for example, rectification and claims for damages based on fraudulent inducement of the contract.
'**In relation to**' has the same general restrictive meaning as 'in connection with.'
'**In respect of**' includes disputes as to whether there has been a breach, or whether circumstances have arisen which have discharged a party or parties from future performance.
'**Relating thereto**' is fairly wide, it includes, for example, allegations that the contract has been terminated through failure of a condition precedent, or non-disclosure.
'**Relative to**' has the same general meaning as 'relating thereto.'
'**With regard to**' has the same meaning as 'in respect of.'[3]

Avoid the use of outdated legal words such as hereof, whereof, thereof, and herein, hereinafter, and hereinbefore, together with hereby, thereby, and whereby. These words, now rarely used in modern language, are unnecessary in contemporary legal writing. Your use of dates should be consistent using numerals and months without shortening, where 11 November 2022 is correct. You should avoid 11th Nov 22 and 11/11/22 as examples that can be easily misunderstood.

1.12 Tone of voice

Tone of voice is a term often used in verbal communication, but it is equally applicable to written communication. The use of plain straightforward language that can be easily understood by your audience is essential. All written communication, including e-mails, should be spell-checked before issue.

The tone of voice of your e-mails, your letters and finally your decision will reflect your competence as an adjudicator. You should eliminate grammatical errors, spelling mistakes, bad use of language, inappropriate phraseology, and use of slang. Overly technical terms or excessively legal language may only serve to confuse the parties and dilute the ease of understanding of your decision.

1.13 Drafting of contentious matters

There may be situations through the process that are contentious, for example, one party complaining about the behaviour of the other or being uncooperative with your directions. With

[3] CIArb Construction Adjudication Workbook – Module 3, Charles Brown.

contentious matters, where time allows, you should draft a response and then set it aside until a later time to review. You should seek to ensure that there are no mistakes and that it does not cause offence. Your tone of voice in responding to these situations should always be firm, decisive, and always courteous.

Do not to become overly involved through any negative expression of opinion that could be seen to be procedurally unfair. Remember that 'heat of the moment' complaints will often fade away as matters are overtaken by other events in the tight timetable of the process. When required to respond, it will always be better to act with guidance rather than censure.

1.14 Don't over communicate

When drafting your communications only say something once, there is no need to emphasise or repeat as this will only increase the possibility of mistake. An e-mail should be structured to communicate your intent with brevity and accuracy without undue elaboration. Be aware that any vagueness will serve to dilute confidence in your control of the process.

If your communication is by letter attached to an e-mail, do not repeat what is in the letter within the covering e-mail. Remember that your e-mail only serves to be the method by which you are issuing your letter. Your communications, whilst always courteous, should be straight to the point. You should always endeavour to ensure your communications are received by both parties. It is good practice to request an acknowledgement of receipt of a communication from each of the parties.

1.15 Concurrent or retrospective writing up

An essential discipline of being an adjudicator is forward planning to allow yourself enough time to complete the tasks required of the process. It is always better to start the structure of the decision at the beginning of the process. Avoid the temptation of delaying the commencement of the decision writing.

It will always be more efficient and accurate to record and write up the procedural matters as they occur, as they will be fresh in your mind and contemporaneous with the adjudication process. Recording the process in this way will ensure that your writing reflects the unfolding events of the process accurately.

The alternative of later or retrospective writing up will necessitate increased time in referencing back over past communications, which may be contained in multiple e-mail strings and letters. Referencing back will absorb time through the necessity of cross-checking to ensure accuracy. Because the writing up will be after the event, there will be an increased likelihood of mistake and inaccuracy of chronology. Put simply, it is easier and more accurate to record events as they happen whilst they are in your mind.

1.16 Fully utilise your software

All the most popular word processing programmes now include an editorial check function. With their availability and ease of use there is less tolerance for spelling mistakes or grammatical error. It is good discipline to use the spellcheck function for all written communication including e-mails. Your writing style will improve through use of the spellcheck, thesaurus, and dictionary functions, whilst also expanding your vocabulary.

Further reading:

Martin Cutts, *Oxford Guide to Plain English* (OUP, 5th Ed, 2020), Chapters 1, 12, 13, 14, 28, 29 and 30, Appendix 1 and 2.

Notes:

Topic 2 – Evidence and witnesses

2.1 General

Adjudication is the process of determining a decision, where it is evidence, persuasive or otherwise, that provides the proof in support of the decision. Evidence is utilised to prove or disprove a matter of fact, to provide a credible basis to inform the making of a conclusion or decision. Important aspects of evidence are relevance, admissibility, and weight. Relevance is considered by reference to the issue of difference that the adjudicator must decide upon. Admissibility determines whether evidence should be considered as a matter of law. Weight considers the degree to which the evidence should inform the decision.

It follows that evidence that is irrelevant should not impact upon the outcome and should be excluded. *'Evidence is relevant if it is logically probative or dis-probative of some matter which requires proof'* and *'makes the matter which requires proof more, or less, probable*.[4] Adjudication is based upon an adversarial system where each party presents evidence in advancing their case.

2.2 What you will learn

Through this topic, you should learn about the importance of evidence as the basis of the decision-making process. You should be able to describe the different types of evidence and their importance, together with determining relevance and admissibility and weight. You should also be able to explain the difference between the legal and evidential burdens.

You should be able to assess the weight to be given to evidence and determine the standard of proof required in adjudication. Finally, you should understand the importance of witnesses of fact and expert evidence together with the differences between them, as used in the adjudication process.

2.3 Purpose of evidence

Evidence is presented to assist in the determination of disputed areas of fact, or disputed areas of opinion, so that the facts of the situation that occurred can be ascertained in the search for truth. Evidence can be defined as:

1. Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of fact.
2. The collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute.
3. The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding.[5]

The use of evidence to determine the facts that occurred can be described as:

'…information by which facts tend to be proved. The law of evidence is that body of law and discretion regulating the means by which facts may be proved. It applies in both courts of law and tribunals and arbitrations in which the strict rules of evidence apply…where all relevant evidence is admissible subject to exceptions.' [6]

Because of the need for finality in litigation, together with the control of cost and time, the courts have developed rules to control what evidence is admissible, and what is not. In the United Kingdom, these rules are provided in the Civil Procedure (Amendment) Rules 2023. These rules, specifically devised for the courts, are not binding upon an adjudicator. However, an understanding of the rules, to determine how evidence is assessed, is essential for anyone acting as an adjudicator.

[4] Director of Public Prosecutions v Kilbourne [1973] AC 729.
[5] Bryan Garner (ed), *Black's Law Dictionary* (5th pocket edition, Thomson Reuters 2016) at 307.
[6] Adrian Keane, *The Modern Law of Evidence* (13th edition, OUP 2022) at 2.

2.4 Types of evidence

There are three primary forms of evidence that are typically presented to an adjudicator, by a party in advancing its case, which are:

- Oral evidence.
- Documentary evidence.
- Real, or tangible, evidence.

Oral evidence: or testimony, is an oral statement provided by a witness. This will normally be in the form of direct evidence, being first-hand knowledge, of what the witness has experienced. If the evidence is relevant to a fact in issue, then it will be admissible.

Documentary evidence: will include recorded matters such as drawings, maps, plans, photographs, tapes, discs, tapes, video tapes, films and in a construction context, documents such as site diaries and labour reports. Documents may be presented to confirm a truth or to demonstrate existence or to prove a condition and may be considered as reliable evidence.

Real, or tangible, evidence: will usually be material provided for inspection to prove what has either been undertaken, or not undertaken. In construction this will usually be advanced at a site inspection, where the matter at issue is apparent or has been opened-up for inspection. In defective work, such evidence will be persuasive as it can be seen and will usually be of significant importance in the adjudication.

There are two further types of evidence that will rarely be applicable in adjudication, but an adjudicator should be aware of, which are:

- Hearsay evidence.
- Circumstantial evidence.

Hearsay evidence: is in common language used to define statements or comments, often in the form of gossip, which cannot be proven to be true. It is defined legally as *'any statement, other than one made by a witness in the course of giving evidence in the proceedings in question by any person, whether it was made on oath or unsworn and whether it was made orally…'*[7] Another way of understanding hearsay evidence is to consider it as second-hand information offered by someone who did not actually witness the event. The Civil Evidence Act 1995 provides rules on how hearsay evidence may be admitted in civil courts. Hearsay evidence is assessed on degree of probity, where it is very rarely raised in adjudication.

Circumstantial evidence: is unlikely to be considered by an adjudicator as it requires a composite approach to evidence. Circumstantial evidence can be described as a rope made up of several cords where *'One strand of the cord may be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence – there may be a combination of circumstances no one of which would raise a reasonable conviction of more than a mere suspicion; but the three taken together may create a conclusion of guilt…'* [8] Or a more recent explanation of circumstantial evidence, being *'Evidence of independent facts, each of them in itself insufficient to prove the main fact, may yet, either by their cumulative weight or still more by their connection of one with the other as links in a chain, prove the principal fact to be established.'* [9]

2.5 Facts

In adjudication it is necessary to seek the truth of the facts that gave rise to a particular event upon which an adjudication has been requested. Facts can be broadly categorised into three types, all of which would be proved by evidence.

Facts in issue: are often referred to as the principal facts which are those that the Referrer must prove in order to have the claim upheld.

[7] Adrian Keane, *The Modern Law of Evidence* (13th edition, OUP 2022) at 11.

[8] Pollock CB in *R v Exall* [1866].

[9] Atkin L.J in *Thomas v Jones* [1921] 1 KB 22.

For example, a party may claim a breach of contract where it is up to the party advancing the claim to prove the fact that a contract existed and the loss that was suffered by the breach.

Relevant facts: will be the facts necessary to prove the facts in issue exist or more generally referred to as supporting evidence such as that provided by an eyewitness.

Collateral facts: will be incidental but relevant to the facts in issue. These facts could for example be facts relating to the asserted lack of competence or credibility of an expert witness. Similarly, a collateral fact could be that a witness was coerced into giving evidence which would render the evidence inadmissible.

2.6 Relevance

In seeking to reduce the time and cost of settling disputes either through the courts, or by any other form of proceeding, it is necessary to ensure that evidence must be relevant. The classic definition of relevance is that *'any two facts to which it is applied are so related to each other that according to the common course of events one whether taken by itself or in connection with the other facts proves or renders probable the past, present or future existence or non-existence of the other.'*[10]

In summary any evidence that does not either prove or disprove an issue in dispute will be irrelevant. It follows that if irrelevant evidence were to be permitted it would have the likely effect of simply causing confusion rather than serving to assist in the resolution of the matter. It has been said that *'relevance is a question of degree determined, for the most part, by common sense and experience.'* [11]

2.7 Admissibility

In addition to being relevant, evidence must also be admissible, in that as a matter of law the evidence is properly admitted. The primary categories of inadmissible evidence are opinion evidence and privileged communications.

Opinion evidence, such as in bare assertions without a basis of grounding, will generally be ignored by an adjudicator. Privileged evidence which is primarily communication between a party and their legal advisors is considered confidential and will be inadmissible in adjudication.

2.8 Weight

In the context of adjudication, weight means the cogency of probative worth of the evidence, usually assessed through common sense built up from experience, taking account of:

- The extent to which the evidence is supported or contradicted by other evidence.
- The credibility of a witness in the circumstances in which the witness claims to have experienced the facts in issue.

Weight is similar to relevance as it will always be a question of degree. Evidence may be of such weight that it could justify in favour of the party advancing it. Where evidence is of so little weight, or weak, it will not justify finding in favour of the party introducing it, thus it will be insufficient evidence. The most compelling or persuasive evidence is regarded as conclusive evidence. Where evidence is in conflict an adjudicator must decide which evidence carries more weight, by the application of the test of consistency and probability, in representing the truth.

2.9 Consistency and probability

The test of consistency and probability is used in adjudication to assess documentary evidence. An example would be in a day work claim by a contractor for costs. Where the day work documentation is provided and the liability for payment has been found it will be straightforward to check the amount claimed against the documentation provided. This is not so easy where documentation is missing or is incomplete. In this case the adjudicator must

[10] James Stephens, *A Digest of the Law of Evidence* (1936) at 2 (Part 1, Article 1).

[11] Lord Steyn in *R v Randall* [2002] 1 WLR 56, HL at 62.

assess if the sum claimed, without evidential proof, is consistent with the sums claimed and proved where documents exist. If the sum is consistent the second part of the test being probability is applied. The adjudicator must then assess if it is probable in the circumstances of the context of consistency, such as the general progression of the works, that the work in connection with sum claimed was undertaken. Then if this is so, the sum claimed can be awarded to the claimant.

2.10 The standard of proof

The highest standard of proof required is that in criminal proceedings which is 'beyond a reasonable doubt.' Being described as proof that is so convincing that it could be relied upon without hesitation. It will be present where the presumption that someone is innocent until proved guilty, has been overcome. However, as adjudication is not a criminal process but is a civil process the standard of proof is lower, being based upon the 'balance of probabilities.' This could be also described as a point where the preponderance of evidence confirms that the fact is more likely to have happened, than not.

In adjudication if the balance of probabilities is equal then the standard of proof has not been met, best described as: *'The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries a burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened.'*[12]

In adjudication there can be no place for doubt or ambiguity, the disputed facts must be decided upon in accordance with the standard of proof, where *'It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged – but if the probabilities are equal, it is not.'*[13]

2.11 The burden of proof

The phrase 'burden of proof' arises from the Roman legal system phrase *'ei que affirmat non ei qui negat incumbit probatio'* which translates as 'he who asserts a matter must prove it, but he who denies it need not prove it.' The burden of proof is defined as '*A party's duty to prove a disputed assertion or charge; a proposition regarding which of the two litigants loses when there is no evidence on a question or when the answer is simply too difficult to find.*'[14]

This can be summarised as the party asserting something happened should have evidence to prove that it did. In adjudication the burden of proof will be initially with the referring party where the evidence to discharge the burden, or to prove, will be set out in the Referral submission. The Respondent will then set out its case as a defence in the Response submission. Where the Response submission includes a counterclaim, which would not be unusual in going beyond a straightforward denial, the burden of proof for advancing the counterclaim will be with the Respondent.

There may be issues that are so clearly established that there is no burden to prove, as they cannot be seriously disputed. Where these issues exist courts will be prepared to take judicial notice and not require proof, on the basis of being reasonable presumption. Examples of matters that do not need to be proved that illustrate judicial notice would be, in the absence of a programme the work should be completed in a reasonable time, the material will do the job expected or that the work would be carried out to a usual standard.

[12] *Re D (Fact-Finding Hearing: Medical Treatment)* [2014] EWHC 121.

[13] Lord Denning in *Miller v Ministry of Pensions* [1947].

[14] Bryan Garner (ed), *Black's Law Dictionary* (5th pocket edition, Thomson Reuters 2016) at 94.

2.12 Power to ascertain the facts and the law

It is commonly the case that an adjudicator in assessing evidence has the power to take the initiative in ascertaining the facts and the law. In the UK this power is set out in Section 108(2)(f) of the Housing Grants Construction and Regeneration Act (HGCRA) 1996. To reach a decision an adjudicator must be satisfied that the materials provided through the various submissions of the parties are sufficient to reach a decision. However, an adjudicator may decide that more information is needed to enable a decision to be formed. It follows that the power to request further information is discretionary and there is no obligation upon the adjudicator to use this power.

Where the Scheme for Construction contracts applies in governing the procedure, paragraph 13 provides the adjudicator with wide powers of ascertainment as follows:

The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute and shall decide on the procedure to be followed in the adjudication. In particular he may—

(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),
(b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,
(c) meet and question any of the parties to the contract and their representatives,
(d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,
(e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,
(f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,
(g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and
(h) issue other directions relating to the conduct of the adjudication.

Through the operation of paragraph 13, the Scheme permits the adjudicator to request that certain documents are disclosed. The adjudicator cannot compel a party to provide requested documentation, or evidence. If the request is not met, then adverse inferences can be drawn. Where a party refuses to disclose documents, the adjudicator can consider the reasonableness of the reasons giving rise to refusal and take this into account in determining the weight given to other evidence.

Similarly, a request for disclosure may be made by one of the parties. When considering such a request an adjudicator should ensure that the subject matter of the requested disclosure is narrow, or focused, and relevant to the facts to be ascertained. It follows that 'fishing expeditions' that are wide and imprecise should be resisted. An adjudicator should be aware that there are certain categories of documents that a party has no obligation to disclose or will be considered privileged. There are two types of legal privilege as follows:

- That which arises from the relationship between the party and their solicitor.
- Confidential communications that arise from the contemplation of pending litigation.

A further area of privilege is 'without prejudice communication,' arising either orally or in writing with the intention of seeking settlement.

There is a societal interest in allowing parties to seek settlement. This privilege seeks to encourage parties to settle by removing any potential embarrassment of previous concessions or negotiations that would prejudice a party's position should the dispute continue to litigation.

2.13 Witness evidence

In addition to documentary evidence there is also witness evidence which will be provided as either of two categories. The first category is evidence of a witness of fact and the second is evidence of an expert as provided by an expert witness. The evidence provided by witnesses, subject to their being credible, can be extremely persuasive in an adjudication and can considerably enhance the strength of the case being advanced by a party.

An important part of the skill of being an adjudicator is to determine issues of fact, or more simply the truth of what happened. As the adjudicator would have not been present at the event when it took place there is significant benefit in the evidence of someone who was there, as in a witness of fact, or has a deep knowledge of the subject area as in an expert witness.

The adjudicator needs to be mindful that there are unreliable witnesses who will state matters they believe to be true, but where they are in fact untrue. This can occur when a witness has in interest in the outcome of the process. This does not necessarily mean that a witness is lying. They may believe that their evidence is true, but there may not be sufficient grounds to support that belief.

2.14 Witnesses and the process

There are no strict guidelines for witness evidence in adjudication and it would be rare for any applicable adjudication rules to set out how witness evidence should be assessed. Witness evidence will usually be provided as part of the submissions by each party. It must be borne in mind that the Referrer who will have had time to prepare witness evidence before initiating the adjudication will usually be advantaged. The Respondent, in having to react to the Referral submission, will have significantly less time to prepare witness evidence unless the adjudication has been anticipated and prepared for.

Where there is extensive witness evidence to be considered in the Referral, with counter-part evidence to be provided by the Respondent, the adjudicator may give a clear direction as to what is expected. This may include, if necessary, approval to a time extension from the Referrer. An adjudicator needs to flexible in the treatment of witnesses and their evidence where a decision is required within the short period of time as dictated by the process. There is the possibility of extension of time but only by permission given by the Referrer. Therefore, an adjudicator has to balance the need for expedience with the requirement that the process is conducted in a manner procedurally fair to both parties.

2.15 Witnesses of fact

A witness of fact, will it follows provide evidence of a factual nature, as they know these facts, and no more. This is somebody who is asked to verify certain facts or events that they have experienced with their own senses which will normally be by sight or by hearing (rarely smelt, felt, or tasted). The evidence should be based only upon the witness's first-hand knowledge and should not be extended into providing any form of opinion.

It is not unusual for parties acting as witnesses of fact to stray into providing evidence that is irrelevant, amongst what is often extraneous material. For example, a site inspector may make observations on workmanship and then extend these observations into an opinion. Or it would not be unusual for a principal, with a considerable emotional interest in the dispute, to go beyond the facts of the event and offer disparaging commentary. In every-day language opinion can also mean conjecture as to whether a fact is true or not.

It common for a witness of fact statements to include conjecture. For example, 'In my opinion that person was incompetent.' The general rule is that opinion evidence from witnesses of fact is inadmissible. It is important that an adjudicator sees beyond opinion and considers only the facts.

Similarly, it is not unusual for witnesses of fact to be vague in defending assertions. Where witness statements are in conflict the adjudicator should compare the statements to other documentary evidence to verify facts or expose contradictions, discrepancies, or inconsistencies. The degree to which the evidence of a witness of fact is consistent and in corroboration with other evidence will reflect upon the witness credibility. The credibility of a witness of fact will in turn influence the weight given to the evidence presented, in seeking the truth.

2.16 Expert witnesses

As detailed above the general rule of evidence is that opinion evidence is inadmissible. The exception to this rule is evidence provided by expert witnesses. This exception is necessary as there may be issues where it is not possible for an adjudicator to reach a conclusion on the evidence available. Whilst it may be the case than an adjudicator has a broad depth of knowledge and expertise, there may be a lack of specific knowledge on certain typically technical aspects, for example in material science and quality testing. Professionally paid expert witnesses provide a service through their specialist expertise. In contrast witnesses of fact should not be paid, or profit from their evidence, as they will then be seen as having a vested interest that will serve to undermine their objectivity and thus credibility.

Someone will be usually regarded as an expert if he or she is skilled in a particular field through a combination of qualifications and experience. It follows that the evidence provided by an expert witness will always be strictly limited to an opinion in which he or she has the necessary expertise. The classic image of an expert witness is someone of great eminence with undoubted experience who presents their evidence in unclear and even impenetrable language. However, expert evidence is prepared by professionals from all walks of life. There are two pre-conditions that should be met in advancing expert evidence, as follows:

- The matter in question calls for expertise.
- The expert witness is suitably qualified.

Expert witnesses appointed by the parties will have professional obligations to their instructing party. Expert witnesses from any of the professions will have to comply with their applicable code of conduct with a duty to exercise reasonable skill and care. Expert witnesses are expected to give evidence in good faith and not to assist their respective clients but instead to assist the adjudicator to determine the truth. The over-riding duty of an expert witness is to assist the adjudicator with objective evidence. Despite this over-riding duty, there continues to be court criticism of expert witnesses for being partisan or being perceived as hired guns.

Unlike a witness of fact, an expert witness can express any opinion they wish, but they cannot engage in conjecture. Expert witnesses are required to consider the primary facts in a professional manner, and to then apply the knowledge of their profession. From this, expert witnesses are then expected to draw reasoned conclusions or inferences and then communicate them in an opinion, always limited to their own area of specialist expertise.

Expert witness evidence can be extremely persuasive and, when correctly delivered, can significantly enhance the strength of a party's case. For this reason, it is important for an adjudicator to always adopt a healthy degree of scepticism and caution in assessing expert evidence. It is not unusual for two experts to set out their cases with equal conviction and in some cases to reach entirely opposite views. Conversely there can be serious negative consequences when an expert witness

presents evidence in an unclear manner. At the most extreme expert evidence presented with bias, and not questioned, can lead to a miscarriage of justice.

2.17 Duties of an expert witness

The risk of over-reliance on expert witness evidence, without questioning the quality or credibility of the opinions advanced by the expert, is injustice. In seeking to minimise the potential for injustice the courts have sought to set out the duties and responsibilities of an expert witness in a number of leading cases. The most prominent of these cases is known as the Ikarian Reefer,[15] which was the name of a ship that ran aground off Sierra Leone. The duties of an expert witness have since further evolved[16] but can be summarised as follows:

- To tell the truth, both in written reports and oral evidence.
- To be independent of the client and legal team.
- To give evidence within their own expertise.
- To assist the decision maker to reach their own decision.
- To reach a reasoned conclusion on the issues.
- To research or ascertain the relevant facts.
- To educate the decision maker as to the relevant specialist or technical knowledge.
- To co-operate with the client and instructing legal team.
- To co-operate with the other legal teams when required.
- To co-operate with other experts when required.
- To communicate any changes of mind on the relevant issues.
- To comply with the directions of the decision maker.[17]

2.18 Adjudicator or joint appointed experts

It is possible for an adjudicator to appoint an expert directly, albeit this is rarely done. The advantage is that a direct appointment can save costs. There can also be a more focused briefing from the adjudicator as to the exact requirement in evidence. However, any such appointment and the associated costs should be discussed and agreed with both parties prior to proceeding. An adjudicator appointed expert runs the risk that the evidence provided will be challenged by either or even both parties, where the initial cost benefit will then be lost. To proceed with an adjudicator appointed expert without the approval of both parties is likely to draw adverse commentary. The adverse commentary may include an accusation of a breach of natural justice, with the potential for any later decision being unenforceable.

A more suitable alternative is for the parties to jointly appoint an agreed expert witness. This approach has the advantage of saving the costs associated with two experts presenting evidence in an adversarial manner. Whilst it is more likely that the evidence from a single joint expert witness will be accepted there is a danger that the expert does not have the supervision of an expert on the other side to challenge the evidence and opinion made.

2.19 Oral evidence at a hearing

The limited time in which adjudication takes place, with a default timetable of 28 days, will rarely allow time for an oral hearing. When an oral hearing is requested by a party it should be carefully considered in terms of the assistance it may provide to the process of determining the truth of factual allegations. An oral hearing is a process which assists an adjudicator to decide which of the factual allegations made by the parties and witnesses are more likely to be true. An oral hearing, if permitted by the

[15] National Justice Campania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1995] 1 Lloyds REP 455.
[16] Anglo Group plc v Winther Brown and Co Ltd [2000] EWHC Technology 127.
[17] Based on the listing in Mark Tottenham, *'The Reliable Expert Witness,'* (Clarus Press Ltd 2021)15 to 39.

adjudicator, will normally require an extension of time to come to a decision so that the necessary arrangements for the oral hearing may be made.

Any first extension of time up to an additional 14 days can only be permitted by the Referrer. Any extension beyond 14 days is only with the permission of both parties. If an oral hearing is requested by both parties, an adjudicator would be ill-advised to overrule the clear wish of the parties. To refuse a request for an oral hearing, particularly if made by both parties, is likely to result in an accusation of breach of the rules of natural justice in preventing the parties from presenting their cases as they wish.

Sometimes the expert evidence presented at an oral hearing will be contradictory. Where this occurs, it is legitimate to request the two expert witnesses to separately meet to discuss their respective evidence. The purpose of the meeting is to identify the areas on which they agree and to isolate those upon which they disagree, the latter then being presented as oral evidence.

Meetings between expert witnesses provide a valuable opportunity to clarify issues that could otherwise take substantial oral hearing time to resolve. If conducted correctly, with each expert acting in good faith, the differences of opinion can be made clear and explained to the adjudicator.

2.20 Examination of oral evidence

The accepted procedure of presenting oral evidence starts with evidence in chief, cross-examination and then re-examination. Evidence in chief is when a witness of fact gives their account of what took place or in the case of an expert witness provides a summary of their expert report, which will have been issued prior to the oral hearing. In all cases the evidence is presented by the witness through questions asked of them by their own legal team, where prompting to elicit or influence an answer is not permitted.

Cross-examination, follows the evidence in chief, as the opportunity for the other party to question the witness on matters of fact, for the following purpose:

- To elicit or emphasise the facts that are supportive to the cross-examining party's case.
- To establish facts that have the effect of undermining or damaging the other party's case, such as previous inconsistent statements.
- To discredit the witness by demonstrating that they are unreliable through mistakes, omissions, or inconsistences in their evidence.

Re-examination is where the witness is afforded the opportunity, through the answering of questions by their own side, to repair any undermining of evidence resulting from cross examination. In addition to the adversarial process of the party representatives directing questions to the witness, it is permissible for the adjudicator to also ask questions of the witness. The adjudicator has the power to conduct the ascertainment of the relevant facts in an inquisitorial manner.

2.21 Concurrent evidence

An alternative to the accepted procedure for presenting evidence through examination in chief, cross-examination and re-examination is through concurrent evidence, as an alternative process. Concurrent evidence, also known as 'witness conferencing' or 'hot tubbing' is where experts give their evidence together or concurrently. This approach enables simultaneous questioning and discussion on the key issues of the evidence.

The process of concurrent evidence is more like a committee meeting chaired by the adjudicator, who will seek to compress the experts into a narrowing of the issues. Because the process is led by the adjudicator it reinforces the overriding duty of the expert witnesses to assist and be answerable to the adjudicator.

It is argued that concurrent evidence provides greater latitude for the experts to more fully explain their opinions as they are not encumbered with the limitation of answering questions in sequence. It is said that concurrent evidence favours the expert who is well prepared and knows their subject. The perhaps less prepared hired gun is more easily exposed as ill-thought through argument will be more easily revealed.

2.22 Remote hearings

Developments in remote video-conferencing technology, accelerated by the Coronavirus epidemic, have allowed for remote hearings to become a practical reality. However, there are difficulties in witnesses providing evidence remotely where the nuances of an exchange of questions and answers can be lost, particularly in the case of contentious witnesses. Where a witness is presenting evidence remotely it is difficult to ensure that there is no-one else in proximity to provide prompts to the questions being asked.

In seeking to break down a defensive witness an advocate will find it more difficult through remote presentation as body language cannot be seen and attitude is more difficult to discern. The time delay associated with remote delivery can negatively affect the flow of delivery. The more impersonal medium, with the questioner and answerer in two different locations and with a minimum of eye contact, can dilute the effectiveness of cross-examination.

Notwithstanding these difficulties, the use of remote hearings provides significant advantages in sustainability, reducing travel time and arguably making the coordination of hearings easier through greater flexibility of arrangements.

Further reading:

1. Adrian Keane, The Modern Law of Evidence (13th edition, OUP 2022), Chapters 1, 2, 3, 5, 6, 7, 8 and 11.

   Or

   Ian Dennis, *The Law of Evidence* (5th edition, Sweet & Maxwell 2013), Chapters 1, 2, 8, 11, 13, 14, and 15.

2. Mark Tottenham, 'The Reliable Expert Witness' (Clarus Press Ltd 2021), Chapters 1, 2, 6, 7 and 10.

   Or

   Robert Horne and John Mullen, *The Expert Witness in Construction* (Wiley Blackwell 2013), Chapters 2, 4, 8, 9, and 10.

Notes:

Topic 3 – Purpose, reasons, and reasoning

3.1 General

It may be obvious, but it is important to emphasise that the sole purpose of an adjudicator's decision is to decide on the dispute referred to the adjudicator and no more. The boundaries in which you work as an adjudicator on a dispute are defined by the 'Notice of intention to refer the dispute to adjudication' issued by the Referrer. The detail of the dispute will then be expanded upon within by the following submissions of the parties.

The adjudicator must then consider the facts through evidence, the law to be applied and the liability to be apportioned. The complete consideration, reasoning, and subsequent determinations need to be recorded in a single self-contained document which is the decision through the medium of writing. This is the purpose of an adjudicator's decision. Central to credibility, and therefore authority, will be reasoning that supports the final determinations. The reasoning within an adjudicator's decision should be comprehensible to an intelligent but not necessarily qualified reader. In parallel the reasoning should demonstrate to the qualified reader that the approach, consideration, thinking, and final deliberation is consistent with the law and where required the technicalities of the dispute.

3.2 What you will learn

Through this topic you will learn what is the essential purpose of an adjudicator's decision and its importance in collating thought and communicating its determinations. You will learn the importance of the decision as the medium, where through the participation of the parties and the adjudicator, a decision in settlement of a dispute can be formulated. You will learn that the robustness of the reasoning derived through the process will underwrite the credibility of the decision as a solution to the dispute that can be accepted by the parties.

3.3 Purpose

The primary purpose of an adjudicators' decision is to set down in writing your decision on the matters that have been referred by the parties. By issue of the decision, to the parties will then be informed of the final determination in the dispute. The issue of the decision will have consequences and require action. It is of upmost importance that the parties fully understand what must be undertaken to comply with the decision. The decision should set out the context, or background, and then guide the reader through a logical sequence of reasoning and thought through to the decision, and how it has been reached. In summary the decision will:

1. State the parties, their business relationship and the contract that governs their relationship, the dispute, the adjudication appointment, the substantive matters in dispute and the submissions made.
2. Provide a narrative of the consideration of the submissions, the evidence, the applicable law, the decisions on substantive matters, quantum, interest, and liability for the adjudicator's fees.
3. Conclude with the adjudicator's decision, or directions, to provide an entire and self-contained document that is then signed and dated by the adjudicator.

In some jurisdictions a dispute can only be referred to adjudication if it is a payment dispute. However, in the UK any form of construction dispute can be referred, provided that it is not an exception under the Act. Most adjudication decisions are an order that one party should pay the other a sum of money as damages for a breach of contract.

The adjudicator whilst deciding on the sum to be paid must also specify the time in which it is to be paid. In the first instance the decision is for the benefit of the parties and their representatives where the conclusions and decision reached must be easily understood. In making the decision the adjudicator must:

1. Ensure that as adjudicator that he/she does not have an interest in the outcome.
2. Act fairly, in good faith and without bias.
3. Ensure that each party has the fair opportunity to present its case and to address the case of the other side.

3.4 Requirements to meet purpose

There are several formal requirements to provide a valid decision in meeting the primary purpose. These requirements originate within the Act, have evolved through common law, and will reflect the applicable rules used in the adjudication. These requirements can be summarised as follows:

Cogency: The decision must be based upon, and demonstrate, convincing, persuasive, and consistent reasoning.
Completeness: A decision must deal with the matters with which it purports to deal, all matters in issue, but no more.
Certainty: A decision must not be ambiguous and must leave no doubt as to the intention of the adjudicator, or what has to be done by one or both of the parties.
Finality: A decision must not leave an opportunity for re-opening the issues resolved by that decision.
Enforceability: A decision must be capable of being enforced. For example, if the decision is for a sum of money, then it must be clear what amount is awarded, what is to be paid by whom and to whom and when.
Jurisdiction: A decision can only include matters which are within the adjudicator's jurisdiction in respect of the adjudication.[18]

If a decision requires further explanation, or reference to other material, it will not be a stand-alone document. It is wholly unsatisfactory for parties not to be able to easily understand the decision. Such a decision will have likely failed in its primary purpose.

Finally, there will be occasions, albeit rare, where a party fails to comply with an adjudicator's decision. The successful party will want to ensure that the decision is complied with by seeking assistance from the courts to enforce the decision. In the UK the application for enforcement would be made to the Technology and Construction Court (TCC), The TCC is a specialist court that deals with construction adjudication cases, amongst other matters. It is always useful to consider the primary purpose of an adjudicator's decision as being:

1. To provide a decision that is clear, unambiguous and enforceable, should the successful party need to do so, and:
2. To provide a decision that explains in a clear and unambiguous narrative and reasoning why the unsuccessful party has lost.

3.5 Reasons

Under the Scheme an adjudicator is not required to give reasons for a decision unless they are requested by one of the parties, which will usually be the case. For all cases and particularly for complex cases, the provision of reasons is considered best practice. Reasons should be deduced if only to reduce the risk of the adjudicator missing a particular point of importance, and to ensure that the thought process is logical and judicial.

Without a process of developing adequate reasoning, it is easy to reach a conclusion solely based upon experience, rather than comprehensive analysis. This is a situation to be avoided. If there is any doubt about the provision of reasons you should seek clarification from the parties at the earliest opportunity. Upon issuing an unreasoned decision, which would be rare, it should nonetheless be expected that one of both of the parties may request reasons. In this situation it is far from ideal to have to create reasons, from rough notes in a short time, to meet such a request.

[18] Ciarb Construction Adjudication Workbook – Module 3, Charles Brown at 85.

It may be possible to justify the issue of an adjudicator's decision without reasons on the grounds of saving cost. However, the parties may not be impressed to receive a decision without reasons, and therefore without transparent justification, in order to benefit from what would be a marginal cost saving. It is generally recognised that an unsuccessful party with the benefit of having reasons will more properly understand and will be more likely to accept the decision of an adjudicator.

The reasons should be factual and concise, they should be absent of emotion and any narrative of negative action or inaction of any of the parties through the process. The reasons should 'tell the story' in a simple and concise manner. The reasons 'should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues.'[19] It is not necessary to provide an answer to every issue raised, such as with minor issues, but answers only in respect of the identified substantive issues. In confirming the extent of information contained in the reasons the courts have advised that 'there was no duty to give reasons unless asked, and that, even if there was, such reasons could be cursory.'[20]

The reasons will explain each step of the reasoning process in reaching the resolution of each substantive issue forming part of the final decision. One advantage of providing reasons, which is often overlooked, is that it gives both parties a basis on which to further negotiate and settle the dispute. Any following negotiations by the parties will be with the benefit of a reasoned decision from a third-party neutral and may thus avoid having to revert to the courts.

3.6 Reasoning

The ability to undertake reasoning logically is an essential skill for an adjudicator. To be able to reason should not be daunting as it is something we all do in every-day life and thus could be considered as a straightforward process comprising:

1. Sorting through the facts that are relevant, being those that have a bearing on the decision to be made.
2. The consideration of any influences that may inform or have a bearing upon the decision.
3. Having considered the facts and any influences to then look at the various outcomes that may arise.
4. Then to choose the outcome that is appropriate in consideration of all the facts and influences that bear upon the decision at that time.

In the context of adjudication this process could be further elaborated upon. In the first instance the adjudicator has to assemble all the facts and where these are disputed to then determine which version of the facts is correct. The correct version of the facts is then applied to the law, together with the rights and obligations between the parties set out in their relationship, usually the contract. The law will be formed by statute, by common law or in some cases by accepted custom which will inform the application of the law.

Having applied all aspects of the law to the facts as found, the adjudicator will then make a decision on a fair and reasonable basis in accordance with the rights and obligations between the parties. This is the process of reasoning, which can be defined as:

1.To attempt to arrive at a conclusion through close examination, inference, and thought; to form a specific judgment about a situation after carefully considering the facts. 2.To examine or deduce by means of close analysis and thought; to infer or conclude. 3.To persuade or dissuade by marshalling grounds for proving;

[19] *Carillion v Royal Devonport Dockyard Ltd* [2005] BLR 310.

[20] *Multiplex Construction (UK) Ltd v West India Quay Development (Eastern) Ltd* [2006] EWHC 1569 (TCC).

influence by argument. 4.To present or discuss (pros and cons); to debate.[21]

3.7 Deciding upon the facts

The first step in reasoning in adjudication is to decide upon the correct facts, or the truth, where this process can be thought of as determining:

1. What are the facts alleged by the Referrer?
2. Which of these facts are disputed by the Respondent?
3. For the disputed facts which party has the burden of proof?
4. What evidence has been advanced by the party who has the burden of proof?
5. Is the evidence advanced by the Referrer for the disputed facts incontrovertible?
6. Where the evidence is not incontrovertible what evidence has been advanced by the Responding party to defend against the allegation?
7. On the balance of consistency and probability which evidence is preferred?
8. Does the decision upon the facts reflect the preferred evidence as the most compelling from either of the Referrer of the Respondent?

The phrase 'he who avers must prove,' or put another way the person advancing the allegation has the burden of proving the allegation, is a central part of adjudication reasoning. The burden of proof in proving a contract, a breach of its terms and the subsequent loss will always lie with the Referrer, in advancing the claim. Conversely the burden of defence that extends beyond a simple denial of facts will lie with the Respondent. Where a Respondent advances a counter claim in defence the burden of proof and the burden of defence will be reversed.

The onus of the burden of proof to prove assertions made will usually be clear in the submissions of Referral, Response and Reply, but possibly not so clear in supporting documentation such as witness statements. It is often the case that witness statements will include unsubstantiated opinion or assertions that are not supported by evidence.

Part of the adjudicator's skill is to identify these unsubstantiated assertions and deal with them accordingly. If they are not central or relevant to a substantive issue they should not be dealt with, as any detailed consideration can be more of a hinderance than a help.

3.8 Probability

Due to the tight timetable for adjudication, it is not always possible to decisively prove one way or another the outcome of a disputed fact by analysis of the fact itself. This can occur where you have two conflicting witness statements each arguing opposing positions of fact with equal conviction. Normally there will be evidence which corroborates one or the other statements, where the adjudicator can apply the balance of probability.

The adjudicator can ascertain if the disputed facts are consistent with the wider factual matrix of the issue. The adjudicator can then assess how probable is one assertion of the disputed facts compared to other. In this way the adjudicator can determine the preferred factual assertion on the balance of probability. It should be remembered that the standard of proof in adjudication is not 'beyond a reasonable doubt' as in criminal proceedings. In adjudication the standard of proof is on the 'balance of probability' which is a lower standard that the adjudicator must not exceed. However, it should be remembered that if the adjudicator cannot determine the facts on balance, it means that the assertion has not been adequately proved and must thus fall away.

3.9 Consistency

An additional test available to the adjudicator in assessing the correct facts is consistency,

[21] Bryan Garner (ed), *Black's Law Dictionary* (5th pocket edition, Thomson Reuters 2016) at 654.

particularly in respect of witness statements, where the following should be considered:

1. Is the chronology within the witness statement consistent with other evidence submitted.
2. Are the statements asserted within the witness statement supported by other evidence.
3. Are the claims asserted within the witness statement consistent with the evidence contained in any other witness statements.
4. Are the statements asserted within the witness statement corroborated or confirmed within other submissions.

If the witness statement is consistent across all aspects of evidence, it follows that it is probable that the statement can be relied upon as fact.

3.10 Deciding upon the law

After deciding upon the facts, the adjudicator must then seek to ascertain the rights and obligations of each party according to the contract they have entered into. Adjudication arises out of contract whether this is in a standard form, bespoke form, letter of intent or verbal agreement, where the parties have both entered into this contract. The contract will operate within the context of the law as set out by the jurisdiction of the contract. As with probability and consistency there are some simple steps that can be applied:

1. What law applies to the contract and the dispute?
2. From where does this law arise?
3. How does this law impact upon each of the parties?

It is usual for the parties to have analysed the contract, the law, and the implications within their submissions, using written authority within textbooks or through previously decided cases in common law. An adjudicator should not take such submissions at face value as an extract from a court judgment can appear to state something completely different when taken out of context. Any evidence drawn from written textbook authorities should be thoroughly analysed to ensure relevance and correctness.

Where no commentary upon the law is provided within the party submissions you will have to decide upon the law yourself through your own investigation. Enquiry may be required regarding implied terms to the contract, together with any applicable case law or statute law. If you seek to rely on an authority not advanced by the parties, it is important that you give the parties the time and opportunity to comment upon that authority. Then taking account the full legal context, usually provided and analysed primarily through the party submissions, the rights and obligations, upon which the decision will be based, can be identified.

3.11 Reasoning concepts

As the style of decision content will differ between adjudicators, it follows that the concepts for reasoning will also differ in style. These styles are often referred to as linear thinking, intuitive thinking, black box thinking, and glass box thinking. Linear thinking is where each issue is taken in turn, considered entirely objectively, and worked through logically from beginning to end. This would be sequentially working through a gathering of the facts, deciding upon the facts, applying the relevant law to the acts, and ultimately reaching a decision on each issue. However, whilst this is a laudable approach the practicality of adjudication undertaken within a constrained timescale is not conducive to such an ordered and likely extended approach.

Practicality suggests that intuitive thinking will to some degree be brought to bear, as experience will inform the likely outcome of an issue from the first review of evidence. This approach has merit, providing that the adjudicator has the discipline to objectively question during the thought process. It is well known amongst those who make decisions on complicated matters that they initially start out with a strong feeling for the answer, as in a first review of the Referral submission. When the

Response submission, and all the evidence, is then fully considered it can be the case that the answer is the reverse of what was initially thought to be the answer.

Two common concepts for reasoning are illustrated at the extremes of approach. Practicality suggests that there are many variations in-between, based upon the application of conscious and unconscious thinking. The first approach is entirely determinative in thinking, referred to as the 'black box' approach utilising direct conscious thought. It is related to linear thinking insofar as the problem is approached head-on and worked through stage by stage in a structured manner with little latitude for lateral thinking. It is a concept that works on the basis of all the necessary aspects of the decision being revealed through the submission process, with no further investigation. The facts are assembled, the correct facts are determined, the law is applied, and the decision is made.

The alternative approach is glass box thinking where thought goes beyond the black box utilising the conscious and the sub-conscious mind. This approach is less structured and looser in application, recognising that when we are not using our conscious minds the sub-conscious mind will continue thinking. This is why we find ourselves in situations where the answer to a problem leaps out from a more unfettered and less intense time of thinking.

The application of this approach begins with a summary of the issues in simple notes or jottings undertaken early in the process, which is consistent with good practice and time management. Having undertaken this, it is then consciously left to one side, with the pressure to make an early decision alleviated. The passing of time promotes a more open-minded approach by allowing the sub-conscious mind to have the space and time to process new areas of thought. From these ideas an improved reasoning can be formulated as a steady progression of thought. This more lateral unpressured approach can lead to more persuasive conclusions and more compelling reasoning.

3.12 Reasoning approaches

Apart from differing reasoning concepts there are also different reasoning approaches that can be adopted in reasoning. One approach is known as the 'black bag', not be confused with 'black box' discussed earlier, which aligns well with linear thinking. The adjudicator works strictly within the confines of the material, primarily through the submissions, that are provided to the adjudicator at the time of the adjudication and no more. In this approach the adjudicator seeks to avoid reliance upon experience, being satisfied that the submissions provide all that is required, and where the decision is limited to what is encompassed within the submitted evidence. Because the adjudicator does not seek to in any way shape the dispute through enquiry, this approach could be considered as safe, conservative or passive.

A second approach is often referred to as the 'inquiring mind.' This approach recognises and utilises the inquiring powers available to the adjudicator under the applicable contract or rules. For example, Section 108(2)(f) of the Act requires that the contract between the parties 'shall enable the adjudicator to take the initiative in ascertaining the facts and the law.' To fully explore and understand the cases advanced, an adjudicator adopting this approach will question the parties and pro-actively probe the evidence. The inquiring mind approach will add shape to the dispute through questioning, identifying areas of concern, seeking clarification, or even requesting further submissions to elaborate on specific points. This approach demands more discipline in management and control of the adjudication to meet the time constraints of the process. It is an approach often used by experienced adjudicators, who have built up confidence through experience, in managing what is a more pro-active reasoning approach.

3.13 Reaching the final decision

As an adjudicator it is only necessary to provide reasons, where it is entirely inappropriate to have extensive narrative only on reasoning. This is an important distinction. The reasons are a summary or an abstract of the reasoning that has been applied. The detail included in the reasons should be strictly limited to that which is required to make the reasons comprehensible and no more.

An essential attribute of being an adjudicator is being able to test, test and to test again the conclusions reached to fully reflect the facts and the law. The most common basis of complaint about an adjudicator's decision is the lack of connection between the decision reached in the context of the facts and application of the law. It is critical to the credibility of an adjudicator's decision that the logical chain of reasoning is always connected from the beginning to the end.

There may be a temptation to issue a decision to the parties as a draft for consideration before final formal issue. This is not a recommended course of action as the issue of a draft will inevitably result in comments from one side or from both sides, each of which will need to be considered. It is likely that an issue of a draft decision will provoke further representations rebutting the final draft, where time will be pressing. It is therefore recommended that a draft decision is never issued. Apart from there being no provision for the issue of a draft either under the Act or the Scheme, it is considered impractical to issue a draft decision within the limited default timescale of 28 days for which the adjudicators decision is to be issued.

An adjudicator should always have a degree of anxiety before issuing a decision, this anxiety is healthy and will reflect a concern for ensuring that the decision is comprehensive, correct, and judicial in its outcome. As an adjudicator you should always remember that your decision will have consequences and a direct impact upon the parties.

Further reading:

Sir Peter Coulson, *Coulson on Adjudication*, (4th edition, 2018), Chapter 20.

James Pickavance, *A Practical Guide to Construction Adjudication*, (2016), Chapters 11, 12, 15 and 17.

Notes:

Topic 4 – Structure and issue

4.1 General

Whilst an adjudicator has considerable latitude in the style and content of the decision, to reflect the matter referred, there are some common elements of decision structure that are considered best practice. The legislation, as set out in the Act and the Scheme, does not prescribe any requirements for structure or content. However, it is accepted that there are a minimum set of common requirements that should be included in every adjudication decision. It is often said in seeking to identify the requirements of any decision, that it should be:

- Cogent
- Complete
- Certain
- Coherent
- Final

The period between completing a decision and issue of the decision is important, as it is the only opportunity to undertake final checks. Once published the decision can only be amended in the narrowest of circumstances, as has been determined through case law.

4.2 What you will learn

In this topic you will learn how to correctly structure your decision to include the common requirements that are considered necessary, and to structure your decision in an easily understood chronology. Through the learning of this topic, you should be able to structure your own adjudication decision. You should be able to order the common requirements as a flow of logical thinking from the beginning, the middle and to the end of the decision, as a self-contained and stand-alone body of work. Finally, you will be aware of the strict limitations available to you for any amendment of your decision once published.

4.3 Front page

Although it may sound obvious, the starting point of an adjudication decision is the front page. Established convention in any form of decision writing is that the front page clearly states the names of the parties in dispute, usually positioned at the top centre of the page. The correct legal identity for each party will have been established, for example a company, a partnership, or an individual as examples. The party who has referred, or advanced, the claim will be the Referrer and the party who is seeking to defend itself from the assertion of the claim will be the Respondent.

The top of the front page should identify the applicable legislation, as the authority for the adjudication in the UK. This will usually be written as 'In the matter of an adjudication pursuant to the Housing Grants, Construction and Regeneration Act 1996.' If the scheme applies this should also be stated or alternatively any adjudication rules that apply or have been agreed by the parties. The title 'Adjudicator's decision' should be prominently placed below the names of the parties in the centre of the page. It is common for the title to be accentuated by including a parallel line above and below the title.

It is not unusual for those unfamiliar with adjudication to refer to the making of an award, this is never the case. Only an arbitrator can make an 'award' where similarly only an adjudicator can make a 'decision.' The two terms are quite separate and entirely different where the word award does not exist in UK legislation. Finally, the page should include a brief project title of no more than a few words for reference and dated to match the back page.

4.4 Contents page

The inclusion of a contents page will be of considerable assistance to those reading your decision to allow quick reference. A contents page will convey the impression of a thought-out structure in support of the decision. Always check the contents page before issue as it is easy to make a mistake in page numbering. A contents page should only be omitted for the briefest of decisions.

After the contents page, the following written narrative will consist of the common elements by which various adjudicators refer, using different titles. For example, some adjudicators will start with a short 'Background' or 'Introduction.' However, most will start with a section detailing the parties themselves, structured as follows.

4.5 The parties and the project

This section is used to confirm the names of the parties, their address, their involvement, their company registration numbers (if applicable) and the name of the person in charge together with an e-mail address and telephone number, set out as a paragraph for each party. Some adjudicators will continue to refer to each party by full name, shortened name or initials throughout the decision. Other adjudicators take the opportunity to advise that after the opening detail paragraphs, the parties will be referred to as the Referrer and Respondent and jointly as the parties. The referencing used to identify the parties is a matter of personal style, but it should always be consistent. Should a redacted copy of your decision be required at some future date this is clearly more easily achieved through the latter approach.

The end of this section will identify the project, the location, and the address, where nothing further is required. If the parties are represented you should include a short paragraph for each of the representatives with their details, name, firm, telephone number, and e-mail address.

4.6 The dispute

This section sets out the details of the dispute that has arisen between the parties. You should avoid detailing the dispute yourself, as there is a possibility that you will get this wrong. Instead, refer to the Referral submission as this will always set out the basis of the dispute. Remember that you have been engaged to decide on the dispute that has been referred, and only that dispute. The detail in the Referral will usually set out the chronology of the dispute, where you can confirm that the difference between the parties has crystallised into a dispute.

You may want to add, on checking through the Referral and the Reply, that the dispute progressed to being referred under S.108(2) of the Act and any application to a nominating body for an adjudicator, but only if applicable. You should state the rules that apply to the adjudication, usually the Scheme, in the absence of any contractual rules or other rules agreed between the parties.

4.7 The contract

This is the point where you identify the business relationship between the parties and the details of the contract between them. Remember it is not unusual for construction disputes to be absent of a standard form of contract where the parties have instead worked to a verbal agreement or a 'Letter of Intent.' You only need to state the facts as they have been presented to you in the submissions, as the point in time when the contract was formed may be in dispute. If a contract has been agreed, it is only necessary to provide a summary of its terms. Where the contract between the parties includes adjudication rules, these should be stated. You should also confirm, as it will usually be the case, that it is a contract that is within the jurisdiction of the Act and is not an exception.

4.8 Appointment of adjudicator

This is where you introduce yourself as the adjudicator and detail how you were appointed. You may have been appointed directly by agreement between the parties or have been named in the contract between them, although this is now becoming rare. It is more likely that you will have been appointed by an Adjudicator Nominating Body (ANB) resulting from an application by the Referrer. Confirm when you were contacted by the ANB and the day that you were appointed. Also confirm that you

carried out a conflict-of-interest check, actual, or perceived, with both parties.

Use this section to advise that you previously provided the parties with your terms and conditions, together with your fee proposal, to the parties. Record when your conflict-of-interest enquiry and appointment were confirmed as accepted by each of the parties. Ensure you use this section to record that a contract has been formed, for you to act as adjudicator, between you and the parties.

4.9 Challenge on jurisdiction

If you are to receive a challenge on jurisdiction it can be expected to be made by the Respondent after your appointment, or after the issue of the Referral. It will usually be a threshold challenge that seeks to reject the adjudication process as having no legal authority. It is also possible to receive a challenge based on a breach of natural justice usually grounded in an assertion of conflict-of-interest. In both cases the Respondent is seeking to stop the adjudication from proceeding from the start, hence the term threshold challenge.

It is important to respond to a challenge on jurisdiction expediently. Your decision on the matter should be a reasoned non-binding decision to either continue with the adjudication or resign. The nature of the challenge, any request for further representations, the consideration and reasoning informing your non-binding decision should be summarised within an early decision. Your decision on a challenge to jurisdiction should be in the form of a letter issued expediently to both parties.

4.10 Redress sought

The onus is upon the Referrer to set out the redress sought in settlement of the dispute, being based upon the established principle of 'he who avers must prove.' The redress sought by the Referrer will be detailed within the Referral where the easiest way to include this within your decision is to 'cut and paste' the relevant section into your narrative. You may have to make minor grammatical adjustment for ease of understanding, but nothing more. If you are writing contemporaneously in time you can write up this detail on receipt of the Referral. Be aware that on the receipt of the Response, 10 to 14 days later, it would not be unusual for the Respondent to include a counter claim as part of its defence. Similarly, the redress sought by the Respondent should be 'cut and pasted,' to ensure accuracy, within your narrative.

4.11 Procedure and submissions

This section will detail the process of the adjudication commencing with the receipt of the Referral. In this section you should detail the communications during the process, your directions, the receipt, and the content of each submission as each occurred in time. It is good practice to always acknowledge receipt of submissions and to briefly list what you have received to avoid misunderstanding. It is also good practice to confirm receipt of witness statements to avoid any later accusation that you have not taken a particular witness statement into account. Remember that witness statements may have been prepared with significant past investment of time and emotion.

Consider this section as your opportunity to explain the process of the adjudication. The narrative should include the parties' compliance with the agreed timetable, any application, and any agreement to an extension of time, together with any difficulties that were encountered. It would be appropriate, in the absence of reason otherwise, to also thank the parties and their representatives for their assistance throughout the process.

4.12 Site meeting and/or hearing

Given the constraints of time in the default timetable for the issue of your decision, within 28 days of receipt of the Referral, it is rare for a site visit or hearing to be required. If one, the other of both, is to be held it will usually arise

from an explicit request. If one party requests a site meeting, or hearing, firstly satisfy yourself that it is justified. A site visit can usually be accommodated within the adjudication timetable with sufficient prior notice, but a hearing will normally require an extension of time. Always remember that a first extension of up to 14 days for the issue of the decision can only be given by the Referrer. Always ensure that any site meeting or hearing is recorded, as it will always be for the purposes of deducing evidence. Ensure the agenda for the site visit procedure and or the hearing is agreed, together with the outcome that is being sought. Prepare and issue a note of the site meeting and or hearing to include the date, time, venue, who was in attendance and what was discussed.

This section and the previous sections should comprise a narrative summary of the facts as they have been presented to you. The ordering of the sections will reflect the chronology of the process in arriving at the point of your deliberating upon the dispute. This first part of the decision should be concise, uncontroversial, and written without unnecessary or elaborative narrative. These early sections are often collectively referred to as the 'Introduction', the 'Background', or the 'Recitals.'

The next sections involve the discussion of the relevant elements of the dispute. At this point in the decision, you will identify the substantive issues of the dispute and commence the formulation of your consideration for each. These following sections are sometimes referred to as the discussive section.

4.13 Substantive issues

The issues of difference between the parties will be identified in the submissions. On reference to the cause or causes of the dispute and the relief sought, it will be apparent that some of the differences will be substantial and others less relevant. In this section you must identify the 'substantive issues' on which you must decide the dispute. The correct identification of the substantive issues is one of the most important actions of the decision. You must always remember that you should:

- Only decide on the dispute that is referred to you.
- Never introduce a new dispute.
- Only decide the dispute on the issues raised by the parties.
- Only decide the dispute on the submissions and materials the parties have provided.
- Never make the case for a party.

Having considered the dispute, you should then list the substantive issues, being the main points upon which you will decide in formulating the final decision. There may be sub-issues within a substantive issue, but you will usually find that there will be several substantive issues, possibly more, upon which you will need to decide. This section is then completed with a list of the substantive issues in the order that you will consider them.

4.14 Determination of the substantive issues

Apart from the final operative part, this is the most important section of the decision where you set out the reasoning for the decisions on each of the substantive issues. The Act does not require you to give reasons as part of your decision and the Scheme only requires you give reasons if requested to do so by one of the parties. Even if no reasons are to be provided, which would be rare, it is beneficial to identify the substantive issues. You should set out the contentions and conclude on each issue if only to provide you with a clear structure to your reasoning. In practice, adjudicators will prepare and provide reasons, even if only by their own volition and retain this information in their own records.

A reasoned decision, with clarity of thought, will always be more likely to be accepted by the parties as the final resolution of the dispute. It is important that the Parties can see and understand the thinking and rationale of the decision in which they are successful or

unsuccessful. Furthermore, the provision of reasons allows a person in authority, who has not been involved in the dispute, to gain a full understanding of the dispute in a fully contained decision.

The determination of each substantive issue can be thought of as an individual decision. Firstly, you discuss the facts in relation to the events that took place. Secondly you determine the facts at issue through the weight of evidence offered, the law is then applied to the decided facts. Having decided upon the facts and the law that applies, you then identify the liability for the applicable quantum to be applied, or any relief directed through performance. Ensure you have fully considered and decided upon each identified substantive issue, as you work through each one.

4.15 Summary of the substantive issues

This is the point in the decision where you bring forward the findings of investigation for each substantive issue as an overall summary. In an adjudication where there are various matters of valuation under dispute this is where you would include a summary table detailing sums awarded to the Referrer or, where there is counter claim, to the Respondent. The summary table should be set out clearly the basis of any calculations to ensure a full understanding. The table may include a set-off calculation at the end of the totals between the parties, to determine the final liability of quantum to be paid and by who.

4.16 Interest and Value Added Tax

It is not unusual for a party to request payment of interest for any sum it believes is being withheld by the opposing party, and to which it asserts it is entitled. The request for interest will often be stated as part of the relief sought within the Referral. If interest has not been asked for, it is recommended that you do not give it consideration. Where interest is requested, it will be typically simple interest from a determined date up to the date the decision is issued. There may be different periods of interest for differing sums, perhaps where interim payments have been made, to be calculated up to the decision date.

You must provide a clear explanation for your calculation of interest and its basis, where there may be provision for the payment of interest in the contract. You can calculate interest where requested, in the absence of a contractual provision, in accordance with the Late Payment of Commercial Debts Act 1988. Interest due on the payment directed by your decision is usually expressed as a monetary rate per day.

Value Added Tax (VAT) will often be included in the relief sought to ensure that there is no misunderstanding that sums are inclusive of VAT or gross. VAT law is a complex area where payments for elements for which it is to be applied can be treated differently. There is no expectation that you should be conversant with VAT law, only to recognise that VAT is present. Unless the VAT is straightforward, and you are confident in dealing with it. You should limit your decision to all sums net of VAT, being simpler and with less opportunity for mistake. It is acceptable to state within your decision that ‘all sums payable, will be subject to VAT in accordance with The Value Added Tax Regulations 1995 or any amendment or re-enactment thereof.’

4.17 Adjudicators fee

The final disposal of the dispute will include a decision upon the liability and apportionment of your own fee. Professionalism would suggest that you show the basis on how your fee has been calculated, usually from a previously agreed hourly rate as set out in your terms. A total number of hours expended, multiplied by your agreed hourly rate will usually suffice. It is advisable to have your timesheets available should any query arise.

The convention is that ‘costs follow the event’. It would be usual to allocate the liability for all, or most, of the adjudicator’s fee to the

unsuccessful party. Where both parties have been largely unsuccessful in their claims it is reasonable to apportion the fee in proportion to the lack of success. Similarly, it is reasonable to account for unjustified challenges through the process. Addressing challenges takes time and diverts attention in already pressured circumstances. If you consider the challenge spurious, you can directly allocate a part of your fee, for the time unnecessarily expended.

4.18 Decision

The final part, most usually at the end of the decision on the closing page or pages, is the most important part of the decision, often referred to as dispositive or operative part. This is the only part, to be distinguished from all previous parts including the reasoning and findings, of your decision that is binding upon the parties.

The purpose of the decision is to convey the conclusions of the adjudication to the parties in a manner that is clear, final, and easily understood. The decision should be written in a manner that the parties can know how it affects them and what either, or both, must do in what time as a result. The decision must be self-contained, clear, definitive in its effect and be absent of any form of ambiguity.

The decision must encompass all the points of dispute and state the remedy in a way that, if necessary, can be enforced by the courts. Put simply if your decision is not capable of enforcement it is not a decision, where a considerable amount of resource and money will have been wasted.

Apart from detailing the sum to be paid, where applicable the decision should set out any non-monetary relief through required performance. In addition, any liability for interest accrued and interest to run on non-payment, together with apportionment of the adjudicators fee must be stated. Accepted terms widely used in adjudicator's decisions are as follows:

Order – used in the payment of money. "I hereby order the payment of X by…."

Declaration – Used to identify the rights of parties. "I hereby declare that A is entitled to…."

Direction – Used when an action has to be undertaken "I hereby direct that A must…."

The Scheme and most adjudication rules include the explicit provision that the parties are liable for their own costs of the adjudication. It is rare to have to decide on the costs of the parties, such as their own legal and professional fees. To ensure completeness, it is usual to include a note that states 'all other claims in connection with this adjudication are dismissed.'

4.19 Prior to issuing the decision

Before you issue your decision ensure you allow enough time to check and proofread it. If grammatical errors are present in your decision, they will give the impression of carelessness and in the most extreme cases cause offence. Proofreading is not skim-reading, you need to be focused, as it is difficult to review your own work with which you are familiar. Allow a slow read for the decision layout, contents, headings, and paragraph numbers. Then allow a second read for sense, grammar, and spelling. Be prepared to ask yourself:

- Have I answered all the questions asked by the parties?
- Am I correct in relying on the findings I have made?
- Have I applied the law correctly?
- Have I relied upon case law that was not introduced by the parties?
- Are all the answers included in the decision?
- Is my decision entirely within the bounds of the Referral?
- Have I checked the arithmetic throughout?
- Are all the page and paragraph numbers correct and reflected in the contents?

Finally, prior to issuing the decision you should undertake an unconscious bias check. Unconscious biases are now recognised as prejudices and stereotypes that individuals

develop as learned assumptions, beliefs or attitudes, which the individual may not be aware of. Bias is a normal part of brain function, but it can often reinforce stereotypes that can impact upon your objectivity as an adjudicator. An awareness of unconscious bias can significantly reduce its impact through directing deliberate attention and effort, through continuing professional development.

4.20 Issuing of the decision

The decision must be communicated in writing in a timely manner that is compliant with the adjudication process. Check your calendar to ensure that any day calculation is correct. It is usual to issue the decision as an attachment to an e-mail where only a brief explanation is required, as the parties will be anticipating its issue. Avoid issuing late at night on the last day, as this can be seen as unprofessional and inconsiderate, where mid-afternoon is probably the optimum time.

Given that you have now completed your work, you may wish to also issue your invoice, or invoices if your fee is to be divided between the parties, as part of issuing the decision. It is essential that your decision is issued at the same time to the parties where this should be by copy of a single e-mail, also forwarded to the representatives. Best practice would suggest that you include an explicit request that receipt is acknowledged from each party.

4.21 After the decision has been issued

Following the issuing of your decision you no longer have any further involvement in the dispute, except for the correction of any error, identified by you or the parties. Most adjudicators on later review of their decision may write a part differently, but this will be only in word rather than intent. The courts have confirmed that an adjudicator can amend a decision after it has been issued, through what is known as the slip rule. However, the ability to amend is limited to genuine mistakes or clerical errors and not amendment of the substance of the decision. The provision is only in respect of your original intention, as reflected by the correction of a typographical or mathematical error of omission.

Any amendment, which may originate from one of the parties and to which you agree requires amendment, must be made within a reasonable time. This time is only a few days, where a week could be considered too long. The presence of the slip rule, which may lead to a request for amendment from one of the parties, would suggest that it is essential that you are available in the days following the issue of your decision.

4.22 Decision checklist

Front page:

- Applicable legislation (usually in Capitals)
- Names of parties (correct legal entities)
- State ‘Referrer’ and ‘Respondent’ correctly
- Adjudicator’s Decision (usually in capitals)
- Brief title of project
- Date (ensure it is the same date as last page)

Introduction, Background or Recitals part

Contents page:

- Lists section and page number
- Always undertake a final check at the end

The parties and the project:

- Names of the parties
- Registered Company No.s (if applicable)
- Person in charge
- Telephone and e-mail contact details
- Details of representatives (if applicable)

The dispute:

- Background to the dispute (as set out by the parties)
- Confirm that the dispute falls under the Act

The contract:

- Identify the business relationship between the parties
- Identify the basis of contract e.g. Letter of Intent, standard form of contract, or Bespoke form of contract
- Identify any relevant contract amendments

- Identify contract adjudication rules (if applicable)

Appointment of adjudicator:
- State the basis of your involvement
- Appointment jointly between the parties or through an ANB
- Confirm your conflict-of-interest checks.
- Confirm the issue of your proposed terms and fee
- Confirm agreement to your terms and fee

Challenge on jurisdiction:
- Set out how the challenge was presented and when
- Set out the details of the challenge
- State allegation of breach of natural justice, if made
- Confirm if you invited any additional representations
- Set out your consideration of the challenge
- Provide reasons for any controversial decision
- Confirm the issue of your non-binding decision

Redress sought:
- Detail the redress sought by the Referrer
- Detail any redress sought by the Respondent
- Ensure that redress is recorded correctly

Procedure and submissions:
- Receipt of Referral
- Summarise any directions you have issued
- Summarise of jurisdictional challenge (if applicable)
- Receipt of Response
- Receipt of Reply
- Receipt of Rejoinder (if applicable)
- Receipt of Surrejoinder (if applicable)
- Receipt of any other representations
- Detail any application and grant of extension of time
- List documents received with submissions
- List receipt of witness statements
- Record your acknowledgement of submissions
- Detail any virtual meetings with the Parties
- Confirm the point at which submissions were ceased
- Record any difficulties encountered
- Thank the parties and their representatives

Site meeting and/or hearing:
- Rarely required
- Agree purpose and record
- Detail the agenda
- Record the date, duration, venue, and attendance
- Record the outcome
- Do not accept surprises, keep control

Discussive part

Substantive issues:
- Identify the substantive issues of the dispute
- Ensure that you remain within the bounds of your jurisdiction
- List the substantive issues in the order in which you will address them in considering the decision

Determination of the substantive issues:
- Work through each substantive issue individually
- Determine the facts through the weight of evidence
- Apply to law to the facts as they occurred.
- Determine and apportion liability according to the facts and the law
- Calculate the quantum and or any performance relief in accordance with liability

Summary of the substantive issues:
- Collation of the decisions on each substantive issue
- Master table summarising quantum, if any, to be awarded
- Use clear and straightforward table layouts
- Use sub-totals to explain calculation steps
- Detail the setting off calculation of quantum
- Always check and re-check arithmetic

Interest and Value Added Tax (VAT):
- Only address interest if you are asked to
- Always set out the basis of any award of interest

- Note that there may be contractual right to interest
- The calculation will usually be simple interest only
- Interest from the date of decision expressed as a rate per day until settlement
- Decide upon VAT in only the simplest of cases
- Calculate net of VAT and state payment on Any sum to be paid is subject to prevailing VAT legislation

Adjudicators fee:

- Under the Scheme you have discretion as to how your fee is to be apportioned.
- It is usual for 'costs to follow the event'
- Costs can be apportioned to both parties
- Take account of any previous 'on account' payment
- Include any agreed and incurred expenses
- State that liability for payment is joint and several

Dispositive or Operative part

The decision:

- State who pays and how much to be paid
- Detail what comprises the sum to be paid (monetary relief, interest, fee on account reconciliation etc.)
- State who is required to provide any non-monetary or performance relief, clearly and definitively
- State who will pay the adjudicators fee together with any expenses
- Unusual for you to allocate payment of party costs, bear in mind that this could be requested or be available through the applicable rules
- Note that all other claims in connection with the adjudication are dismissed
- Time for payment and/or performance
- Interest to run for non-payment
- Value Added Tax (VAT) to be paid in accordance with prevailing legislation
- No ambiguity or uncertainty
- Signed and dated (good practice to include place)
- No necessity to witness

Further reading:

Sir Peter Coulson, *Coulson on Adjudication* (4th edition, 2018), Chapter 10, 12, 13, 14 and 20.

James Pickavance, *A Practical Guide to Construction Adjudication* (2016), Chapters 11, 12, 15, 16 and 17.

Notes: