[2017 Gib LR 65]

ANSALDO'S TOWNHOUSE LIMITED v. SHARROCK SHAND LIMITED

SUPREME COURT (Jack, J.): April 21st, 2017

Construction Industry—adjudicator—appointment of adjudicator—"adjudication" has no established meaning in Gibraltar, unlike in England and Wales—if building contract substitutes Gibraltar law for English law and deletes definition of Scheme as being "Part 1 of Schedule to Scheme for Construction Contracts (England and Wales) Regulations 1998," purported appointment of adjudicator ineffective

Disputes arose between the parties concerning a building contract.

The parties had entered into a building contract in 2014 for the redevelopment of a property. The Royal Institution of Chartered Surveyors had appointed, or purported to appoint, an adjudicator, which was challenged by the claimant.

The contract between the parties followed the Joint Contracts Tribunal Standard Building Contract With Quantities (Without Subcontractor Design) 2011 but there were substantial modifications. Among the modifications was the substitution of Gibraltar law for English law, and the deletion of the definition of "the Scheme" as being "Part 1 of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998." (In England and Wales, the Housing Grants, Construction and Regeneration Act 1996 provided statutory authority for construction contracts to be referred to adjudication by the parties and the default scheme was that set out in the 1998 Regulations.) Clause 9.2 of the parties' agreement provided: "If a dispute or difference arises under this

Contract which either party wishes to refer to adjudication, the Scheme will apply . . ."

The claimant submitted that (a) the disapplication of English law in the contract rendered the references to adjudication otiose; (b) there was no internationally accepted definition of adjudication which would allow the parties or the court to assume anything regarding the process; (c) there was no statutory equivalent in Gibraltar to the procedure which existed in England; and (d) given the lack of certainty, no effect should be given to the adjudication clause.

The defendant submitted that (a) the parties had expressly agreed to use adjudication as a means of dispute resolution; (b) although references to and application of English law had been expressly removed, adjudication was not impossible; and (c) adjudication could exist in the absence of any statutory framework and that, once appointed, an adjudicator had a discretion and wide powers to determine the procedure for the adjudication if it could not be agreed between the parties.

Held, ordering as follows:

(1) The purported appointment of the adjudicator was not effective. The adjudication clause was so vague as to be unenforceable. If English law had applied it would have been very easy to infer that adjudication meant adjudication under the 1996 Act. As English law had been expressly disapplied, however, and Gibraltarian law substituted, that inference could not be drawn. In Gibraltar, the term "adjudication" had no established meaning. There were three possible meanings: a final determination; a temporary determination similar to that provided in para. 23(2) of the Scheme in the 1998 Regulations; or that adjudication was not intended to be binding at all. Accordingly, the effect of clause 9.2 of the agreement was that an adjudication award would not be binding in law. That did not render the clause otiose, and the parties might wish to continue the adjudication proceedings to obtain a neutral evaluation from the purported adjudicator who appeared to be an eminently qualified expert (paras. 16–22).

(2) Although it was not necessary to decide the point, the court considered whether the absence in Gibraltar of any defined scheme such as in the 1998 Regulations meant that a reference to adjudication would not succeed. As a quasi-judicial tribunal, an adjudicator would have had sufficient power to govern his own procedures and give appropriate directions provided he acted in accordance with natural justice. It could not, however, be said that this power extended to an adjudicator's fees. The 1998 Scheme provided for an adjudicator to fix his own fees but such a term could not be implied. Likewise, a term as to the incidence of the fees could not be inferred. The 1998 Scheme provided for the adjudicator to decide who was ultimately responsible, with both sides jointly and severally liable in the meantime. That could not be implied. Equally plausible would be a provision for equal division. Therefore, on this

ground too, the absence of any scheme would be fatal for the enforceability of 9.2 (paras. 23–25).

Cases cited:
(1) *Qureshi* v. *Qureshi*, [1972] Fam. 173; [1971] 1 All E.R. 325; [1971] 2 W.L.R. 518, followed.
(2) *Scammell (G.) & Nephew* v. *Ouston*, [1941] A.C. 251; [1941] 1 All E.R. 14, followed.

Legislation construed:
Housing Grants, Construction and Regeneration Act 1996 (c.53), s.108: The relevant terms of this section are set out at para. 7.

Scheme for Construction Contracts (England and Wales) Regulations 1998 (S.I. 1998/649), as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (S.I. 2011/2333), para. 19: The relevant terms of this paragraph are set out at para. 9.
para. 20: The relevant terms of this paragraph are set out at para. 9.
para. 21: The relevant terms of this paragraph are set out at para. 9.
para. 22: The relevant terms of this paragraph are set out at para. 9.
para. 22A: The relevant terms of this paragraph are set out at para. 9.
para. 23: The relevant terms of this paragraph are set out at para. 10.
para. 25: The relevant terms of this paragraph are set out at para. 10.
para. 26: The relevant terms of this paragraph are set out at para. 10.

R. Pennington-Benton and *D. Martinez* for the claimant;
G. Stagnetto, *Q.C.* and *K. Power* for the defendant.

1 **JACK, J.:** This is the determination of a question raised by a Part 8 claim form issued on February 13th of this year. The underlying dispute concerns a building contract made on November 14th, 2014, in connection with a property known as Ansaldo's Townhouse, which is near the Moorish Castle. The object of the contract was to redevelop the townhouse into a boutique hotel.

The contract

2 Ansaldo's Townhouse Ltd. ("ATL") is the employer; Sharrock Shand Ltd. ("Sharrock Shand"), the builder. As to the underlying substantive issues, there are complex claims and counterclaims which it is not necessary for me to set out. Sharrock Shand claims over half a million pounds. The immediate dispute before me concerns a reference, or a purported reference, of the dispute to adjudication. The President of the Royal Institution of Chartered Surveyors ("RICS") has appointed, or purported to appoint, Mr. Mark Entwhistle, FRICS as adjudicator. ATL disputes that the appointment is effective or that Mr. Entwhistle has any

power to determine the substantive dispute between the parties, either finally or on an interim basis.

3 The terms of the contract are set out in a written contract using the Joint Contracts Tribunal "Standard Building Contract With Quantities (Without Subcontractor Design) 2011," but there are substantial modifications. The employer is described as ATL; the contractor, Sharrock Shand. The recitals recite:

> "First the Employer the employer wishes to have the following works carried out: the Ansaldo's Townhouse Project at Ansaldo's Passage, Gibraltar, and has had drawings and bills of quantities prepared which show and describe the work to be done."

4 The contract continues with the articles:

- Under Article 2, the contract sum is fixed at £938,276.23. The contract administrator is defined as Rebecca Faller, although subsequently she was replaced. (That is again a subject of a dispute.)
- Article 7 provides: adjudication—"If any dispute or difference arises under this contract, either party may refer it to adjudication in accordance with Clause 9.2."
- Article 8: arbitration—"Not Applicable."
- Article 9: legal proceedings. "Subject to Article 7 and (where it applies) to Article 8 the—*and here "English" is crossed out and "Gibraltar" substituted*—Gibraltar Courts shall have—*and the word "exclusive" is added*—exclusive jurisdiction over any dispute or difference between the parties which arises out of or in connection with this contract."
- Article 10: "For the avoidance of doubt, whatever reference is made to 'English' courts and/or law throughout this document, it shall be deemed to be substituted with Gibraltar courts and/or law."
- The contract then deals with construction design and management matters which I do not need to set out.
- Under the contract particulars, it says in relation to Article 8: "Arbitration, Article 8 and Clauses 9.3 to 9.8 Arbitration do not apply."
- Under Clause 9.2.1 "Adjudication" it says "Nominating body—where no adjudicator is named or where the named adjudicator is unwilling or unable to act (whenever that is established), the adjudicator is said 'TBC,'" but the clause

then immediately says that the appointing body is to be the Royal Institution of Chartered Surveyors.

5 Section 1.1 of the conditions has definitions. The only definition to which it is necessary to refer is the reference to "the Scheme." Originally this was defined as "Part 1 of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998." However, the whole of that entry has been deleted by striking through.

6 Section 9 of the agreement is entitled "Settlement of Disputes." This starts "Mediation":

- "9.1 Subject to Article 7, if a dispute or difference arises under this Contract which cannot be resolved by direct negotiations, each party shall give serious consideration to any request by the other to refer the matter to Mediation."

It continues with "Adjudication":

- "9.2 If a dispute or difference arises under this Contract which either party wishes to refer to adjudication, the Scheme will apply, subject to the following—

  1. for the purposes of the Scheme, the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contract Particulars;

  2. where the dispute or difference is or includes a dispute or difference relating to Clause 3.18.4 and as to whether an instruction issued thereunder is reasonable in all the circumstances—

     1. the adjudicator to decide such dispute or differences shall (where practicable) be an individual with appropriate expertise and experience in the specialist area or discipline relevant to the instruction or issue in dispute.

     2. if the adjudicator does not have the appropriate expertise and experience, the adjudicator shall appoint an independent expert with such expertise and experience to advise and report in writing on whether or not the instruction under clause 3.18.4 is reasonable in all the circumstances."

- The next clauses are entitled "Arbitration" and provide: "Clauses 9.3 to 9.8—Not applicable."

The English legislation

7 Before turning to the parties' contentions, I should say something about the position in England and Wales. Part 2 of the Housing Grants,

Construction and Regeneration Act 1996 provides statutory authority for construction contracts to be referred to adjudication by the parties. The relevant section is s.108 (the right to refer disputes to adjudication). This provides:

> "(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
>
> For this purpose 'dispute' includes any difference.
>
> (2) The contract shall—
>
> (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
>
> (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
>
> (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
>
> (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
>
> (e) impose a duty on the adjudicator to act impartially; and
>
> (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
>
> (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
>
> The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
>
> (4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
>
> (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

Sub-section (6) then deals with arbitration.

8 The default scheme under s.108(5) is that set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998. The Schedule to those Regulations gives a detailed scheme of reference to adjudication. Paragraph 1 provides for any parties to a construction contract to give written notice referring a dispute to adjudication. Then para. 2 deals with the appointment of the adjudicator. There are further provisions as to who can be an adjudicator and how the matters shall proceed. Paragraph 8 provides that the adjudicator may, with the consent of all the parties to the dispute, adjudicate on more than one dispute out of the same contract, and on related disputes under different contracts. Then there are the duties of an adjudicator to act impartially in para. 12. Paragraph 13 provides that an adjudicator may take the initiative in ascertaining the facts and law necessary to determine the dispute. There are then listed various powers which he has to require documents and submissions and to inspect the property. Paragraph 14 imposes an obligation on the parties to comply with directions. Paragraph 15 allows inferences to be drawn if parties fail to comply with directions. Paragraph 16 refers to the representation of parties before the adjudicator. There are then provisions as to confidentiality.

9 The Scheme, as amended, provides:

> **"19.**–(1) The adjudicator shall reach his decision not later than—
>
> (a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or
>
> (b) forty two days after the date of the referral notice if the referring party so consents, or
>
> (c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.
>
> (2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph (1)—
>
> (a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
>
> (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
>
> (3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

Adjudicator's decision

20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may—

(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(9) of the Act, when that payment is due and the final date for payment,

(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

21. In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.

22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

22A.–(1) The adjudicator may on his own initiative or on the application of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(2) Any correction of a decision must be made within five days of the delivery of the decision to the parties.

(3) As soon as possible after correcting a decision in accordance with this paragraph, the adjudicator must deliver a copy of the corrected decision to each of the parties to the contract.

(4) Any correction of a decision forms part of the decision."

10 Paragraph 23(1) has been repealed. The Scheme continues:

"**23.**—(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

. . .

25. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination.

26. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability."

The parties' submissions

11 The submissions of the parties are conveniently set out in the skeleton argument for the defendant prepared by Mr. Stagnetto, Q.C. He says (at para. 6):

"The thrust of the claimant's arguments can be summarized as follows:

- The disapplication of English law by the Contract renders the references to adjudication otiose.
- Where there are no pre-agreed rules, no meaning can be ascribed to reference to 'adjudication.'
- For an adjudication clause to have legal effect there must be clarity as to the effect of the adjudication clause.
- There is no internationally accepted definition of adjudication which would allow the parties or the court to assume anything regarding the process.
- There is no legal concept or common law concept to adjudication and there is no statutory equivalent in Gibraltar to the mechanism procedure which exists in England.
- There are sound reasons of policy why certainty is required and in this case no effect should be given to the adjudication clause."

12 He summarizes his own submissions as follows:

"Conversely the defendant contends that:

- The parties expressly agreed to use adjudication as a means of dispute resolution.

- The parties took specific steps in the drafting of the Contract not just to retain references to adjudication but to identify a mechanism for the appointment of an adjudicator.
- Whilst references to and application of English law was expressly removed, that does not have the effect of making adjudication impossible.
- Adjudication can exist in the absence of any statutory framework.
- The procedure provided for under the contract for the appointment of an adjudicator is specific and well recognized; [it] does not require the parties to reach any further agreement for the adjudicator for these functions and therefore provides sufficient certainty.
- Once appointed, the adjudicator has a discretion and wide powers to set the procedure for the adjudication if it cannot be agreed between the parties. In setting the procedure, the adjudicator must ensure that it complies with principles of natural justice.
- Additionally the adjudicator will be bound by the guidelines supplied to him by his representative body, the RICS which the parties agree should act as the adjudicator nominating body . . .
- The relevant provisions of the contract do not amount to an agreement to agree (eg an agreement to negotiate in good faith) which the courts have rejected on occasions in the past as being too vague, too uncertain and too difficult to enforce.
- The choice of the parties to nominate RICS as the adjudicator nominating body with a conscious decision to be bound by the rules and guidelines and the RICS nominating and adjudication procedure.
- On a proper construction, the contract provides for a two tier system of dispute resolution adjudication followed by Court proceedings.
- Adjudication is in any event widely understood and accepted to be a first tier dispute resolution mechanism which can subsequently be reviewed by arbitration or court proceedings.
- To the extent necessary the court should imply terms which gives business sense to the contract. In England and Wales

there are limited means of challenging and adjudication award."

Discussion

13 In England and Wales there are limited means of challenging an adjudicator's award. The court will grant summary judgment on an adjudicator's award unless a party is able to make a jurisdictional attack on the award. This contrasts with the position in other jurisdictions.

14 *Hudson's Building & Engineering Contracts*, 13th ed., at paras. 11–016ff. and 11–054ff. (2015) shows wide variations in the extent to which merits-based challenges can be made to an adjudicator's award. In Victoria, an aggrieved party can seek a review of an adjudicator's decision from another adjudicator. The Australian Capital Territory allows appeals on points of law to the ordinary courts. Western Australia gives a full right of appeal to the state's Administrative Tribunal. There are equally wide variations as to which disputes can be referred to adjudication and what defences a party can put up. Adjudicators' powers to correct errors in their awards also differ substantially. The differences between the "East Coast Model," covering New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory, and the "West Coast Model" of Western Australia and the Northern Territory are such that a Royal Commission has proposed that the Commonwealth of Australia should enact overarching legislation. Singapore adopts a mixture of the New South Wales and British approaches.

15 The background to the 1996 Act is said in *Hudson*, at para. 11–001, to be the introduction of adjudication (as we know it under the 1996 Act) in the late 1970s in the JCT DOM/1 standard terms contract. However, there is no evidence that the expression "adjudication" became a precisely defined term of art at that time. Indeed the contrary is the case. *Jowitt's Dictionary of English Law*, 3rd ed. (2010) (the then-current edition in 2014) defines adjudication as (at 58):

> "The judgment or decision of a court or tribunal. (1) Formerly used in bankruptcy proceedings, the adjudication being the order which declared the debtor to be bankrupt (now referred to as a bankruptcy order) . . . (2) The term is used routinely in relation to tribunals, less so in relation to courts. (3) In general the decision of a dispute; now specifically in the United Kingdom (Part II of the Housing Grants, Construction and Regeneration Act 1996, as amended) Singapore and some Australasian and US jurisdictions, a statutory scheme giving parties to construction contracts a right (in some jurisdictions, a duty) to refer certain categories of dispute to an adjudicator for speedy initial resolution. (4) [Makes reference to the Adjudicator to Her Majesty's Land Registry]."

16 The primary meaning of adjudication, it can be seen from that definition, is a final determination of a dispute. Indeed as I have noted, the second sentence of s.108(3) of the 1996 Act makes express provision for the parties to agree to be bound finally by an adjudication award. It is only from 1996 onwards that "adjudication" became a defined statutory term in the various statutes in the United Kingdom and elsewhere, providing for a statutory adjudication process in relation to construction contracts.

17 Thus there are three possible meanings of adjudication in the current contract: first, a final determination; secondly, a temporary determination similar to that provided set out in para. 23(2) of the Scheme in the 1998 Regulations; or thirdly, that the adjudication is not intended to be binding at all.

18 As to this last possibility, section 9 of the contract is headed "Settlement of Disputes," with mediation and adjudication given as possible means of settlement. Mediation of course requires the parties' agreement to any mediator's proposal of settlement. The same could potentially be applied to adjudication, which would, on this interpretation, become a form of early neutral evaluation.

19 The question would of course not arise if the Scheme provided by the 1998 Regulations applied, but the definition of the Scheme has been deliberately deleted in the contract. Mr. Stagnetto sought to overcome this problem by referring to the RICS guidelines. The fourth edition is effective from January 2017, so it post-dates the making of the contract, but I have little doubt that the earlier edition of the guidance was in very similar terms. However, the guidance note has a limited effect. It reads (at 4):

> "This guidance note applies to RICS members who are either nominated by RICS or another adjudicator nominating body . . . or appointed directly by the parties, to adjudicate disputes relating to . . . [and then it has a bullet point] works carried out under a construction contract as defined [in the 1996 Act] . . . [and then second bullet point] works carried under a contract to which the Construction Act does not apply, but under which the parties have agreed a contractual mechanism to enable them to adjudicate disputes.
>
> It is also intended to assist the parties and those acting for them by making them aware of the procedures likely to be followed in an adjudication. However, this guidance note should not be taken as a complete statement of the law and practice of adjudication generally. Readers should also ensure that they are aware of any developments in the relevant law and practice which arise after publication.

> This guidance note is based upon the law and practice in England and Wales. Readers should be aware that the law and practice in Scotland and Northern Ireland differs somewhat.
>
> Readers should also note that, although this publication provides outline guidance, those acting as an adjudicator will need to have a wider and deeper understanding of the law and practice than has been considered appropriate to provide here."

It then goes on to provide fairly detailed guidance about how the scheme under the 1998 Regulations or similar contracts made under s.108 should be applied.

20 There are two problems, in my judgment, with Mr. Stagnetto's submissions. First, the guidance itself says that it only applies to English law. By seeking to rely on these guidelines, and therefore impliedly incorporating the 1996 Act, Mr. Stagnetto, in my judgment, is making a bootstraps argument. If English law does not apply, as it does not apply in this contract, then the guidelines are not applicable. Secondly, the guidelines are primarily addressed to surveyors. Although in general the President of the Royal Institution of Chartered Surveyors can be expected to appoint members or fellows of the Institution as adjudicators, he can, and on occasion does, appoint other professionals such as chartered engineers or lawyers to act as adjudicators. If such an appointment were made then the guidelines would not apply in any event.

21 Mr. Pennington-Benton for ATL took me to the House of Lords decision in *Scammell (G.) & Nephew* v. *Ouston* (2). In that case the Oustons had agreed to purchase from Scammell a new motor van but stipulated that this order was given on the understanding that the balance of the purchase price could be paid on hire purchase terms over a period of two years. The judge at first instance and the Court of Appeal held that that was a valid contract and that the term that the purchase to be on hire purchase terms over a period of two years was sufficiently precise to be an enforceable contract. The House of Lords unanimously disagreed and held that the clause as to hire purchase terms was so vague that no precise meaning could be attributed to it and, consequentially, there was no enforceable contract between the parties.

22 The same in my judgment applies here. If we were in England, it would be very easy to infer that adjudication meant adjudication under the 1996 Act but, here in Gibraltar, we cannot draw that inference. The parties have deliberately excluded English law and substituted Gibraltarian law. Here in Gibraltar, the expression "adjudication" does not have an established fixed meaning. I cannot say that the term "adjudication" means "a temporary award which can be reopened in subsequent litigation." Accordingly, in my judgment, the effect of section 9.2 is that an adjudication award is not binding in law. This does not render the clause otiose. On

the contrary, the parties may wish to continue the adjudication in order to obtain a neutral evaluation from Mr. Entwhistle who appears to be an eminently qualified expert.

23 That is sufficient to dispose of the matter but, because other issues were fully argued, I should give my view on those matters. Mr. Pennington-Benton submitted that the absence of any defined scheme such as in the 1998 Regulations was fatal to a reference to adjudication being successful. Thus, for example, without the 28-day deadline for making an adjudication award, a reference to adjudication was of a wholly different quality. Mr. Stagnetto's answer to this was that, as a quasi-judicial tribunal, the adjudicator had the power to govern his own procedures and give appropriate directions.

24 I agree that in *Qureshi* v. *Qureshi* (1), Simon, P. held (reading from the headnote to the *Law Reports, Family Division* ([1972] Fam. at 174)):

> "Where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objective with which it was set up."

Accordingly, in my judgment, the adjudicator had and has sufficient powers to give procedural directions.

25 There is, however, one matter to which the *Qureshi* power does not, in my judgment, extend and that is fees. There may be cases where an adjudicator does not require payment of his fees, however this is likely to be rare. The 1998 Scheme provides for an adjudicator to fix his own fees, but such a term cannot in my judgment be implied. Likewise, a term as to the incidence of the fees cannot be inferred. The 1998 Scheme provides for the adjudicator to decide who is ultimately responsible, with both sides jointly and severally liable in the meantime. Again, that cannot be implied in my judgment. Equally plausible would be a provision for equal division. Thus on this ground too, the absence of any scheme would be fatal for the enforceability of section 9.2.

26 In those circumstances I find that the appointment of Mr. Entwhistle is not effective. I shall hear the parties on any consequential orders.

Order accordingly.

This judgment was corrected under the slip rule, June 9th, 2017.