

SHIFTING THE BURDEN OF PROOF:  
REVISITING ADJUDICATION DECISIONS

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**A. Introduction**

- 37.01** It was an honour to be asked to write a short chapter for this *Liber Amicorum* in recognition that the CI Arb has been established for a hundred years. The CI Arb received its Royal Charter in 1979 and the object of the Institute ‘is to promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court (collectively called “private dispute resolution”)’.<sup>1</sup> With over 14,000 members around the world and ADR becoming increasingly popular the CI Arb seems well placed to go forward for another century.
- 37.02** We have decided to write a short chapter on a core subject that affects all forms of adjudicative dispute resolution. The concept of the burden of the proof is a fundamental part of any adjudicative procedure—whether it be court proceedings, arbitration or adjudication. Stepped dispute resolution clauses are now the norm in construction contracts and we wanted to look at how these clauses affect the burden of proof.
- 37.03** Construction contracts are different from many other forms of commercial contracts. The works can take months, if not years, to complete and therefore, to ensure the smooth functioning of the contract, a third person (e.g., an architect, engineer or project manager) is appointed to deal with the certification of payments and claims. Adjudication clauses are now found in many forms of international construction contracts, such as FIDIC, and are a statutory requirement for English construction contracts. The adjudicator has the power to open up, review and revise the decisions of the architect, engineer or project manager and correct a decision. This allows for disputes to be settled while the contract proceeds and the decision of the adjudicator binds the parties on an interim basis.
- 37.04** It is fundamental for the parties, the adjudicator or the arbitral tribunal to know where the burden of proof lies. The introduction of stepped dispute resolution provisions into construction contracts has added a new level of complexity. The arbitral tribunal when considering the dispute must decide who has the burden of proof. Where an adjudicator has made a decision in relation to a payment or awarded an extension of time, the arbitral tribunal must ask whether that decision has any effect on the burden of proof or whether the slate is wiped clean and the party claiming payment or time is obliged to prove its entitlement again.

<sup>1</sup> CI Arb Royal Charter, Art 4(1) <[www.ciarb.org](http://www.ciarb.org)> accessed 25 September 2015.

**37.05** The following example is typical of the problem.<sup>2</sup> A contractor applies for an extension of time of 1 year for delays caused by the employer. The engineer reviews the claim and awards the contractor a six-month extension of time. The contractor refers the matter to an adjudicator, who reviews the claim. The adjudicator decides that the contractor's claim is valid and awards a full year's extension of time. The employer is dissatisfied and refers the dispute to arbitration. In the above scenario, the employer is the claimant in the arbitration. However, who has the burden of proof? Does it rest with the contractor who has claimed that it has been delayed or with the employer who is challenging the decision of the adjudicator? Under English law there is no conclusive authority on point.

### **B. The Burden of Proof**

**37.06** It is an unequivocal principle of English law that it is the party which makes an assertion that has the burden of proving it and not the party that denies it (*ei qui affirmat non ei qui negat incumbit probatio*). Who has the burden of proof depends on the circumstances under which the claim arises.<sup>3</sup> As Viscount Maugham stated in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*<sup>4</sup>, '[i]t is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons'. The principle that '[e]ach party must prove to the satisfaction of the tribunal the factual veracity of its allegations' has been described 'as a general principle of law; admitted as such in international jurisprudence'.<sup>5</sup> Klaus Peter Berger succinctly stated, 'every party bears the burden of proof for the facts supporting its claim'.<sup>6</sup> This principle can be dated back to Roman law<sup>7</sup> and is now so deeply rooted in all laws that it forms one of the key principles of the *lex mercatoria*,<sup>8</sup> of international law<sup>9</sup> and arbitration.<sup>10</sup>

<sup>2</sup> This is the same example used by Peter Coulson, *Coulson on Construction Adjudication* (2nd edn, OUP 2011).

<sup>3</sup> *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154.

<sup>4</sup> *ibid* 172.

<sup>5</sup> Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) 219.

<sup>6</sup> Klaus Peter Berger, *Private Dispute Resolution in International Business - Negotiation, Mediation, Arbitration* (2nd edn, Kluwer Law International 2009) 536.

<sup>7</sup> Paulus, 'On the Edict' Book LXIX: 'Proof is incumbent upon the party who affirms a fact, not upon him who denies it'.

<sup>8</sup> See Trans-Lex website, Principle No XII.1 – Distribution of Burden of Proof <[www.trans-lex.org](http://www.trans-lex.org)> accessed 25 September 2015.

<sup>9</sup> John L Simpson and Hazel Fox, *International Arbitration – Law and Practice* (Steven & Sons Limited 1959) 194.

<sup>10</sup> Petrochilos (n 5) 214.

- 37.07** Most arbitration laws do not address the issue of burden of proof in relation to making or defending claims, although it is addressed in some arbitration rules.<sup>11</sup> There can be various kinds of burdens of proof such as the evidential burden, the burden of persuasion, the burden of production and the tactical burden. These burdens may be linked to presumptions, standards of proof and shifts and distributions of burdens of proof.<sup>12</sup> There may be situations where one party has to overcome an initial burden.
- 37.08** In ICC Award No 10982, the arbitral tribunal addressed a situation where this occurred.<sup>13</sup> The respondent alleged that there had been fraud in the procurement of a deed, which formed the basis of the claimant's claim. The arbitration was under the UNCITRAL Arbitration Rules. The arbitral tribunal stated that the party who based its claim upon the deed had first to produce a document which inspired a minimally sufficient degree of confidence in its authenticity. The burden then moved to the party alleging fraud to show that it had been produced by fraud.<sup>14</sup>
- 37.09** English law provides that in cases where the burden of proof is not clear—because the parties' cases are equally weighted—the burden of proof lies on the party who would be unsuccessful if it did not produce any evidence.<sup>15</sup> Also it does not matter if a party is making an affirmative or negative assertion, the burden of proof still lies with that party.<sup>16</sup>

### **C. The Orthodox View—The Burden of Proof Does Not Move**

- 37.10** Sir Peter Coulson, in the leading text book on adjudication,<sup>17</sup> and a number of English and Scottish cases, discussed below, suggest that the burden of proof remains with the party making the initial claim and the adjudicator's decision, once challenged, is of no effect whatsoever. Coulson states:

[o]nce the decision has been formally challenged by the issue of subsequent litigation or arbitration, the contractor in the example noted above is not entitled to rely on the existing

<sup>11</sup> See, eg, Art 27 of the 2010 UNCITRAL Arbitration Rules and Art 19 of the 2009 ICDR Arbitration Rules.

<sup>12</sup> Hendrik Kaptein, Henry Prakken and Bart Verheij, *Legal Evidence and Proof: Statistics, Stories, Logic* (Ashgate Publishing 2009) 223.

<sup>13</sup> Yves Derains, Note to ICC Case No 10982, Award (2001) 2005 JDI 1256, 1263.

<sup>14</sup> *ibid* 1265.

<sup>15</sup> *Amos* (1835) 174 ER 160, 1 Mood & R 464.

<sup>16</sup> *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247.

<sup>17</sup> Coulson (n 2).

decision as having any status whatsoever, let alone one that changes or displaces the ordinary burden of proof.<sup>18</sup>

**37.11** However, in *Walker Construction (UK) Ltd v Quayside Homes Ltd & Or*,<sup>19</sup> Gloster LJ cast doubt on this view. For the reasons set out below we consider that Gloster LJ's obiter dicta statements on this point are correct and that the burden of proof is shifted by an adjudicator's decision.

**37.12** The issue of whether an adjudicator's decision shifts the burden of proof was first addressed by the courts in the Scottish case of *City Inn Ltd v Shepherd Construction Ltd*.<sup>20</sup> The contract was a JCT Standard Form with Quantities and provided explicitly for adjudication. Clause 41A.8.1 provided:

[t]he decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by court proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

**37.13** In the *City Inn* case a dispute was referred to adjudication and the adjudicator held that, in addition to the extension of time awarded by the architect, the defenders were entitled to a further extension of time of five weeks. Lord MacFadyen then addressed the question of whether this decision had any effect on the onus of proof. *City Inn* submitted that it did not and argued that the burden of proof remained with *Shepherd Construction Ltd* to justify the extension of time which they sought. Reference was made to the marginal note beside clause 41A.8.1 which stated:

[t]he arbitration or court proceedings are not an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by the Adjudicator.

**37.14** *City Inn* submitted that the note correctly stated the law. *Shepherd Construction*, on the other hand, stated that the effect of the adjudicator's decision was to throw onto *City Inn* the burden of showing that the extension of time which the adjudicator awarded was not justified. It argued that the binding quality of the adjudicator's decision continued, not merely until the dispute was made the subject of litigation, but until the court proceedings were finally determined. That, said *Shepherd Construction*, meant that during the proceedings, the adjudicator's decision remained binding and had to be rebutted by the party arguing for a different result.

**37.15** Lord MacFadyen stated:

<sup>18</sup> *ibid* [14.48].

<sup>19</sup> [2014] EWCA Civ 93.

<sup>20</sup> [2002] SLT 781.

[i]n my opinion, [City Inn's] submission is correct. As has been observed in a number of cases, the function of adjudication, as contemplated in the 1996 Act, is to provide a speedy means of reaching a binding interim determination of disputes arising under construction contracts. It goes no further than that. I agree with [City Inn] that the side note to clause 41A.8.1 correctly states the law. It is, in my view, no part of the function of an adjudicator's decision to reverse the onus of proof in any arbitration or litigation to which the parties require to resort to obtain a final determination of the dispute between them. It is reading too much into the reference in clause 41A.8.1 (and Section 108(3)) to the adjudicator's decision being binding 'until the dispute or difference is finally determined' to construe it as affecting the burden of proof in the arbitration or court proceedings [...]. The burden of proof in any such action lies where the law places it, and is unaffected by the terms of the adjudicator's decision.<sup>21</sup>

**37.16** Lord MacFadyen therefore concluded that the words in section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA') that the adjudicator's decision is binding 'until the dispute or difference is finally determined' should not be read as having an effect on the burden of proof in an arbitration or litigation.

**37.17** A number of cases that have followed City Inn have accepted that the burden of proof remained unaffected by the adjudicator's decision.<sup>22</sup> In the recent cases of *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*<sup>23</sup> and *Bellway Homes Ltd v Seymour (Civil Engineering Contractors) Ltd*<sup>24</sup> the party challenging the adjudicator's decision had pleaded its case on this basis and, despite being the claimant in the litigation, it did not bear the onus of proof. However, in neither of these cases did the court address the question of who actually had the burden of proof.

#### **D. De Novo Hearing—A Rationale for the Orthodox View**

**37.18** A court or arbitral tribunal, when being asked to reconsider a decision of an adjudicator, undertakes a *de novo* review of the dispute. The fact that the hearing is to be *de novo* is sometimes used as a basis for arguing that the adjudicator's decision has no status.<sup>25</sup> In *The Construction Centre Group Limited v The Highland Council* Lord MacFadyen considered the words 'open up, review and revised' and stated that: 'I do not consider that the use of the word "revised" in Clause 66(4) and (6)(iv) compels the conclusion that the arbiter's

<sup>21</sup> *ibid* [58].

<sup>22</sup> See, eg, *CFW Architects (A Firm) v Cowlin Construction Ltd* [2006] EWHC 6 (TCC).

<sup>23</sup> [2015] UKSC 38; [2013] EWCA Civ 1541; [2013] EWHC 1322 (TCC).

<sup>24</sup> [2013] EWHC 1890 (TCC), [2013] All ER (D) 82 (Jul).

<sup>25</sup> Coulson (n 2) [14.48].

task is not to approach the resolution of the dispute *de novo* but to review the adjudicator's decision'.<sup>26</sup>

**37.19** However, the fact that there is a *de novo* hearing does not mean that the adjudicator's decision has no status or that the burden of proof goes back to the original party making the claim. For example, where an arbitrator revises a decision of an engineer or architect there is a *de novo* hearing; however, in such cases the engineer's or architect's decision does not necessarily lose its status. In the case of *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Limited and Others*<sup>27</sup> Lord Hope stated that in determining the rights of the parties the court was entitled to look at all the facts and so could take account of the architect's certificate and either agree with it or not as it was not conclusive.

**37.20** In the United States, there are state-administered compulsory arbitration schemes dealing with consumer disputes. One of these relates to the purchase of vehicles which are said to be 'lemons'.<sup>28</sup> On a trial *de novo* before the circuit court the party challenging the decision of the arbitral tribunal has the burden of proof to show that the decision of the arbitral tribunal is wrong, despite the trial being a *de novo* hearing.<sup>29</sup> In *Mason v Porsche Cars of North America*<sup>30</sup> the court held that any benefit of compulsory arbitration would be lost if simply by filing a challenge to the decision, the burden of proof was placed back on the successful party. Equally, it may be argued that the benefits of statutory or contractual adjudication would be lost if a party simply needed to issue a notice of dissatisfaction so that the burden of proof reverted to the person initially making the claim.

### **E. Shifting the Burden—The Approach in *Walker v Quayside***

**37.21** The issue of who has the burden of proof when challenging an adjudicator's decision came squarely before the English courts in the case of *Walker Construction (UK) Ltd v Quayside Homes Ltd & Or.*<sup>31</sup> The facts of the case were that Walker Construction undertook to carry out drainage and highway works for Quayside. The contract was under an NEC form. A dispute arose, which was referred to adjudication, and the adjudicator awarded Walker Construction the sums that it claimed were due, which included £8,941.16. Quayside paid Walker Construction. Quayside then raised a counterclaim that there were defects in the works and claimed in the county court repayment of sums paid to Walker Construction

<sup>26</sup> [2002] ScotCS CSOH 354.

<sup>27</sup> [1999] 1 AC 266, 292.

<sup>28</sup> Florida's Lemon Law – see Chapter 88-95, Laws of Florida.

<sup>29</sup> *Mason v Porsche Cars of North America* 621 So 2d 719 (Fla 5th DCA1993); and *Aguilar v Ford Motor Co* 683 So 2d 1158 (Fla Dist Ct App 1996).

<sup>30</sup> *ibid.*

<sup>31</sup> See n 19.

plus further damages. His Honour Judge Bailey in the county court awarded Quayside £10,035.91 for the defects but rejected the claim for repayment of the sum of £8,941.16 awarded by the adjudicator.

**37.22** Quayside argued that on bringing the claim in the county court the adjudicator's decision became effectively null and void and that Walker Construction had the burden of proving its entitlement to be paid before the court. Quayside framed its claim on the basis of restitution. His Honour Judge Bailey summarised Quayside's case as follows:

the adjudicator's decision has no status or value whatsoever in subsequent legal proceedings. The determination, the reasons and the evaluation of parties' case in adjudication are to be ignored by the court. The slate is wiped clean. The burden of proof lies where the law placed it. The adjudicator's decision does not affect this burden. In other words, submits Quayside, the court, when considering claims which have been the subject of an adjudication must turn the clock back to the position prior to the adjudication.<sup>32</sup>

**37.23** His Honour Judge Bailey accepted that he did not have to take account of the adjudicator's decision in forming his judgment. His Honour agreed with Lord MacFadyen in *City Inn v Shepherd*<sup>33</sup> and with the comments by Sir Peter Coulson. However, he dismissed Quayside's claim because he could not discern a cause of action. The judge concluded that Quayside may have had a right in contract to claim repayment of the monies paid but had failed to plead any breach of contract, or even assert that there was a breach of contract. The learned judge then considered whether there was a claim in restitution but decided that there was no basis for this in law.<sup>34</sup> Quayside therefore lost this part of the case based on the fact that (1) no cause of action had been pleaded for the breach of contract argument; and (2) there was no basis in law for a claim for restitution.

**37.24** Quayside appealed this part of the decision to the Court of Appeal. In the appeal, neither party adduced any evidence. Walker Construction had already been paid so it took the view that it was unnecessary. Quayside relied on the orthodox view that the burden of proof remained with Walker Construction. Quayside based its case on Walker Construction's failure to discharge its burden to adduce evidence of its entitlement to the £8,941.16. It also argued that because this sum had not been certified it was not contractually due.

**37.25** Gloster LJ, giving the leading judgment at the Court of Appeal, rejected Quayside's submission and held that Quayside's claim should be dismissed. However, Gloster LJ's reasoning was different to that of His Honour Judge Bailey. Her Ladyship held that

<sup>32</sup> *ibid* [111]

<sup>33</sup> See *City Inn* (n 20).

<sup>34</sup> In *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38 [24], Lord Mance held that an independent restitutionary obligation did exist to claim an overpayment. It follows that the reasoning of His Honour Judge Bailey on this point must now be considered as being incorrect.

Quayside had failed to adduce evidence in support of its assertion that it was entitled to be paid back this sum. Her Ladyship held that the burden of proof in the court action was on Quayside because its counterclaim was in essence a claim to set off damages in respect of allegedly defective works. The burden of proof did not rest on Walker Construction because it had already been paid and was not claiming any further payment. Gloster LJ agreed with Quayside that it was irrelevant that the sum of £8,941.16 in question had not been certified by the engineer.

**37.26** Gloster LJ then considered *City Inn Ltd v Shepherd Construction Ltd*<sup>35</sup> and the burden of proof issue. Her Ladyship found difficulties with the MacFadyen/Coulson view that the adjudicator's award could never have an impact in a subsequent proceeding. Her Ladyship suggested that as the award exists until it is overturned or affirmed, the burden of proving that it was wrong should shift to the party who referred the matter to arbitration or litigation and not to the party that was not seeking to contest the adjudicator's decision. Referring to the *City Inn* case, her Ladyship stated:

In those circumstances, why should the defendant contractor, for example, on the facts of *City Inn Limited v Shepherd Construction Limited* not be entitled to contend that, until the contrary was proved to the court's satisfaction, the adjudicator's decision that the contractor was entitled to an extension of time remained binding, and that therefore the onus of proof was on the claimant employer (the losing party in the adjudication) to adduce evidence, and prove on that evidence, that no such extension was justified and it was entitled to its money back?<sup>36</sup>

**37.27** Gloster LJ stated that if the burden was reversed so that it shifted to the party who was not making any claim in the litigation or arbitration then the result would be a legal fiction. Her Ladyship argued that placing the burden of proof on the party who was not claiming would be an incorrect hypothesis.<sup>37</sup> This approach, we suggest, is correct. The orthodox approach places the burden on a party who is not seeking to challenge an adjudicator's decision and is contrary to the established principle that where the burden of proof is not clear because the parties' cases are equally weighted, the court considers that it is the party who would be unsuccessful if it did not produce any evidence that has the burden of proof.<sup>38</sup> Moreover, the orthodox approach could lead to a proliferation of negative declarations and, as stated by Longmore LJ in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*,<sup>39</sup> it would be counter-intuitive to expect a person who says he is not liable to have to take the initiative and himself start legal proceedings.

<sup>35</sup> See n 20.

<sup>36</sup> *Walker Construction* (n 19) [51].

<sup>37</sup> *ibid.*

<sup>38</sup> *Amos* (n 15).

<sup>39</sup> [2013] EWCA Civ 1541.

## F. The Difficulties Arising from the Orthodox View

### (a) Recovering monies which have been overpaid

**37.28** The question of how to claim back monies overpaid under an adjudicator's decision has been the subject of much recent judicial scrutiny. The issue was recently addressed by the Supreme Court in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*.<sup>40</sup> Lord Mance held that a paying party had 'a directly enforceable right to recover any overpayment to which the adjudicator's decision can be shown to have led, once there has been a final determination of the dispute.' His Lordship then stated that the right arose 'either by contractual implication [an implied term] or, if not, then by virtue of an independent restitutionary obligation'.

**37.29** The right to recover in restitution had previously been doubted in a number of cases. In the Scottish case of *Castle Inns (Sterling) Ltd v Clark Contracts Ltd*<sup>41</sup> Lord Drummond Young held that:<sup>42</sup> 'the use of an implied term of the contract is a more natural mechanism than a restitutionary obligation based on unjustified enrichment, which is necessarily an extra-contractual obligation.' Lord Drummond Young's reasoning was derived from the case of *Dollar Land (Cumbernauld) Ltd. v CIN Properties Ltd*<sup>43</sup> where Lord Hope of Craighead held that:

[a]n obligation in unjustified enrichment is owed where the enrichment cannot be justified on some legal basis arising from the circumstances in which the defender was enriched. There can be no better justification for an enrichment than that it was obtained and is being retained in the exercise of a contractual right against the party who seeks to invoke the remedy.<sup>44</sup>

**37.30** Criticisms had also been made with regard to implying a term in order to recover overpaid monies. At first instance in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*<sup>45</sup> Akenhead J had doubted whether there was an implied term. The test for implying a term into a contract is not easily met. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,<sup>46</sup> Lord Simon of Glaisdale identified the following tests for the implication of a term: (1) it must be reasonable and equitable; (2) it must be necessary to give business

<sup>40</sup> [2015] UKSC 38 [23]-[24] (Lord Mance).

<sup>41</sup> [2005] ScotCS CSOH\_178.

<sup>42</sup> *ibid* [14].

<sup>43</sup> 1998 SC (HL) 90.

<sup>44</sup> *ibid* [94E]-[F].

<sup>45</sup> See n 23.

<sup>46</sup> (1978) 52 ALJR 20.

efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; and (5) it must not contradict any express term of the contract. Lord Hoffmann in AG of *Belize v Belize Telecom Ltd*<sup>47</sup> added some further embellishments to the test. His Lordship stated that:

‘[t]he question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs [...] The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so’.<sup>48</sup>

**37.31** Gloster LJ, in *Walker Construction (UK) Ltd v Quayside Homes Ltd & Anr*<sup>49</sup> followed Akenhead J’s view that there was no need to imply a term and the test for implication of a term had not been met. Her Ladyship took the view that the relevant cause of action in court proceedings to reclaim money, following an adjudication’s decision, flowed from the underlying construction contract itself. Her Ladyship held:

‘I agree that, for limitation purposes, no new cause of action arises either as a result of an implied contractual term, or on the basis of a restitutionary claim, and that, when an unsuccessful party to the adjudication subsequently brings court proceedings, it is doing so on the basis of its original rights under the construction contract to claim payment under the contract, damages for breach of contract or a negative declaration that it is not in breach’.<sup>50</sup>

**37.32** Although Lord Mance, in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*,<sup>51</sup> expressly overruled these obiter observations of Gloster LJ, the question remains whether a court would imply a right to repayment in all circumstances. For example, where the construction contract contained an entire agreement clause and where there was a contractual adjudication clause then the court may not arrive at the same conclusion.

#### **(b) Recovery under the contract and the concept of temporary finality**

**37.33** In many construction contracts, before the introduction of adjudication, the engineer or architect would make a decision which would have interim binding effect on the parties until overturned by arbitration. In the case of *Royal Brompton Hospital NHS Trust v*

<sup>47</sup> [2009] UKPC 10.

<sup>48</sup> *ibid* [17].

<sup>49</sup> See n 19.

<sup>50</sup> *ibid* [63].

<sup>51</sup> See n 23.

*Hammond (No 3)*<sup>52</sup> the House of Lords had to consider an arbitration clause which provided the arbitrator(s) with the power to ‘open up, review and revise any certificate, opinion, decision [of the architect] and to determine all matters in dispute [...] as if no such certificate, opinion, decision [...] had been given’. The facts of the case were that the architect overcertified an extension of time to the contractor. The employer brought a claim against the architect for negligently over-certifying. Lord Steyn, referring to the employer’s case, stated:<sup>53</sup> ‘In such a case the Employer must go to arbitration in order to restore his position. He has the burden of proof in the arbitration and has to face the uncertain prospect of succeeding in what may perhaps be a complex arbitration’. The case was remitted back to the High Court and it was subsequently held<sup>54</sup> that the architects had been negligent in over certifying an extension of time and that the employer had suffered a loss, as it no longer had an entitlement to claim liquidated damages. The employer now had the burden of proof of opening up, reviewing and revising the architect’s extension of time award and proving that the extension of time should be less than that awarded.

**37.34** Adjudication has now added a further layer in the dispute resolution process. Adjudicators under the Scheme or under contractual provisions have the power to decide a dispute and have the power to open up, review and revise any decision taken or certificate given unless it has become final and conclusive. The power to open up, review, and revise is seen as an important power because it involves modifying the agreement of the parties.<sup>55</sup> This permits the adjudicator or the subsequently appointed arbitrator to challenge a decision of a certifier, which is binding on the parties until it is revised.

**37.35** In *Northern Regional Health Authority v Derek Crouch Construction Co Ltd*<sup>56</sup> the question of whether the courts had the same powers to open up, review and revise the decision or certificate of an architect/engineer was considered. The Court of Appeal held that while it had the power to deal with breaches of contract by a certifier, it did not have the power to modify the agreement of the parties and impose its own views.<sup>57</sup> A court could therefore not open up, review and revise a decision. The Court of Appeal made a distinction between the powers of an arbitrator and the powers of a court. Sir John Donaldson MR stated that an arbitrator had ‘to declare the rights of the parties on the basis of the situation produced

<sup>52</sup> [2002] 1 WLR 1397; [2002] App LR 04/25.

<sup>53</sup> *ibid* [23].

<sup>54</sup> *Royal Brompton Hospital National Health Service Trust v Hammond & Ors* [2002] EWHC 2037 [258-259]

<sup>55</sup> *Northern Regional Health Authority v Derek Crouch Construction Co Limited* [1984] QB 644, [1984] 2 WLR 676, [1984] 2 All ER 175 (CA).

<sup>56</sup> *ibid*.

<sup>57</sup> *ibid* [48] (Wilkinson LJ).

by his own revising activity'.<sup>58</sup> This was not a power the court possessed because there was no cause of action. The Crouch decision was subsequently distinguished in *Partington & Son v Thameside*<sup>59</sup> and expressly overruled in *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Limited and Others*.<sup>60</sup> In *Beaufort Developments (NI) Ltd*, the House of Lords held that they had the same powers as an arbitrator to open up, review and revise.

**37.36** Many construction contract disputes arise from a challenge to an architect/engineer's certificate or determination.<sup>61</sup> An adjudicator must therefore first determine the status of the certificate or determination and who has the burden of proof. In *Royal Brompton Hospital NHS Trust v Hammond (No 3)*<sup>62</sup> the House of Lords indicated that the burden of proof had moved when an architect/engineer issues a certificate or makes a decision. The party challenging the decision or certificate has the burden of proof of showing that the decision or certificate was wrong.

**37.37** Recently, in the Scottish case of *SGL Carbon Fibres Ltd v RBG Ltd*,<sup>63</sup> Lord Glennie arrived at the same conclusion as Lord Steyn in the *Royal Brompton Hospital* case.<sup>64</sup> Lord Glennie held that when an arbitrator (or adjudicator) looks at the decision of a certifier the decision of the certifier stands until the certificate or decision is corrected:

'The onus must be on the party seeking to persuade the arbitrator to depart from the assessment [...] made by the Project Manager. In so far as the Contractor (RBG) seeks further payment, the burden is on him. In so far as the Employer (SGL) seeks to argue that the Project Manager's assessment is too high, it must shoulder the burden'.<sup>65</sup>

**37.38** Lord Hoffmann in *Beaufort Developments (NI) Ltd*<sup>66</sup> similarly described an architect/engineer's certificate as having 'provisional validity', meaning that it was enforceable until it was challenged. There seems to be no rationale for not taking this one step further. Where an adjudicator reviews and revises the certificate or determination of the architect/engineer then that determination should replace the previous decision of the

<sup>58</sup> *ibid* [67].

<sup>59</sup> (1985) 33 BLR 150.

<sup>60</sup> [1999] AC 266, [1998] 2 All ER 778, [1998] 2 WLR 860.

<sup>61</sup> In most construction contracts a claim is first referred to the architect, or engineer, or project manager, and then, if a party is dissatisfied with the decision, to adjudication.

<sup>62</sup> See n 52.

<sup>63</sup> [2012] CSOH 19.

<sup>64</sup> See n 52.

<sup>65</sup> *ibid* [26].

<sup>66</sup> See n 27.

architect/engineer.<sup>67</sup> The party challenging that decision should then have the burden of proof of showing that the adjudicator's decision is wrong.

**37.39** If an architect/engineer's decision or certificate has the effect of shifting the burden of proof then why not an adjudicator's decision? There appears no logical rationale for treating an adjudicator's decision as having less value than that of an architect/engineer. The adjudicator is appointed to act fairly and impartially. The adjudicator's role is to correct the errors made by the architect/engineer and to determine the rights and losses of the parties. In other jurisdictions, the courts have held that an adjudicator's decision has a binding effect which 'endures, at least, until it has been so revised. It is clear from the wording of clause 20.4 [FIDIC Red Book] that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised'.<sup>68</sup>

**37.40** The term 'cause of action' is, however, at variance with what the court or arbitral tribunal is required to do if it is asked to 'open up, review and revise' an adjudicator's decision. Courts, when they consider a cause of action, look for legal rights which arise from breaches of contract, from negligence or from nuisance. It is therefore not surprising that lawyers and judges have struggled when looking for a cause of action in order to overturn an adjudicator's decision. The problem is that there is no cause of action in the traditional sense because the court is not being asked to determine the legal rights of the parties. This point was made by Lord Nolan in *Beaufort Developments (NI) Ltd* when considering the phrase 'open up, review and revise any certificate, opinion, decision':

The language used is not that of the Supreme Court Practice. It seems to suggest an informal and constructive approach to the resolution of problems occurring in the course of the building work, an approach appropriate to the work of an arbitrator who is chosen because he is an architect rather than a judge.<sup>69</sup>

**37.41** There is a consensus that an adjudicator's decision has a temporary binding effect.<sup>70</sup> However, the courts appear to have struggled to agree on when that temporary binding effect comes to an end. Section 108(3) of the HGCR 1996 provides that '[t]he contract shall provide [in writing] that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for

<sup>67</sup> In contrast, see *The Construction Centre Group Limited v The Highland Council* [2002] ScotCS CSOH 354.

<sup>68</sup> *Tubular Holdings (Pty) Ltd v DBY Technologies (Pty) Ltd* (2013) Case No 06757/13 (South Gauteng High Court, South Africa).

<sup>69</sup> See n 67.

<sup>70</sup> The concept of temporary finality is found at s 108(3) of the HGCR 1996 and s 23(2) of the Scheme for Construction Contracts.

arbitration or the parties otherwise agree to arbitration) or by agreement'.<sup>71</sup> Wording to the same effect is found in the JCT, FIDIC and NEC forms of contract, among others.

- 37.42** The concept of 'temporary finality' aims to provide 'a quick and interim, but enforceable, award to be made in advance of the final resolution of what are likely to be complex and expensive disputes'.<sup>72</sup> One of the purposes of adjudication was to improve cash flow, which prior to the enactment of the HGCRA 1996 was a problem in construction contracts and resulted in the insolvency of many sub-contractors. The debates in the House of Lords, as reported in Hansard, reveal that initially there was a drive to make an adjudicator's decision final and binding but the construction industry advocated against this as being arbitration by the back door. The industry desired a quick temporarily binding dispute resolution method which could be revisited through arbitration or litigation. However, no one appears to have addressed the question of who has the burden of proof when seeking to challenge an adjudicator's decision.

## G. Conclusion

- 37.43** It is surprising that the issue of who has the burden of proof has not come directly before the courts earlier. It is perhaps more surprising that for over a decade parties and their lawyers have unquestioningly assumed that the burden of proof does not shift when an adjudicator makes a decision. We suggest that the Sir Peter Coulson/MacFadyen approach is open to question and that the approach adopted by Gloster LJ is to be preferred.<sup>73</sup> There seems no logical reason why an architect/engineer's decision or certificate should be treated any differently than a decision by an adjudicator. In fact, logic would seem to dictate that the decision of an adjudicator should have greater standing than the decision or certificate of an architect/engineer. The reason for this is that the adjudicator is independent whereas the architect/engineer is appointed by one of the parties.
- 37.44** In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*,<sup>74</sup> the court considered enforcement of an adjudicator's decision under a FIDIC contract. The court held that the adjudicator's decision is binding and only loses its binding effect if and when it is revised. The court concluded by stating that the giving of notices of dissatisfaction 'merely allow a possible revision of these decisions without affecting their interim binding nature'. The indication from the South Gauteng High Court in Johannesburg was that while the court had the power to open up, review and revise a decision it did follow that it had to exercise

<sup>71</sup> Similar wording is used in s 23(2) of the Scheme which provides that '[a]n adjudicator's decision is binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings or arbitration'.

<sup>72</sup> *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] EWCA Civ 507, [2001] 1 All ER (Comm) 1041 [2] (Buxton LJ).

<sup>73</sup> See paras 37.26 and 37.27 above.

<sup>74</sup> An unreported decision of South Gauteng High Court, South Africa.

that power and replace the adjudicator's decision with its own decision. There may therefore be a distinction between contractual adjudications and statutory adjudications. The orthodox view, if it is correct, may be limited only to statutory adjudications whereas the logic for wiping the slate clean does not necessarily apply to contractual adjudications because the parties have expressly agreed for an independent person to determine their rights.