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The construction & energy law specialists

4th Adjudication Update

Jeremy Glover, Partner, Fenwick Elliott LLP
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George Boddy, Senior Associate, Fenwick Elliott LLP

Today's Agenda

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- Adjudication in 2020: a quick recap;
- Adjudication in 2021;
- Natural Justice;
- Round-up since Adjudication Update #3
- Questions

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Adjudication in 2020: a recap

Jeremy Glover
Partner, Fenwick Elliott LLP

Bresco v Lonsdale [2020] UKSC 25

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"It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator. Furthermore the availability of adjudication as of right has meant that many disputes are speedily settled between the parties without even the need to invoke the adjudication process."

Lord Briggs

Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48

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- Confirmed the long-standing test for apparent bias:

"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"

- Confirmed legal duty of impartiality;

- Confirmed duty of disclosure – TeCSA requirement:

"not accept any proposed appointment where I have any conflict of interest in relation to any proposed appointment and / or where I am aware of any involvements, interests, relationships or other matters which might reasonably be perceived as likely to affect my independence or impartiality.

A quick recap from our Adjudication Updates

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- Adjudication continued as usual during 2020, with the TCC as always, expecting parties to be sensible and take reasonable steps to ensure that adjudications can proceed in line with the lockdown measures that currently apply. (*MillChris)*
- Getting the formalities right: get your notice in before appointing the adjudicator. (*Lane End v Kingstone*)
- When considering whether additional information, objectively assessed, gave rise to a new claim, and so could not form part of an adjudication referral, the court will look at things in a *"sensible and commercial way."* (*High-Tech v Balfour Beatty*);

A quick recap from our Adjudication Updates

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- The courts will take a "*practical and flexible approach*" to severance" in order to enforce the valid parts of the decision unless they are significantly tainted by the adjudicator's reasoning in relation to the invalid parts. (*Dickie & Moore Ltd v McLeish);*
- Care should be taken to reserve your position when paying the adjudicator's fees, if you are going to dispute the adjudicator's decision. (*ISG v Platform)*
- If you bring Part 8 proceedings, they must raise a "*short and self-contained issue which arose in the adjudication*". (*ISG v Platform)*

A quick recap from our Adjudication Updates

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- In certain circumstances, an insolvent party can commence adjudication proceedings. (*Bresco v Lonsdale);*
- Those circumstances will include ring-fencing any sums an adjudicator orders to be paid over, and providing (ATE) security for costs. (*Style & Wood v GE CIF Trustees*)
- If the adjudication decision was arguably procured by fraud, then, on the assumption that the allegations of fraud could not have been raised in the adjudication itself such allegations can be a proper ground for resisting enforcement. (*PBS Energo v Bester)*

Adjudication in 2021 and beyond

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• May 2016-April 2017	1533	1% increase
• May 2017-April 2018	1685	10% increase
• May 2018-April 2019	1905	13% increase
• May 2019-April 2020	1945	2% increase
• May 2020-April 2021	???	

- TeCSA LVD Scheme / CIC Low Value Disputes Model Adjudication Procedure.

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Natural justice update

George Boddy

Senior Associate

Recap on Natural Justice

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- Two key principles from which the case law has developed:
  - a party should be informed of the allegations against it and be given an opportunity to answer those allegations.
  - a party is entitled to have its case heard by an unbiased and impartial tribunal.
- The Court of Appeal: *Carillion Construction v Devonport Royal Dockyard* [2005] EWCA Civ 1358 and *Amec v Whitefriars* [2004] EWCA Civ 1418
- Principles develop in the TCC: Cantillon v Urvasco:
  - the court should not take an over-analytical approach to questions of natural justice in adjudications;
  - a challenge must be plain, clear and relatively comprehensible
  - Two stage analysis: (1) has the adjudicator failed to apply the rules of natural justice; (2) the breach must be serious and more than peripheral.

Examples of possible breaches

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- Conflict of interest or apparent bias.
- Right to a fair hearing:
  - Procedure:
    - Lack of time: *Willow Corp v MTD Contractors* [2019] EWHC 1591 (TCC)
    - Too big, too complex: *AMEC Group v Thames Water Utilities*
  - Matters taken into account by the adjudicator:
    - Determination made on un-argued grounds: *Corebuild v Cleaver* [2019] EWHC 2170 (TCC)
    - Failure to give a party the opportunity to address new evidence: *McAlpine v Transco* [2004] EWHC 2030 (TCC)
    - Reliance on own materials: *RSL v Stansell* [2003] EWHC 1390 (TCC)
    - Failure to consider a party's defence: *Barhale Ltd v SP Transmission plc* [2021] CSOH 2;

Global Switch Estates 1 Ltd v Sudlows Ltd [2020]: the Facts

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The facts:

- Sudlows were appointed pursuant to a JCT design and build contract for the fit out and upgrade of Global Switch's specialist data centre at East India Dock.
- Disputes arose between the parties and four adjudications followed.
- In the fourth adjudication, commenced on 15 May 2020, Global Switch sought a decision as to the true value of parts of Interim Application 27 and an order that Sudlows should pay the sum of £6.8m to Global Switch.
- In the Notice of Adjudication, Global Switch sought to expressly exclude certain matters from the scope of the adjudication.
- Sudlows disputed this and defended the claim for payment by asking the adjudicator to determine its entitlement to further extensions of time and loss and expense.
- The Adjudicator decided that Global Switch was entitled to limit the scope of his jurisdiction to the specified parts of Interim Application 27 referred by Global Switch and that he did not have jurisdiction to award further extensions of time and loss and expense to Sudlows.

Global Switch Estates 1 Ltd v Sudlows Ltd [2020]: the Law (1)

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The law: the Judge set out 10 key principles:

1. A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.

2. A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.

3. A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication

4. Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.

Global Switch Estates 1 Ltd v Sudlows Ltd [2020]: the Law (2)

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O'Farrell J's 10 key principles continued:

5. However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.

6. It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.

7. If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.

8. If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.

9. Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

10. If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced

Global Switch Estates 1 Ltd v Sudlows Ltd [2020]: the Decision

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- Sudlows' loss and expense claims were clearly relevant to the true valuation of Interim Application 27 for the purpose of payment as they raised a potential defence.
- The adjudicator ought to have considered them.
- He did not because he assumed, wrongly, that he did not have jurisdiction to do so.
- As Global Switch sought not only a true valuation of specific parts of the account but also an award of payment, he should have considered Sudlows' defence to a claim for payment.
- This amounted to a plain and obvious breach of natural justice and rendered the decision unenforceable.

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A round-up since Adjudication Update #3 (November 2020)

Dr Stacy Sinclair, Partner

Head of Technology and Innovation

Adjudication & NEC Contracts

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The Fraserburgh Harbour Commissioners against McLaughlin & Harvey Ltd [2021] ScotCS CSOH_8

- The works: to deepen part of Fraserburgh Harbour.
- Defects in the works & FHC brought an action before the court for damages in excess of £7 million.
- M&H said that the terms of clause W2 of the contract were a mandatory step prior to the issue of court proceedings (or arbitration).
- The question: did clause W2.4 of the NEC3 operate as a contractual bar, requiring the dispute to be first referred to adjudication prior to the court?

Adjudication & NEC Contracts

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The Fraserburgh Harbour Commissioners against McLaughlin & Harvey Ltd [2021] ScotCS CSOH_8

- Clause W2.4 provided as follows:

  (1) ...A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract.

  (2) If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision.

Adjudication & NEC Contracts

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The Fraserburgh Harbour Commissioners against McLaughlin & Harvey Ltd [2021] ScotCS CSOH_8

- The Judge found that the parties had to adjudicate before they arbitrate (which was the form of tribunal agreed in the contract).
  - Adopted the analysis in *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* (2010).
  - Ignoring the express words of the contract would effectively permit a parallel regime of dispute resolution and would "*render nugatory*" clause W2.4.
  - Adjudication was the contractually agreed *"first mode of dispute resolution".*

Adjudication & NEC Contracts
Notice of Dissatisfaction

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Fermanagh District Council v Gibson (Banbridge) Ltd [2014] NICA 46

- NEC2: in the event one party was dissatisfied with an adjudicator's decision and wished to bring arbitration proceedings, it had to do so within four week's of the adjudicator's decision. [NEC2 clause 93.1, NEC3 clauses W1.4(2) and W2.4(2)]
- Fermanagh served a notice of intention to refer the dispute to arbitration out of time & the Court of Appeal (NI) refused an extension of time under s12(3)(a) of the Arbitration Act 1996

Adjudication & NEC Contracts
Notice of Adjudication

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Sitol Ltd v Finegold & Anr [2018] EWHC 3969 (TCC)

- NEC 93.3
- Referral to adjudication was made out of time – the contract requires the parties to refer the dispute within 4 weeks of becoming aware of it.
- Mr Justice Waksman noted that he had:

  "come to the conclusion (with no great enthusiasm, I should add), that this adjudication was started too late. It may be regarded as a technical point, but I have to apply the law, I am afraid. The analysis and the correspondence here I am afraid only points one way."

Adjudication & NEC Contracts

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2 things to remember when using NEC contracts:

- Adjudicate before you arbitrate or litigate
- Notice of Dissatisfaction within 4 weeks of the Adjudicator's Decision

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Adjudicator's Jurisdiction
"simply stated"

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Fundamental Principle

"If a dispute has arisen between two parties to a construction contract and the adjudicator is validly appointed to decide that dispute, then, provided his decision attempts to answer that dispute, his decision will be binding in accordance with the 1996 Act, regardless of errors of fact or law or procedure. If, on the other hand, he was not validly appointed, or he decided something other than the dispute that was referred to him, his decision will be unenforceable because it would have been made without jurisdiction."

Coulson on Adjudication, 7.37

Adjudicator's Jurisdiction
"simply stated"

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The Adjudicator's Decision will not be enforced if:-

1. the adjudicator goes too far and exceeds their jurisdiction; or
2. the adjudicator does not go far enough and fails to exhaust their jurisdiction.

Adjudicator's Jurisdiction

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Hochtief Solutions AG and others v Maspero Elevatori S.p.A [2020] CSOH 102

- Queensferry Crossing – opened in August 2017, 2.7 km long, world's longest 3-tower, cable-stayed bridge
- Dispute about the lifts in the 3 bridge towers
- Maspero were the sub-contractor for the design, manufacture, installation and commissioning of the bridge towers
- Hochtief terminated the sub-contract, which Maspero did not accept
- Adjudicator found in favour of Hochtief and Maspero refused to pay £1.25m

Adjudicator's Jurisdiction

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Hochtief Solutions AG and others v Maspero Elevatori S.p.A [2020] CSOH 102

- Maspero argued the Adjudicator both:
  - acted in excess of his jurisdiction (the dispute did not fall under the terms of the sub-contract, but rather a separate and distinct "new agreement"); and
  - failed to exhaust his jurisdiction by failing to address substantives lines of the defence.
- Judge disagreed on both accounts:
  - the Adjudicator had the jurisdiction to decide on whether the "new agreement" varied the sub-contract or was a new agreement; and
  - he had taken into account Maspero's submissions when deciding whether design costs were covered by clause 12.3.1(c)

Adjudicator's Jurisdiction

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Hochtief Solutions AG and others v Maspero Elevatori S.p.A [2020] CSOH 102

- No new law
- Reminder that:
  - it is a high hurdle to demonstrate that an Adjudicator acted outside of his or her jurisdiction; and
  - a party must challenge the Adjudicator's jurisdiction "appropriately and clearly" if it wants to rely on this in due course.

Adjudicator's Jurisdiction

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Barhale Ltd v SP Transmission plc [2020] CSOH 2

- Challenge to enforcement based on adjudicator's failure to exhaust jurisdiction
- Excavation and foundation work necessary for an electricity sub-station at Currie in Scotland.
- The defender submitted that the adjudicator had failed to exhaust his jurisdiction because his decision failed to consider its argument as to the proper contractual basis for assessment and payment for the excavation and associated disposal and filling works, and in particular failed to consider its argument as to the operation and effect of rules M6 and M16 in CESMM3.
- The Judge found that the adjudicator did not address this issue effectively or indeed at all. The issue was a critical one raised by SP in its response to the referral and rejoinder and in a subsequent email.
- Adjudicator's decision set aside.

Adjudicator's Jurisdiction

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Ex Novo Ltd v MSP [2020] EWHC 3804

- TCC had to consider whether substance and jurisdiction overlapped,
- Substantive issue: MSP had not served a pay less notice,
- The jurisdiction question: how many contracts had the parties entered into – 1 contract or 4 contracts?
- Adjudicator had decided there was one contract as a preliminary point, to determine whether he had jurisdiction and should continue, rather than as part of determining the substantive issue between the parties.
- This meant that his jurisdiction decision was non-binding on the parties and could be challenged in enforcement proceedings.
- However, on the facts, his decision was enforced (no real prospect of there being multiple contracts).

Adjudicator's Jurisdiction

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Aqua Leisure Int Ltd v Benchmark Leisure Ltd [2020] EWHC 311 (TCC)

- Adjudication Decision included £12,500 in respect of legal costs under s5A fo the Late Payment of Commercial Debts (Interest) Act 1998.
- The Judge held that the Adjudicator had no jurisdiction to make the award on costs because the statute under which the Adjudicator purported to act, the Late Payment Act, had no application.
- The Judge severed this part of the decision, and enforced the remainder:
  - In the absence of a compromise, sums were still due under the 2015 contract and under the terms of the binding adjudication award – there was no subsequent agreement that superseded the award
  - "Subject to contract" means just that.

Foreign Jurisdiction Clauses

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Motacus Constructions Ltd v Paolo Castelli SpA [2021] EWHC 356 (TCC)

- This was an unusual application for summary enforcement of an adjudication decision in the sum of £450,000.
- Works in London, governing law of the contract was Italian, subject to the jurisdiction of the courts of Paris.
- PC said that the court did not have jurisdiction to determine the application because it had been brought in breach of a clause in the contract which conferred exclusive jurisdiction on the courts of France.
- The Judge considered the Hague Convention on Choice of Court Agreements (Hague Convention) and enforced an adjudicator's decision: an interim, rather than final & conclusive, remedy.

Enforcement Proceedings Indemnity Costs

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Faithdean Plc v Bedford House Ltd (No.1) [2021] 3 WLUK 62

- Defendant did not pay the Adjudicator's decision (circa £1.5m).
- No jurisdiction objections or defence provided, other than it intended to defend the entire claim and would make payment after it knew the exact amount.
- Held: Defendant to pay the costs of enforcement proceedings brought on an indemnity basis.
- The defendant had known or ought to have known that it had no defence to the enforcement, but still had not paid the amount due.
- Something out of the norm has to have occurred before indemnity costs are awarded. Here, not a reasonable course of conduct.

Dispatch Newsletter

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- A very quick round-up today
- See ***Dispatch*** for further detail:

www.fenwickelliott.com/research-insight/newsletters/dispatch

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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Issue 249 - March 2021

Dispatch

Adjudication: foreign jurisdiction clauses
Motacus Constructions Ltd v Paolo Castelli SpA
[2021] EWHC 356 (TCC)

This was an unusual application for summary enforcement of an adjudication decision in the sum of £450k. PC SpA said that the court did not have jurisdiction to determine the application because it had been brought in breach of a clause in the contract which conferred exclusive jurisdiction on the courts of Paris, France. Did this clause prevent the TCC in England from hearing a claim for a breach of the term implied by paragraph 23 of the Scheme that the decision of an adjudicator binds the parties until the final determination of the dispute?

The works in question were carried out at a London hotel. The governing law of the contract was the law of Italy. Although PC SpA reserved its position during the adjudication, it did not provide any evidence of Italian or French law or procedure. HHJ Hodge QC noted that absent such evidence, the presumption was that the foreign law was the same as English law.

Motacus said that it would be "manifestly" contrary to the public policy enshrined in the HGCRA not to enforce the decision. Further, the enforcement of an adjudicator's decision was the enforcement of an interim decision. It therefore fell outside the scope of the 2005 Hague Convention and so PC SpA could not rely on its provisions. What was before the court was not the underlying dispute but whether an interim procedure and remedy had been followed and granted. If the court enforced the decision, the parties were still free to litigate that underlying dispute in the courts of Paris.

PC SpA submitted that the court did not have jurisdiction to determine the request for summary judgment, which had been brought in breach of the exclusive jurisdiction clause agreed between the parties as set out at clause 19 of the construction contract. The relevant question for the court was whether the enforcement of the alleged breach of the term implied by para 28 of the Scheme should take place in England (or Wales) or in France. The answer to this question was that the parties had agreed in clause 19 of the contract that all disputes arising out of their contract must be settled by the courts of Paris, France.

The Judge agreed that the reality of the application here was that the court was being invited to grant an interim, rather than a final and conclusive, remedy. The position was consistent with the position under construction contracts containing arbitration clauses – see *MSF Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] EWHC 2244 (TCC). Where a contract contains an arbitration clause, the "pay now, argue later" policy of the HGCRA requires the enforcement by the courts of the interim adjudicator's award before the final determination by the chosen forum. The whole purpose of the HGCRA is to ensure that the adjudicator's decision is binding until it is successfully challenged by arbitration or in court. In the ordinary case, the sum awarded by an adjudicator must be paid; and the paying party cannot seek to avoid payment by staying the enforcement proceedings for arbitration. A similar approach applied here, in the face of a foreign exclusive jurisdiction clause.

Liquidated damages: non-completion certificates
D Mcloughlin and Sons Ltd v Linthouse Housing Association Ltd
[2021] Scot SAC Civ 5

Linthouse commenced proceedings against DM, seeking declaration about the true value of what was termed "the final certificate sum". Was there a contractual entitlement to withhold sums retained by way of liquidated damages? The date for completion of the Works was 28 October 2016; completion was actually achieved on 15 June 2017. The necessary contractual notices followed including a notice of intention to deduct liquidated damages. On 11 May 2018, the architect granted an extension of time of five weeks and a new completion date of 2 December 2018 was fixed. That had the effect of cancelling the earlier Non-Completion Certificate. No new Non-Completion Certificate was issued. DM repaid the damages deducted by reference to the five-week extension and continued to withhold the rest. At first instance, the Sheriff said that because no further certificate was issued, DM had no basis for withholding the remaining liquidated damages.

DM said that the fixing of a later completion date did not mean that they lost the right to liquidated damages. If that had been the case, the contract would have expressly provided for that. To imply such an obligation would give rise to draconian consequences on an employer and go against commercial common sense. DM did have a valid contractual basis upon which to withhold liquidated damages under the contract. As such, Linthouse had no entitlement to the liquidated damages sum. To hold otherwise would be to unjustly reward Linthouse in relieving it of the consequences of a 28-week period of delay. Linthouse said that the contract was clear that the ability of a party to impose liquidated damages was subject to the suspensive conditions laid out in the contract. There was no valid Non-Completion Certificate which meant that those conditions were not satisfied.

The court disagreed with DM. The position in relation to the deduction of liquidated damages in the absence of a valid Non-Completion Certificate had been clear for a considerable period of time. Where a Non-Completion Certificate was required, the absence of such new certificates was fatal to these claims (*Octavesse LLP v Trok Special Projects Ltd, Dispatch* Issue 199).

Adjudication and the NEC form
The Fraserburgh Harbour Commissioners Against McLaughlin & Harvey Ltd
[2021] ScotCS CSOH 1_8

The question for Lady Wolffe was whether clause W2.4 of the NEC 3 Contract in the form agreed between the parties operated as a contractual bar to preclude resort to the court (or to arbitration) if a dispute between the parties falling within the scope of clause W2 had not first been referred to adjudication.

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Conclusions

Crystal Ball Gazing - 2021

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- Will there continue to be more adjudications?
- If there are more adjudications, is now the time to open up the adjudicator nominating body lists so that they become more diverse?
- Has the time come to remove the power and other industry exemptions? What about residential owners too?
- Adjudication's role in dispute avoidance?
- On the bigger projects in the UK, adjudication and dispute boards? Can they sit together? See new JCT Rules coming in May 2021.

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Thank you!

Questions?

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Dr Stacy Sinclair, Partner, Fenwick Elliott LLP
George Boddy, Senior Associate, Fenwick Elliott LLP

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Webinar

Watch | Listen | Discuss

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Next webinar:

Smart Contracts & AI in Construction

Thursday, 8 April 2021
12pm (40mins + 10mins Q&A)

Stacy Sinclair
Partner
Fenwick Elliott

Rebecca Keating
Barrister
4 Pump Court

Register at **www.fenwickelliott.com/events**