

Tony Bingham Like the umpires in last month's ill-fated test match, adjudicators test the dispute against the rules and make a judgment – unfortunately some construction folk, and one or two lawyers, haven't quite grasped that they can't tamper with the ball either ...

Certi fiable adjudicators



Cricket umpire Darrell Hair and his fellow umpire Billy Doctrove gave the press and cricket world a real good story for the dog days of summer. Protesters in Pakistan burned effigies of Hair after he made two decisions that led to the test match being awarded to England. I heard myself muttering "Who'd be an umpire?"

And then the phone rang. The voice said that he was ready to shoot the umpire. No, no, not Hair or Doctrove, this was a construction dispute umpire ... an adjudicator. He told me the story. Within a few minutes it was plain to me at least, that the adjudicator had done his job perfectly and precisely ... he had applied the rules of the game, the rules in the contract, the rules for deciding disputes. The adjudicator had decided my caller had won nothing. My caller was defiant: "It is a staggering example of an overbearing adjudicator applying the letter of the law."

Well, errr, hmmm, yes.

The truth is that my caller didn't actually want the adjudicator to adjudicate. Instead he wanted the fellow to do everything and anything to help him win. He had convinced himself that he, or rather his client,

deserved to win. And, if there were gaps in his case, a hole or two in his evidence, well now, the adjudicator could have invited him to fill the gaps, plug the holes. Instead, the adjudicator simply announced there wasn't enough evidence to prove a point.

Hair and Doctrove also applied the rules when the Pakistan team refused to come out to play. The bails came off the stumps when the rule was broken. Game over. Match awarded against the side having the tantrum.

Retired cricket umpire Dickie Bird would not have adjudicated. He said, "I'd have done everything possible to keep the match going." "After the match, you all get around the table and thrash it out." Mr Bird wasn't all too impressed with using the letter of the law.

That was when I realised that my caller didn't want his adjudicator to actually adjudicate. He had spent all his construction years mixing it with architects, engineers and quantity surveyors, who play the game like Dickie Bird.

Look, when an architect issues a certificate indicating the amount due, they are not adjudicating a dispute. Unlike an arbitrator or an adjudicator or a judge, there is no judicial duty. The architect, engineer or QS is carrying out an investigation; then they make a decision, but not a judicial decision in the

Brian Kilgallon Project bank accounts and project insurances were pioneered six years ago, but few have adopted them. Will the 2012 Olympics prove the catalyst for permanent change?

Collaboration is the real Olympic prize

The government published the 2012 Construction Commitments in July. Collaboration is a key driver of the commitments, which make a series of best practice policies obligatory on all Olympics contracts, including project bank accounts and project insurances.

The public sector has been leading the drive for best practice for some time. Successive initiatives and reports from Latham, Egan and most

lately Lord Rogers have championed collaboration.

The Olympics offers the sort of catalyst the industry needs to really embrace it and make it work. Indeed Tessa Jowell, the Olympics minister, has pledged to make the 2012 commitments the norm for all public sector projects.

Collaboration is all about relationships, building teams, establishing an environment of trust, openness and honesty. All

these softer issues have a very important role to play in successful collaborative working.

But two more fundamental issues underpin its success – fair payments down the supply chain and abolition of the blame game when things go wrong.

Project bank accounts (PBAs) and project insurances were pioneered as tools to establish true collaboration on Defence Estates' North site prime contract at Andover, Hampshire,

six years ago. Despite this, few have adopted them. But adopt them they must.

How can a contractor's supply chain ever truly collaborate if it has a festering grievance that it isn't being paid in a timely manner despite offering a good service?

PBAs are open, transparent and auditable and provide suppliers with the surety of timely payment. Their trust status also safeguards the supply chain's

way of determining a dispute. They are deciding what to do in all the circumstances. Dickie Bird had his eye on "all the circumstances"; they included the fact that 23,000 spectators plus millions on television and radio were deprived of a complete test match. An architect may well "adjust" his certificate to suit "all the circumstances"; and he can do so because he is not an arbitrator or an adjudicator or a judge.

The significant distinction is in the peculiar nature of duties of a judicial character. In this country judicial duties do not involve investigation. That remark was made in a famous case in the House of Lords, 30 years ago, called *Sutcliffe v Thackrak*.

The parties submit the dispute for a decision. Each party submits his evidence and contentions, and it is then the function of

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the arbitrator, adjudicator or judge to form a judgment and reach a decision on the materials before them. But it doesn't surprise me one jot if an adjudicator who was previously trained and then practised as an architect, engineer or QS attempts to carry out an arbitration or adjudication in the same mode as a certifier. Call it habit, call it a

norm, or call it a comfort zone. But it's wrong to adjudicate a dispute as if it's a certificate. Make no mistake about it: a dispute decider is carrying out a judicial function.

Does all that mean that if an adjudicator, arbitrator or judge becomes "investigative" he goes wrong? Does all that mean that Hair and Doctrove went wrong?

The answer is that no wrong is done on either count, although there are lots of "ifs". If an adjudicator acts like a detective they will be criticised – if their "inquiry" is unfair. It is dangerous to be "an inquirer" given the timescale of construction adjudication. The court will strike down unfairness. As for cricket and umpires bowling googlies, well now, it's only a game after all. Isn't it?

Tony Bingham is a barrister and arbitrator



Any team can collaborate while things are going well. The real test is what happens when things go wrong

money should the contractor or client become insolvent.

They have been heralded by the National Audit Office and Office of Government Commerce as a great innovation in the drive for fair payments.

Cynics say main contractors dislike them as they will see them as a further erosion of their margins. They can still benefit

from their supply chain's money, albeit less in these post-Construction Act days.

But margins need not be threatened. Any adjustment in the contractor's margin to compensate for PBA should be offset by reduced supply chain prices as the need to price the risk of late payment disappears.

Project insurances are equally fundamental as they tackle the blame culture. Any team can collaborate successfully while things are going well. But team working soon grinds to a halt when problems arise and everyone has to dust off their all risks or PI insurance policies to fight a potential claim.

Project insurance covers the whole supply chain and if structured correctly has no

subrogation rights. In other words, they do not let insurers drill down to involve the policies of individual supply chain members in the event of a claim.

Consequently there is no need to apportion blame to make a claim. All that has to be established is that a qualifying event has occurred. The team's focus remains on the project rather than protecting individual positions.


The adoption of project insurances has had marginally greater success than PBAs, the biggest success story being their use on T5 at Heathrow.

A possible reason for the generally slow take-up by the industry since Andover is that Bucknall Austin was a consultant unusually acting as prime

contractor on the project. As a result it did not have the baggage, established practices or vested interest of a traditional main contractor so could create collaboration at all levels in the team. It scored the highest marks ever awarded to a Constructing Excellence case study for innovation and best practice.

The sheer scale of the Olympics could make them the vehicle to champion change. Their biggest legacy could be to force the construction industry to alter its practices and to usher in a golden era of collaboration.

Brian Kilgallon is a partner at Bucknall Austin and is project director of Andover North

 You can email him at brian.kilgallon@bucknall.com