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Adjudication and the Perception of Fairness: Beyond Natural Justice and Bias

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Abstract

While statutory adjudication in the UK construction sector was introduced to provide swift and enforceable decisions, concerns persist regarding its perceived fairness. Despite meeting legal standards of natural justice and impartiality, adjudication continues to attract allegations of bias and procedural disadvantage. This article argues that the perceived unfairness arises not primarily from legal failings but from cognitive, psychological, and structural factors that influence how parties experience the process. Drawing on psychological literature, procedural justice theory, and recent findings from the King's College London Adjudication Reports (2022–2024), this article explores the hidden drivers of perceived bias and offers practical measures to improve transparency, trust, and legitimacy in adjudication.

1. Introduction

Adjudication, as established under the Housing Grants, Construction and Regeneration Act 1996 (as amended), is designed to deliver a decision that is fast, enforceable, and procedurally sound.

By most technical measures, it succeeds. Statutory requirements of natural justice—such as the right to be heard and freedom from bias—are widely upheld, and enforcement statistics reflect a high level of procedural compliance (KCL, 2023).

Yet, surveys and anecdotal evidence repeatedly reveal that parties—especially losing parties—frequently perceive the process as unfair.

The King's College London (KCL) Construction Adjudication Reports from 2022 to 2024 confirm that while formal complaints of bias remain low, between 27% and 40% of users report suspecting bias during the adjudication process (KCL, 2022, 2023, 2024).

That's not paranoia. It's psychology.

Here's the problem: most adjudications are conducted entirely in writing. No voices. No expressions. No body language. Just PDFs, email attachments, downloads, and a final document.

But, as Dr Albert Mehrabian's 1960s research showed—specifically in situations of incongruence between verbal and non-verbal communication—only 7% of meaning comes from words. The rest? 38% is tone. 55% is body language (Mehrabian & Ferris, 1967).

Thus, reducing communication down to words alone increases the likelihood of miscommunication, misunderstanding, and—yes—disputes.

So, when a party receives an adjudicator's decision, they're seeing—maybe—a fragment of a fair process. The rest is filled in by assumption.

And that's where bias creeps in.

That's why the real question isn't: "Is adjudication legally fair?"

It's: "Does it feel fair?"

Fairness, after all, is not just about legality. It's about legitimacy. And legitimacy depends on how people experience the process—not just how we write about it afterwards.

This apparent paradox—between procedural sufficiency and perceptual dissatisfaction—calls for deeper investigation.

Why does a process that largely adheres to legal standards still feel unbalanced to so many? What shapes those feelings?

And more importantly, what can be done to address them?

Professor Tom Tyler shows us that people are far more likely to accept an adverse decision if the process was transparent, respectful, and balanced—even if the outcome went against them.

Ignore that perception gap, and we damage the legitimacy of adjudication.

Let's bring this to life.

Imagine writing in your Decision: "The Referring Party's position is unproven."

To you, that's neutral.

To them? It may feel like: "I wasn't heard." Or worse—"I wasn't respected."

Perception is rarely about what's said. It's about what's felt.

And when the feeling is "I was steamrolled," then it doesn't matter how technically accurate your Decision is.

Bias isn't about bad intent or bad logic.

As Kahneman, Tversky, and Sunstein show, bias is the brain's coping mechanism—helping us navigate complexity, uncertainty, and overload.

In my own research, I interviewed adjudicators with over 300 appointments. One participant described how reasoning evolved throughout the case, saying:

"Sometimes you realise the story you're writing doesn't make sense… there has to be a different story because this one isn't working."

Another reflected:

"I've had time to think about it… yes, you can reflect on your work."

These insights illustrate how decision-making in adjudication isn't static—it's iterative. It develops with reflection, structure, and experience.

This article argues that the issue lies not merely in legal doctrine but in the psychology of how fairness is perceived.

Drawing on cognitive bias research (Kahneman, 2011), procedural justice theory (Lind & Tyler, 1988), and dispute resolution psychology, it contends that many adjudication users experience a mismatch between the visible structure of fairness and the invisible experience of it.

That experience is shaped by expectations, emotional investment, narrative commitment, and self-esteem regulation—all of which adjudicators can influence through greater transparency, respect, and process design.

The sections that follow will explore these psychological dynamics and their interaction with adjudication procedure, before proposing six pragmatic reforms to enhance both the appearance and reality of impartiality.

2. Defining Fairness and the Problem of Perception

In legal contexts, fairness is often defined narrowly through the principles of natural justice: the right to a fair hearing and the absence of bias.

These principles underpin most procedural safeguards and are relatively easy to verify post hoc.

However, research in psychology and social science shows that people assess fairness not only by procedural formality but also by how processes make them feel—whether they were treated with dignity, whether their voice was heard, and whether the decision-maker appeared neutral and transparent (Lind & Tyler, 1988; Tyler, 2006).

This broader, experience-based view of fairness is known as procedural justice.

Lind and Tyler's foundational work demonstrated that people are more likely to view a decision as legitimate and accept its outcome—even when they lose—if they perceive the process as respectful, neutral, and participatory.

In adjudication, this means that a party's satisfaction depends as much on how the decision was delivered as what it concluded.

The distinction between fairness in procedure and fairness in perception is particularly significant in adversarial contexts like construction adjudication.

Parties typically invest time, money, and professional identity in the dispute, often building a narrative that affirms their own correctness and the other party's fault.

This phenomenon, sometimes called narrative commitment, means that any decision contrary to a party's expectations will be experienced not simply as a legal defeat but as a challenge to their worldview (Welsh, 2004).

This problem is exacerbated by the "thinness" of the adjudication relationship.

Unlike in court proceedings or mediation, adjudicators are often appointed without prior interaction and have limited time to develop rapport or provide parties with a sense of procedural control.

As a result, parties may begin the process with a trust deficit, and minor procedural missteps or ambiguous reasoning may be interpreted as evidence of partiality or incompetence (Kramer & Lewicki, 2010).

Moreover, even subtle elements of decision-making—such as failing to acknowledge arguments, presenting conclusions before explaining reasoning, or adopting an overly technical tone—can erode perceived fairness.

When people are emotionally and professionally invested, these cues are magnified.

A decision that does not reflect back the party's key arguments or give the appearance of reasoned, empathic judgment can feel dismissive—even if legally sound.
The result is a growing perceptual divide: adjudicators believe they are applying the law fairly, but parties may feel unheard or blindsided.

Bridging this divide requires more than technical competence.

It calls for psychological insight and communicative awareness.

3. Psychological Biases Affecting Adjudication

Adjudicators, like all decision-makers, are subject to cognitive limitations.

While training and experience may enhance legal accuracy, they do not immunise adjudicators from cognitive biases—systematic deviations from rational judgment that arise from mental shortcuts and emotional influences (Kahneman, 2011).

Nobel Laureate Daniel Kahneman describes two modes of thinking: System 1, which is fast, automatic, and emotionally driven, and System 2, which is slow, deliberate, and analytical.

In adjudication, where decisions are often made under time pressure and without full procedural formality, System 1 may dominate.

This increases vulnerability to the kinds of biases that distort the evaluation of evidence and the interpretation of intent.

Common biases relevant to adjudication include:

Cognitive Biases

- **Anchoring** – That first figure? It sticks. One party claims £1 million for a 6-week delay and suddenly £200k feels modest. *The brain says: "That's a bargain!"* (Tversky & Kahneman, 1974).

- **Availability** – You've seen one catastrophic extension claim and now every loft conversion smells like litigation. *Even the smell of Dulux gives you flashbacks.* (Tversky & Kahneman, 1973).
- **Confirmation** – You suspect Party A is dodgy. Then they spell 'adjudicator' wrong in their submission. Case closed. (Nickerson, 1998).
- **Framing** – "Withheld payment" sounds harsh. "Rectification for overpayment" sounds reasonable. *Same number. Different trousers.* (Tversky & Kahneman, 1981).
- **Hindsight bias**: Knowing the outcome of an event (e.g., a project delay or payment failure) may make it seem more predictable or obvious than it was, distorting evaluations of foreseeability or risk (Fischoff, 1975).

Attribution Biases

- **Fundamental Attribution Error** – The contractor is late? Clearly disorganised. Unless of course you're the contractor. Then it's "unforeseen circumstances beyond our control." (Ross, 1977).
- **Halo Effect** – "She used footnotes, colour-coded bundles, and cross-references. She must be right." *Or just very good at Word.* (Thorndike, 1920).
- **Just-World Hypothesis** – He lost. So obviously, he must've deserved it. *That's how bedtime stories work.* (Lerner, 1965 and 1980)

Social Biases

- **Ingroup Bias** – You both trained as engineers. Obviously, he's more reliable than that barrister with the shiny shoes and zero diagrams. (Tajfel & Turner, 1979). This risk is heightened when adjudicators are drawn predominantly from one profession or demographic background (Banaji & Greenwald, 2013).
- **Projection Bias** – "I always check clause 4.2. Surely, they did too." *Spoiler: They didn't.* (Loewenstein, O'Donoghue & Rabin, 2003).

Procedural Biases

- **Status Quo Bias** – "We've always accepted emails titled 'Final-Final-Rebuttal-V4' on day 26. Why change now?" (Samuelson, & Zeckhauser, 1988).
- **Sunk Cost Fallacy** – "We've spent £40,000 on this. Let's go all the way!" *Translation: Let's pour petrol on the bonfire.* (Arkes & Blumer, 1985).

Meta-Biases

- **Bias Blind Spot** – "Everyone else is biased. I'm just efficient." (Pronin, Lin, & Ross, 2002).
- **Dunning-Kruger Effect** – Three adjudications in and suddenly you're Socrates in steel-toe caps. (Kruger & Dunning 1999).
- **Illusion of Transparency** – "My intent was obvious." *Not unless you said it. Clearly. Twice.* (Gilovich, Medvec, & Savitsky 1998).

The bias blind spot—the belief that one is less susceptible to bias than others—is especially relevant in adjudication.

Research has shown that people in evaluative roles, including judges, often underestimate their own biases, particularly when they view themselves as objective professionals (Pronin, Lin, & Ross, 2002).

These aren't quirks. These are survival mechanisms.

System 1 thinking is great for dodging buses. It helps us cope—but it can hurt decision-making.

Adjudicators must engage System 2 thinking to decide disputes.

One participant in my study said:

"I break it down to the smallest understandable unit. That keeps me sane."

Another added:

"If you try to reason too quickly, you skip the evidence."

And here's the tension: experience brings confidence.

But confidence, unchecked, can become conviction.

And conviction is a dangerous thing in a neutral role.

These insights suggest that fairness in adjudication is not simply a matter of *intent*, but of *awareness*.

Biases don't just affect *what* we decide. They affect *how* we decide. How we write. How we explain. How we're received.
Biases are not ethical failings but cognitive defaults.

Recognising them is the first step in preventing them from undermining perceived impartiality.

And that's where adjudication lives or dies—not just in outcomes, but in *experience*.

Even where the process ticks every legal box, users still report feeling ambushed, ignored, or overpowered.

Why?

Because nothing threatens identity like loss.

One adjudicator told me:

"The money in dispute—it's their lifeblood."

Another said:

"I lost sleep before sending my decision. I knew it would devastate them."

We talk about natural justice.

But what about emotional justice?

What about dignity?

When people read your decision, they don't start at page one.

They start at the conclusion.

They see they've lost.

Then they scroll back—looking not to understand, but to defend.

They're not reading. They're rallying.

So, if you criticise a party's reasoning—fine.

But do it with respect.

Because the moment someone feels dismissed—even subtly—the process feels biased.

And that perception becomes their reality.

That's why clarity, care, and tone matter.

Acknowledge every argument—even the ones you reject.

Show that you listened.

Explain *why*—not just *what*.

Because people don't just remember what you decided.

They remember how you made them feel.

Let me name six deeper psychological forces that widen the perception gap:

1. **Cognitive Dissonance** – *"I'm right—but I lost?"* That's hard to reconcile. The easiest path? Assume the adjudicator didn't understand. Or worse—was biased. *Much easier than admitting your schedule of loss was mostly wishful thinking.* (Festinger, 1957)
2. **Narrative Commitment** – People fall in love with their story. By the time you're on your third witness statement, it's not a submission—it's a memoir. Reject it, and they take it personally. (Welsh, 2004).
3. **Misattributed Emotion** – "I feel bad—so the process must have been unfair." *Like blaming the X-ray technician for the broken bone.* (Schachter & Singer 1962).
4. **Loss Aversion** – Losing hurts. Twice as much as winning helps. Even losing £1,000 feels worse than gaining £5,000. *Welcome to the emotional economy of adjudication.* (Kahneman & Tversky, 1979).
5. **Ego Threat** – Professionals don't like being told their logic didn't stack up. Especially not by someone who doesn't share their professional background—or worse, uses Arial 10. (Steele, 1988).
6. **Trust Deficit** – The adjudicator is a stranger. You've never met them. They don't look you in the eye. And they just decided your future from a home office with a dog in the background. (Kramer & Lewicki, 2010).

These aren't abstract theories.

They're what parties *feel*.

And if we ignore that—we miss the point.

4. Structural and Institutional Triggers of Perceived Unfairness

This isn't about fixing a broken system.

It’s about making fairness *visible*.

While psychological biases affect individual adjudicators, structural and procedural features of adjudication may also contribute to perceptions of unfairness—especially when compounded by cognitive pressures or adversarial tactics.

These issues are not always visible in legal analysis but they are frequently reported by users in post-adjudication feedback (KCL, 2023).

4.1 The Procedural Asymmetry Problem

Adjudication’s defining feature—*speed*—often becomes its procedural vulnerability.

Tight timetables can produce perceived or actual asymmetry in how thoroughly each party can prepare their case.

In particular:

- Referring parties control the timing of the adjudication and may carefully prepare their referral before issuing a notice.
- Responding parties, by contrast, must typically react within 7–14 days, often under significant commercial pressure.

This time asymmetry can be exploited through so-called “ambushes”, where a referring party serves a complex claim front-loaded with dense evidence, catching the responding party off guard.

Conversely, “reverse ambushes” can occur mid-proceedings, when the referring party is overwhelmed by sprawling, previously unnotified defences, cross-claims, or expert reports—introduced at a stage when procedural constraints limit their ability to respond.

A similar tactic can be used by the referring party late in the process, surprising the responding party with substantial new claims or expert material, again at a point when meaningful rebuttal is practically impossible.

Although neither tactic is inherently unlawful, both can contribute to a sense of procedural imbalance—especially when not clearly managed by the adjudicator from the outset

4.2 Lack of Transparency in Appointment and Decision-Making

Another structural concern relates to the lack of visibility into adjudicator appointments.

Repeat appointments from the same nominating body or for the same party, while sometimes coincidental, can create perceptions of partiality.

Without a robust disclosure or rotation mechanism, losing parties may suspect unconscious allegiance or familiarity bias (Cofely Ltd v Bingham, [2016] EWHC 240 (Comm)).
Moreover, adjudicators are not generally required to publish their decisions, even in redacted form.

This opacity limits the development of consistent procedural standards and deprives parties of a wider body of precedent or guidance against which to judge their own experience.

4.3 Absence of Feedback Loops

Unlike judges or arbitrators, adjudicators rarely receive formal or structured feedback on the

procedural quality of their work.

Most feedback is either informal or arises only in enforcement proceedings—where the legal threshold for setting aside a decision is high.

Consequently, perceived unfairness often goes unaddressed unless it crosses the line into a serious breach of natural justice.

This absence of feedback contributes to a lack of systemic learning and may reinforce adjudicators' assumptions that their own decisions are procedurally sound—even when they are experienced otherwise.

5. Measures to Enhance Perceived and Actual Impartiality

Improving the perceived fairness of adjudication does not require a fundamental overhaul of its legal framework.

Rather, it calls for practical enhancements that address how parties *experience* the process.

These measures aim not only to support adjudicators in exercising sound judgment but also to ensure that parties understand, trust, and accept the outcome—whether they win or lose.

5.1 Transparent Reasoning and Acknowledgement

Research on procedural justice consistently shows that parties are more likely to accept adverse outcomes if they believe their arguments were heard and respectfully addressed (Tyler, 2006).

Adjudicators can support this by:

- Structuring their decisions to first explain their reasoning, not merely state the outcome.
- Explicitly acknowledging each party's key submissions, even if rejected.
- Using clear, neutral language that avoids condescension or sarcasm.

Such practices reduce *ego threat*, especially for parties represented by professionals whose self-image is tied to competence and authority (Baumeister, 1998).

5.2 Early Procedural Signals

To avoid perception-shaping surprises (e.g. late evidence, rushed timetables), adjudicators should set early procedural expectations.

A short, initial statement outlining how the process will be managed helps allay fears of ambush or imbalance and positions the adjudicator as a neutral guide rather than a reactive figure.

This also allows parties to adjust their narrative expectations early, before emotional investment deepens (Welsh, 2004).

5.3 Annual Bias and Reasoning Training

Continuing professional development (CPD) for adjudicators should include cognitive bias awareness, decision-framing exercises, and structured reasoning training.

The Judicial College in England and Wales has integrated such content for judges, recognising that legal expertise alone is insufficient to guarantee impartial thinking (Judicial College, 2024).

By incorporating similar training into adjudicator panels, institutions can strengthen the psychological competence of those who deliver frontline justice.

5.4 Structured Decision-Making Tools

Adjudicators can benefit from checklists, issue trees, and decision matrices that help them organise and transparently present their reasoning.

Tools of this kind, used in healthcare and aviation to minimise cognitive error, have been recommended for judges and arbitrators in complex decision environments.

They also create a procedural record that demonstrates consistency and discipline, supporting enforceability and legitimacy.

5.5 Feedback and Transparency Mechanisms

Panel-nominating bodies could implement anonymous post-adjudication surveys focused solely on procedural fairness.

Questions might ask whether parties felt heard, whether the process was well-managed, and whether the adjudicator appeared neutral.

Aggregate results could inform training and appointment decisions without compromising independence.

Additionally, publishing anonymised decisions (with party consent) would support transparency, allow benchmarking, and encourage greater uniformity in procedural conduct.

5.6 Appointment Rotation and Disclosure

To address suspicion of bias in repeat appointments, adjudicator nominating bodies should adopt or reinforce rotation policies and require enhanced disclosure statements regarding prior appointments or relationships.

Transparency around appointment history can help neutralise suspicion and enhance the legitimacy of the process (Slaoui, 2009).

And here’s a seventh: *Humility*.

One adjudicator told me:

“I explain everything—especially when I’m rejecting it—because if I don’t, they’ll think I ignored them.”

That’s fairness—not just *claimed*, but *demonstrated*.

6. The Role of Self-Esteem and Identity in Dispute Reactions

While legal professionals often view adjudication as a neutral application of fact and law, psychological research reminds us that disputes are deeply personal events.

Parties involved—particularly those in small or medium-sized enterprises—are often emotionally, financially, and reputationally invested in the outcome.

Even representatives such as contract managers or expert witnesses may feel their competence,

credibility, or judgment is being tested.

6.1 Ego Threat and Narrative Identity

When a party loses an adjudication, it may not only feel financially disadvantaged but personally undermined.

This phenomenon, described in social psychology as ego threat, occurs when an individual's self-image is challenged by external judgment (Baumeister, Smart, & Boden, 1996).

In adjudication, ego threat is particularly acute when:

- The decision appears to dismiss a party's core arguments without explanation.
- An expert's analysis is rejected in favour of the opposing party's evidence without clear rationale.
- The language used in the decision is curt, ambiguous, or implicitly critical.

Losing parties often read decisions while experiencing cognitive dissonance—struggling to reconcile their belief in the rightness of their position with the judgment delivered.

In such cases, the natural psychological response is self-protection: interpreting the decision as flawed, biased, or procedurally unfair (Festinger, 1957).

6.2 Emotional Framing and Defensive Reading

Because decisions are usually structured with the conclusion at the beginning, disappointed parties may react defensively before engaging with the reasoning.

As they read, they are not analysing—they are defending.

This dynamic reduces the effectiveness of even well-structured reasoning.

It also reinforces feelings of injustice unless the decision clearly shows that each argument has been heard and answered (Tyler & Lind, 1992).

6.3 Respectful Engagement as a Corrective

To mitigate this, adjudicators should approach decision-writing not only as a logical exercise but as a communicative act.

Research in mediation and restorative justice underscores the importance of acknowledgement—explicitly reflecting back parties' arguments, values, and concerns as a sign of respect (Boulle, 2005).

Such engagement does not require agreement.

Rather, it demonstrates empathy and reinforces the adjudicator's role as a fair and neutral listener.

In doing so, it reduces the emotional sting of defeat and helps preserve dignity and trust in the process.

7. Recommendations and Reform Directions

To strengthen both actual and perceived fairness in adjudication, this article recommends a layered

approach.

The goal is not merely to avoid legal error but to ensure that adjudication processes foster trust, transparency, and respect.

The following reforms are grounded in psychological theory and emerging best practices:

7.1 Lead with Reasoning, Not Conclusions

Begin decisions with a roadmap of the key issues and how they will be assessed.

Only then reveal the final outcome.

This reduces emotional resistance and enhances comprehension—particularly for the losing party, who might otherwise stop reading and start drafting enforcement objections in all caps.

7.2 Acknowledge All Arguments

Even when dismissing a point, show that it was understood and considered.

A short, clear summary of each party's case reinforces procedural fairness and counters perceptions of neglect or dismissal.

Respectful disagreement is far more palatable than silent rejection.

7.3 Integrate Cognitive Bias Training into CPD

All panel members should complete regular training on cognitive bias, procedural justice, and reflective decision-making.

This brings adjudication into line with other professions where human decision-making is both critical and fallible.

If air traffic controllers and surgeons get refresher training, so should people resolving seven-figure disputes from PDFs.

7.4 Implement Feedback Mechanisms

Nominating bodies should collect anonymous, post-adjudication process evaluations.

These surveys should assess parties' experience of respect, clarity, neutrality, and voice—not the outcome.

Because even when someone loses, they can still feel heard.

And when they don't? That's when bias allegations land in enforcement skeletons.

7.5 Encourage the Use of Structured Decision Templates

Frameworks that require adjudicators to define issues, identify evidence, and explain reasoning can help discipline judgment and provide transparency.

They also reduce the risk of missed points, confused readers, and feedback like: "It felt like a lucky dip with footnotes."

7.6 Adopt Transparent Appointment and Publication Practices

Rotation policies, conflict disclosure, and the redacted publication of decisions (with party consent) all increase trust and visibility without compromising adjudicator independence.

Opacity breeds suspicion. Transparency invites scrutiny—but also trust.

8. Conclusion

Fairness in adjudication cannot be measured by legal compliance alone.

While the principles of natural justice remain foundational, the real test of legitimacy lies in how fairness is *perceived* by the parties.

The greatest threat to impartiality isn't corruption.

It's *conviction*.

The belief that:

- Experience equals insight.
- Instinct equals objectivity.
- *"I can't be biased."*

Psychological factors—cognitive bias, emotional investment, self-esteem, narrative commitment—shape how parties read and react to decisions.

Structural asymmetries and process opacity compound these effects, especially in fast-paced or high-stakes disputes.

Adjudicators, therefore, bear a dual responsibility: to reason impartially and to be seen to reason impartially.

That means showing their working, respecting all submissions, and designing processes that communicate care and neutrality.

As one final reflection: if your conclusion contradicts the contract, the facts, and the documents on record—and if your reasoning exists only in your own head, untested by either party—

That's your Chimp, as Steve Peters says—emotional, reactive, in the passenger seat but grabbing the wheel.

Your job is to notice your Chimp—and not let it drive the van.

So aside from Natural Justice and Bias, what keeps adjudication fair?

- *Perception.*
- *Process.*
- *Psychology.*

Slow down.

Show your workings.

Treat every party with care.

And if you do, even the losing party might say:

“I lost. But I was heard. And I understand why.”

That’s not just fairness.

That’s *legitimacy*.

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