



IS THE ENFORCEMENT OF AN ADJUDICATOR'S DECISION A FOREGONE CONCLUSION?

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Introduction

Is the enforcement of an adjudicator's decision a foregone conclusion? It can safely be said that the short answer to this question is "no". There are a number of decisions of the High Court refusing to enforce an adjudicator's decision, a recent example being *Capital Structures v Time and Tide Limited*. However, the more interesting issue that arises from this question is whether the enforcement of an adjudicator's decision has become more of a foregone conclusion. Or, to turn the question on its head, whether it is becoming increasingly difficult to enforce an adjudicator's decision.

The starting point on enforcement

The starting point is, of course, the case of *Macob Civil Engineering Limited v Morrison Construction Limited* in February 1999 where Mr Justice Dyson said the following:

14. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement... The timetable for adjudication is very tight... Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this... But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

Following this was the case of *Bouygues UK Limited v Dahl-Jensen UK Limited* in December 1999. Here, Bouygues challenged the adjudicator's decision on the basis that a mistake had been made in the calculation of the sum due to Dahl-Jensen. Referring to the adjudicator's mistakes, Mr Justice Dyson stated:

25. ...If the mistake was that he decided a dispute that was not referred to him, then his decision on that dispute was outside his jurisdiction, and of no effect... But if the adjudicator decided a dispute that was referred to him, but his decision was mistaken, then it was and remains a valid and binding decision, even if the mistake was of fundamental importance.

Mr Justice Dyson reiterated what he said in *Macob* and went on to say:

It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.

Mr Justice Dyson also said that where the adjudicator has gone outside his terms of reference, the court will not enforce his purported decision, not because it is unjust but because the decision is of no effect in law and that the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference.

Therefore it has been clear from the outset of adjudication that the High Court takes a robust view of arguments put forward by parties seeking to challenge the enforcement of adjudication decisions. *Bouygues* was referred to the Court of Appeal and the judgment of Mr Justice Dyson was upheld and his earlier judgment in *Macob* was approved.

However, this has not stopped parties challenging decisions and, since the inception of adjudication, scores of enforcement actions have been heard by the High Court and, occasionally, the Court of Appeal. In turn, over the past 7 years, parameters have been set by which parties can ascertain the likelihood of successfully challenging an adjudicator's decision.

What is now becoming a matter of concern to lawyers, commentators and the industry generally now is whether these parameters, which were fairly restrictive to begin with, are becoming even more restrictive as time passes. This is particularly so in light of the recent decision of the Court of Appeal in *Carillion v Devonport Royal Dockyard* and the decision of Mr Justice Jackson in *Kier v City & General (Holborn) Limited*.

The grounds upon which to challenge an adjudicator's decision

As was made clear in *Macob*, just because an adjudicator has made a mistake does not mean that their decision is unenforceable. Provided that that mistake was made within the adjudicator's jurisdiction then it cannot be challenged.

There are a number of ways of challenging jurisdiction, however, and the best starting point is to ensure that the provisions of the Housing Grants Construction and Regeneration Act 1996 in relation to adjudication have been complied with.

For example, there must be a dispute for an adjudication to occur. Therefore the first method of challenging an adjudicator's decision is to argue that there is no dispute between the parties and therefore the adjudicator has no jurisdiction.

In theory, this is a fine legal argument. In practice, it is my opinion that it is very difficult to argue this ground successfully, particularly following the judgment of Mr Justice Jackson in *AMEC v Secretary of State for Transport*. The guidance given in that case was that the circumstances from which a dispute can emerge are variable; it is very much open to the courts to interpret negotiations or courses of dealing prior to adjudication as giving rise to a dispute. Accordingly one can rarely challenge a decision on this basis.

The second popular jurisdictional challenge is to state that the contract between the parties is not a construction contract for the purposes of the Housing Grants Construction and Regeneration Act or is not a contract in writing or evidenced in writing. The definition of "construction contract" is set out at s.104 of the Act which states that a construction contract is one for the carrying out of construction operations (a term also defined by the Act), for the arranging for the carrying out of construction operations by others and for the providing of labour or the labour of others for the carrying out of construction operations. Employment contracts are excluded from the definition as are various other types of contract, for example those for the development of land and PFI agreements.

The cases that have arisen in relation to whether a contract is a construction contract are not numerous and tend to be relatively straightforward on their facts. What has caused some difficulty is where a party challenges the adjudicator's jurisdiction on the basis that the construction contract is not in writing or not evidenced in writing. This is a requirement for statutory adjudication pursuant to section 107 of the Act. Initially the definition of "in writing" at section 107 of the Act was considered to be very wide.

However, in the case of *RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited*, the Court of Appeal applied a much stricter interpretation; holding that the whole of the agreement had to be evidenced in writing. In the recent case of *Stratfield Saye Estate Trustees v AHL Construction Limited*, Mr Justice Jackson followed the reasoning in the Court of Appeal and stated that:

an agreement is only evidenced in writing for the purposes of section 107, subsections (2), (3) and (4), if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing.

Therefore the parameters in this type of case have also been defined, discouraging parties from raising this argument as a challenge to an adjudicator's decision.

The third ground on which to challenge the enforcement of an adjudicator's decision is to challenge the decision on the basis that the adjudicator is in breach of the rules of natural justice. The common law rules of natural justice are twofold:

Firstly, every party has the right to a fair hearing - in practice this means proper notice and an effective opportunity to make representations before a decision is made.

Secondly, every party has the right to an unbiased tribunal.

Therefore natural justice encompasses allegations of impartiality and bias as well as procedural unfairness and a myriad of other issues of conduct which an Adjudicator might fall foul of.

Given the difficulty in challenging adjudicators' decisions on the other grounds set out above, a challenge on the basis of natural justice has been seen as the most likely challenge to be successful. Some examples of cases where the behaviour of the adjudicator was considered to be in breach of the rules of natural justice are as follows:

- *Discain v Opecprime* (August 2000). An adjudicator spoke to one party on the telephone without communicating the contents to the other.

- *Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Limited* (February 2001). The adjudicator became involved in mediating some of the issues between the parties.
- *Balfour Beatty v Lambeth Borough Council* (April 2002). The adjudicator undertook delay analysis work without giving the parties the opportunity for further comment.
- *Shimizu Europe Limited v LBJ Fabrications Limited* (May 2003). The adjudicator rejected the position of both parties that they had contracted on the basis of a letter of intent, and did not give the parties the opportunity to make further submissions on the question of contract formation.
- *London & Amsterdam Properties Limited v Waterman* (December 2003). The Adjudicator allowed late evidence from the referring party.
- *Costain v Strathclyde* (December 2003). Strathclyde claimed that the adjudicator had obtained professional advice but failed to disclose the results to the parties.
- *Buxton Building Contractors Limited v Governors of Durand Primary School* (April 2004). The adjudicator failed to consider relevant information submitted in relation to a cross-claim.
- *A&S Enterprises v Kema* (July 2004). The adjudicator made adverse comments on the failure of an individual to attend a meeting.
- *Amec Capital Projects Limited v Whitefriars Estates* (February 2004). At first instance it was held that there was a real possibility that the adjudicator was biased. The adjudicator had obtained legal advice some of which he had not disclosed to the parties and another part of which (on jurisdiction) he had not disclosed until after he had decided the question of jurisdiction. This decision was overturned by the Court of Appeal in October 2004.
- *Ardmore Construction Limited v Taylor Woodrow Construction Limited* (January 2006). The adjudicator agreed to an alternative claim in relation to overtime working which he did not raise with the responding party.

The Carillion case

In April 2005, Mr Justice Jackson gave judgment in the case of *Carillion Construction Limited v Devonport Royal Dockyard*. Devonport Royal Dockyard Limited were engaged by the Ministry of Defence to carry out substantial refurbishment works to a number of docks at the Devonport Royal Dockyard in Plymouth. Devonport in turn engaged Carillion as a subcontractor.

In addition to the subcontract, Devonport and Carillion entered into an alliance agreement which made provision for payment to Carillion on a target cost basis with a pain share/gain share provision.

Substantial delays occurred during the course of the works as a result of design matters for which Carillion was not responsible and substantial delays and cost increases arose generally on the project as a whole. Disputes arose between Devonport and Carillion as to

Carillion's entitlement to payment and in particular the operation of the target cost provisions of the alliance agreement. Issues also arose as to defects in Carillion's works.

On 4 January 2005, Carillion served a notice of adjudication on Devonport claiming approximately £12 million plus interest. Devonport maintained that in fact Carillion had been significantly overpaid and that remedial works to the value of approximately £20 million were necessary and that they should also be taken into account.

Having considered the issues before him, the adjudicator awarded Carillion approximately £10.6m including interest. Devonport refused to pay Carillion and Carillion referred the matter to court for enforcement. One argument that Devonport raised was that the adjudicator's decision was made on an unfair basis in breach of the rules of natural justice.

In particular, Devonport contended that the adjudicator had not taken into account certain submissions that had been made on the target cost issues and, in relation to the defects claim, that he had not considered Devonport's expanded defects claim, simply the original defects claim, that he had not given the parties the opportunity to comment on the 20 per cent deduction he made on the original defects claim and finally he had given no or no adequate reasons for his decision.

Mr Justice Jackson held that the adjudicator's decision was not in breach of the rules of natural justice and, after considering the relevant cases on natural justice, restated four basic principles as follows:

1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see Bouygues, C&B Scene and Levolux.
3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see Discaint, Balfour Beatty and Pegram Shopfitters.
4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see Pegram Shopfitters and Amec.

The Judge then set out five propositions which bear upon the consideration of natural justice in the enforcement of adjudicators' decisions. Of note are the following principles:

- If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision.

- It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty v the London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.
- If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice.

This case was appealed and in November 2005 the Court of Appeal heard an application for permission to appeal. On the natural justice issues, the Court of Appeal refused permission to appeal. The judgment was delivered by Lord Justice Chadwick who indicated Court of Appeal's broad agreement to the propositions set out by Mr Justice Jackson who went on to say:

85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by [Devonport] in the present case...

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or subcontractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly...

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator...

Whilst it has always been acknowledged by those who use adjudication that the courts do not like challenges to an adjudicator's decision, this judgment in such strict terms from the Court of Appeal can only further restrict the ability of parties to successfully challenge an adjudicator's decision. This now seems to be likely.

When Mr Justice Jackson gave judgment in *Carillion* at first instance he stated that the principles that he had set out were reconcilable with the decision in *Buxton v Governors of Durand Primary School*. You may recall that that was the case where the adjudicator failed to take into account the counter claim and set-off argument made by the school in defence to a claim for retention from Buxton. HHJ Thornton QC held that the adjudicator was in breach of the rules of natural justice and the decision was not enforced. In the Court of Appeal judgment in *Carillion*, Lord Justice Chadwick cast doubt over whether the decision in Buxton was right at all.

This point has now been followed up. In March 2006, Mr Justice Jackson delivered judgment in the case of *Kier Regional Limited (t/a Wallis) v City & General (Holborn) Limited*.

The Kier case arose from one of a number of disputes in relation to works carried out by Kier for City & General at the site of the former Patent Office Library in London. The parties have adjudicated on more than one occasion and this case relates to adjudications two and three.

In adjudication number two, the adjudicator awarded Kier an extension of time of 28 weeks in addition to an extension of time of 31 weeks previously granted by the Contract Administrator, AYH. Based on that adjudication award, Kier made a further application for loss and expense of approximately £1.3m. AYH's Interim Certificate number 32 included no further amounts for loss and expense than had been awarded previously. Kier commenced adjudication number three on the loss and expense claim.

City & General served an adjudication Response advancing various lines of defence and including two experts' reports which neither Kier nor the Contract Administrator had seen before. Kier invited the adjudicator to ignore the evidence of the two new reports on the basis that they constituted new evidence.

On 28 October 2004 the adjudicator published his decision in Kier's favour. In relation to the two experts, reports, the adjudicator agreed with Kier that the reports were not before the Contract Administrator when he produced valuation number 32 and that they were therefore not relevant to the way in which he prepared his valuation. The adjudicator stated that he was required to decide whether the Contract Administrator was right in all the circumstances known to him at the time to reject Kier's claim. The adjudicator found that the new reports were new evidence not known to the parties at the time the dispute crystallised and that he should therefore not take them into account in the adjudication.

City & General refused to pay the adjudicator's award, stating that the adjudicator had wrongly refused to pay any regard to the two experts' reports and as a result the process leading to his decision was manifestly unfair and the decision a nullity.

Before turning to Mr Justice Jackson's judgment, I pause here to say that the argument put forward by City & General was not without authority. In addition to the Buxton case, there is the case of *William Verry v Furlong Homes*, which was decided by HHJ Peter Coulson in January 2005 and the case of *Quietfield v Vascroft* decided by Mr Justice Jackson in February 2006. In *William Verry*, Furlong in its response to a final account adjudication submitted that it had a claim for a longer extension of time than had previously been applied for and submitted evidence to that effect. The adjudicator took that evidence into account and his decision was enforced. In *Quietfield*, Vascroft defended a liquidated

damages claim with an extension of time submission, some of which had been seen before in a previous adjudication and some of which was new information. The adjudicator refused to take into account the extension of time submission on the basis that the first adjudication had already dealt with the matter of the extension of time. When the Adjudicator issued an award in Quietfield's favour, Vascroft challenged the award. The Judge held that as Vascroft's defence included new evidence, it was on different grounds than those previously considered in the first adjudication. He therefore refused enforcement.

In *Kier v City & General*, Mr Justice Jackson held that the failure by the adjudicator to take into account the two experts' reports was not enough to render his decision a nullity. The decision was therefore enforced. Counsel for the parties made submissions to the Judge in relation to *Buxton*, *William Verry*, *Quietfield* and *Carillion*.

Mr Justice Jackson considered the cases of *Buxton* and *Carillion* and said firstly that it is now unclear whether or not *Buxton* was rightly decided and secondly that in light of *Carillion* the passages in which the judge asserted that the adjudicator's failure to consider the school's evidence rendered the adjudicator's decision unenforceable must now be regarded as incorrect. In relation to *Quietfield*, Mr Justice Jackson categorised this as one of the "plainest cases" referred to by the Court of Appeal in *Carillion*.

Mr Justice Jackson concluded his judgment by saying that whilst he saw considerable force in the contention that the adjudicator ought to have taken the two expert reports into account, it was not necessary finally to decide this point for one simple reason: that the error allegedly made by the adjudicator is not one which could invalidate his decision. The adjudicator considered each of the arguments advanced by City & General in its Response. At worst, the Judge concluded, the adjudicator made an error of law which caused him to disregard two pieces of relevant evidence, but in the light of the Court of Appeal's decision in *Carillion*, that error would not render the Adjudicator's decision invalid. Further and in any event, this case was not one of "the plainest cases" of breach of natural justice referred to in *Carillion*.

Conclusion

The lifeblood of the construction industry is cash flow and adjudication and the provisions of the Housing Grants Construction and Regeneration Act 1996 are aimed at enhancing cash flow to help the industry operate as efficiently as possible. When parties challenge adjudicators' decisions they are doing so because they are dissatisfied with the outcome. This is in contradiction to the principle of "pay now and argue later".

Over the past seven years, the courts have closed various doors to challenging adjudication decisions. For example, the decision in *Bouygues* in relation to errors and the attitude of the court in relation to potential insolvency. *Carillion* and *Kier* are examples of another such door closing which impacts on every type of challenge, not just those relating to natural justice.

In the cases reported between May 2004 and 2005 approximately two-thirds were enforced and one-third successfully challenged. The effect of the *Carillion* case, therefore, will only be known over the next few months.

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