



Challenging the Adjudicator's Decision

1. Mr Justice Coulson, no doubt quite deliberately, noted in 2007 that:

With challenges based on jurisdiction and natural justice difficult (although not of course impossible) to establish in practice, the resourceful losing party in adjudication has had to look elsewhere for a reason to argue that the adjudicator's decision should not be enforced.¹

2. A look at recent decisions suggests that one of the areas the resourceful losing party is currently giving particular scrutiny to is the actual adjudicator's decision, particularly when that adjudicator has been asked to provide reasons. Parties are increasingly challenging the validity of decisions on the basis that they are, shall we say, not very good. Parties are not saying they are wrong as such,² but are asserting either that:

- (i) the Decision is so poorly written that it is unintelligible; and/or
- (ii) reading the Decision reveals that the adjudicator has not done what he was supposed to do.

3. Actually and more typically they are suggesting both.

4. Remember that an adjudicator is not necessarily required to give reasons. Under paragraph 22 of the Scheme for Construction Contracts, which has been adopted by the JCT, you do not have to give reasons unless one of the parties requires them. The same is true for the TeCSA, see Rule 31. However, in practice, most adjudicators will be required to give reasons.

5. From a party point of view, it is always a good idea to request reasons, particularly if the matter is a complex one. It makes the decision easier to understand. It also makes the decision easier to explain to others, who may not have had any part to play in the adjudication itself, but are only interested in the outcome. It could also be said that making a request for reasons means that you are guaranteeing that the adjudicator does his job properly.

6. So, if an adjudicator has to give reasons, how detailed do the reasons have to be? Mr Justice Jackson said this in *Carillion v Devonport*:

If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view 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.

7. Alternatively, Lord Justice Clerk in the Scottish case of *Diamond v PJW Enterprises Ltd*³ said:

A challenge to the intelligibility of stated reasons can succeed only if the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them. In such a case, the decision is not supported by any reasons at all, and on that account is invalid.

8. So to look at a more recent example or two. In the Scottish case of *CSC Braehead Leisure Ltd & Anr v Laing O'Rourke Scotland Ltd*,⁴ there were a

1 AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd [2007] EWHC 1360

2 Patently, a decision will be enforced provided an adjudicator has answered the right question. Bouygues (UK) Ltd v Dahl-Jenson UK Ltd [1999] EWHC 182

3 2004 SC430

4 [2008] CSOH 119

number of difficulties with the adjudicator's decision. It was expressed to be interim; the adjudicator had apparently not made up his mind on all the points at issue and requested further information. It was argued that where a contract provides that reasons have to be given, there must be an implied term that those reasons are adequate and intelligible. The court referred to the words of Mr Justice Jackson and Lord Justice Clerk.

9. What the court is looking for is to see that the adjudicator has understood the matter remitted to him for a decision and has issued a decision on that matter. Has the adjudicator considered the issues referred to him, considered both parties' submissions on these issues and given a decision on those issues? In this case, the Judge considered that the reasons were "*at times briefly stated and at times somewhat opaque*" but they were not "*so incoherent that it was impossible for the reasonable reader to make sense of them*". Therefore the decision was enforced.
10. However the decision was not enforced in *Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd*.⁵ Thermal was engaged as a subcontractor by AE & E to carry out mechanical services on a power station project. Thermal alleged that AE & E had failed to pay it for certain works and referred the dispute to adjudication. The subcontract incorporated the TeCSA adjudication rules. In accordance with paragraph 31 the parties requested the adjudicator to give reasons for his decision.
11. AE & E raised a defence by way of set-off and/or counterclaim seeking £3.75m arising from Thermal's alleged failure to achieve completion by the agreed date. The adjudicator, in a 23-page decision, found in favour of Thermal in the sum of £905k. AE & E failed to pay, which led to enforcement proceedings before Mr HHJ Davies. AE & E claimed that the adjudicator had failed to give reasons for his decision in relation to its set-off/counterclaim defence. Following the *Carillion v Devonport* case, the Judge noted that the correct test was that AE & E would need to show both that the reasons were absent or unintelligible, and that as a result it had suffered substantial prejudice. The Judge said that:

An adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the adjudicator has decided and why.
12. Here the Judge noted that there was simply no express reference at all to the set-off defence being one of the issues which the adjudicator recognised he had to decide. This left the question of prejudice. AE & E said that it was unclear whether or not the adjudicator had considered the set-off defence on its merits. Thus, it had lost the opportunity of having that defence dealt with, and had lost the prospect of the adjudicator deciding that point in its favour. If AE & E had had to start a further adjudication to seek to recover its losses, first it would have had to comply with this decision and second there was a risk that a second adjudicator might decline to act on the basis that the point had already been decided. Therefore there was a substantial injustice and the decision was not enforced.
13. In the same way, in *Quartzelec Ltd v Honeywell Control Systems Ltd*⁶ the court considered a responding party's right to raise new defences during the course of adjudication. Quartzelec was engaged by Honeywell to design, supply and install communication systems on a construction project in Liverpool. A dispute arose over an interim valuation of Quartzelec's works. Quartzelec referred the dispute to adjudication

⁵ [2009] EWHC 408 (TCC)
⁶ [2008] EWHC 3315 (TCC)

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- under the Scheme, alleging that Honeywell had wrongly excluded certain amounts from the interim valuation. In its response, Honeywell argued that the amount of the interim valuation should be reduced to account for certain items that had been omitted from the scope of works before Quartzelec had submitted its interim valuation. This defence (the omission defence) was a new argument, which Honeywell had not previously raised, even in its correspondence with Quartzelec.
14. Quartzelec argued that the omission defence was not part of the dispute submitted to the adjudicator, meaning that the adjudicator had no jurisdiction to consider it. As part of his decision, the adjudicator accepted Quartzelec's submission and ignored the omission defence, finding in favour of Quartzelec. The adjudicator decided that Honeywell should pay the interim valuation and 85% of the adjudicator's fees and 80% of Quartzelec's costs. As Honeywell refused to pay, Quartzelec started enforcement proceedings in the TCC.
 15. In his judgment, HHJ Davies refused to enforce the adjudicator's decision. One reason for this was that the adjudicator should have considered the omission defence. The court accepted that if the adjudicator had considered and then rejected the omission defence on its merits, then the decision would be enforceable. However, the court was unable to find any such rejection in the adjudicator's decision.
 16. A final example can be found in the case of *HS Works Ltd v Enterprise Managed Services Ltd*.⁷ Following disputes about the final account and contra-charges, there were two separate adjudications. Following the first, Enterprise were required to pay £1.8m; in the second, the adjudicator made a declaration as to the proper valuation of the works allowing for contra-charges. The result of the second decision meant that at least part of the sums due under the first decision should be repaid. Both parties argued that the decision where they had lost, was invalid.
 17. As part of his decision, Mr Justice Akenhead had to consider the approach to "kitchen sink" adjudications, where the dispute is so extensive that an adjudicator or defending party cannot readily or easily deal with it in the standard adjudication period. The Judge said the courts should have regard to:
 - (i) Whether and if so upon what basis the adjudicator felt able to reach his decision in the time available;
 - (ii) In terms of the opportunity available to the defending party, the court should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and what that party was able to and did do in the time available in the adjudication to address the material provided to it and the adjudicator.
 18. In the first adjudication, Enterprise argued that the decision was unenforceable because the adjudicator failed to address the merits and make findings in relation to the contra-charges which it had put forward. However, on review of the decision, the Judge noted that the dispute referred included the assertion that as there were no or no effective withholding notices, the amounts withheld from the contra-charges were not properly withheld and were duly payable by Enterprise. As a matter of logic, if that primary case was upheld, there was no need for the adjudicator to consider the alternative case as put forward by Enterprise. This was exactly the view expressed by the adjudicator. Mr Justice Akenhead said that:

it cannot be incumbent upon an Adjudicator, at least generally, to include in his or her decision a commentary let alone findings upon every issue which arises in the reference, save to the extent that it is necessary to provide reasons and explanations for what he or she does decide

19. In the second adjudication, it was suggested that the adjudicator failed to act fairly and/or apply the rules of natural justice; in part this was because of the extent of the adjudication. However, Mr Justice Akenhead noted that it was clear the adjudicator himself did not ultimately consider that he needed more time in which to produce his decision. In his decision, the adjudicator averred to the fact that his job had been onerous but he had been given a week's extension of time and did not ask for more. The Judge also noted that the adjudicator was provided with extensive evidence and argument by each party in relation to the valuation of final account and contra-charge items. The parties had conveniently subdivided the disputed items into categories and in respect of each separate category, the adjudicator took account of the parties' representations and, depending on the volume of supporting documentation, either checked all the information or in the case of a large disputed item carried out a series of spot checks. Bearing in mind the tight adjudication timescale, the adjudicator's approach could not be criticised.
20. Thus both decisions were valid and enforceable. On balance, the Judge considered that his order should reflect the net effect of the decisions. Calculating the net effect would include taking account of the interest position in relation to the payment (or non-payment) of the respective adjudicator's decisions and costs.
21. A related issue is of course the extent to which an adjudicator can do anything once his decision has been released. Of course, it is only in certain circumstances that an adjudicator can correct an admitted accidental slip or omission in his decision. Following the case of *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd*,⁸ an adjudicator can correct a slip provided that it is done promptly and provided the parties do not expressly ban a slip rule in the contract. Some contracts, or adjudicator's terms and conditions, make express provision for the correction of an obvious slip or omission. This must be done promptly and the adjudicator must agree that there was a genuine error.
22. For a recent example, however, see *YCMS Ltd v Grabiner & Grabiner*.⁹ Here, an adjudicator awarded YCMS £26k. On the same day YCMS wrote to the adjudicator pointing out an apparent arithmetical error, namely that the sum awarded should have been £41k. Two days later, having re-checked his decision, the adjudicator amended his decision to award YCMS £60k. YCMS sought enforcement of the £60k. This was refused by Mr Justice Akenhead who only granted enforcement in the sum of £26k. Whilst the Judge agreed that the correction was made in time, two days was "reasonably prompt", he did not agree that the correction could be allowed. In the first decision, the adjudicator had made an "inexplicable arithmetical error" the correction of which would have left a figure of £41k. What the adjudicator did here was to reject the correction of the simple arithmetical error in favour of a further re-calculation, which included bringing in the sum due and paid under another certificate into the equation. Thus it was not simply the correction of a slip, and further the Grabiners were materially prejudiced because the adjudicator got it wrong a second time.
23. Further, an adjudicator should remember that after having issued their Decision, with the potential exception of the slip rule, that is the end of

⁸ At least in England & Wales. The adjudication legislation is currently being amended to ensure that the slip rule will apply in Scotland.

⁹ [2009] EWHC 127 (TCC)

the matter. Certainly an adjudicator should not be advising the parties as to what they should be doing next. See, for example, *Birmingham City Council v Paddison Construction Ltd*.¹⁰ Here, an adjudicator dismissed claims for loss and expense on the grounds that they were “extravagant and exaggerated”. That said, he accepted that some of the claim may be valid and he went on to say that he:

would grant the Contractor leave to pursue this claim via a further adjudication if they so wish.

24. As Judge Kirkham noted, you cannot do this. Indeed, as a result of the adjudicator considering the claim and deciding that it was extravagant and exaggerated, Paddison was unable to refer its claim for loss and expense to adjudication. Remember, particularly when there are a series of disputes which are referred to the same or different adjudicators over time, that a second adjudicator cannot open up any matters decided by the first adjudicator.¹¹

Conclusion

25. There seems to be little doubt that parties are examining adjudicators' decisions with an even finer forensic toothcomb in a bid to overturn decisions. However, although decisions are being roundly and ever-more stridently criticised before the courts, at least for the time being the courts are demonstrating a marked reluctance to decline to enforce an adjudicator's decision because of the quality of that decision. What matters is whether or not the adjudicator has answered the right question.
26. That said, there has clearly been a significant new development in adjudication enforcement cases. If the court considers that an adjudicator has not addressed all the issues (and particularly all the defences) put before him, then the current trend is for that decision not to be enforced. Accordingly, adjudicators would do well to take extra care to ensure that they have both understood everything that they are required to do (and perhaps to some degree this could quite simply be achieved by confirming with the parties what issues they are required to address) and then to actually go ahead and do it. Indeed, a review of the *HS Works* decision, both of Mr Justice Akenhead's comments and the careful steps taken by the adjudicators in question, might be a useful starting point.

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¹⁰ [2008] EWHC 2254 (TCC)

¹¹ *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC)