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Recent Developments in Adjudication

Introduction

On 1 May 2008 it will be ten years since statutory adjudication was introduced into construction contracts by the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") and the Scheme for Construction Contract Regulations 1998 ("the Scheme").

Adjudication has become a popular and accepted form of dispute resolution encouraged by the courts, adopted by many as a way of resolving disputes both interim and final, and extending far beyond the original aim of its authors.

There are now over one thousand trained adjudicators.[1] In October 2006 there were 1,036 adjudicators accredited with the various List of Adjudication Nominating Bodies. Of these 1,036 trained adjudicators, the majority are either quantity surveyors (35%) or lawyers (26%).[2]

The number of adjudications taking place has reduced from a peak of approximately 2,000 a year in the period 2000/2003 to an average of between 1,400 and 1,500 in 2006.[3] This therefore equates to just over 15,000 adjudications since 1 May 1998.

Adjudication panels have been set up, including most recently the naming of an adjudication panel for the 2012 London Olympics.

The Technology and Construction Court ("TCC") in London and in its regional centres has seen many hundreds of adjudicators' decisions come before it for enforcement. However, just as there has been a reduction in the number of actual adjudications, there has been a sharp reduction in the number of enforcement applications. In 2005/2006, there were 74 adjudication enforcement applications made in the London TCC amounting to some 19% of all cases commenced.[4] In 2006/2007 the TCC reported that 57% of cases heard by the TCC were adjudication enforcement cases. This equates to a 30% reduction.[5] This is a continuation of a trend discussed below in Section 8 which can be dated back to the cases of *Amec Capital Projects Ltd v Whitefriars City Estate Ltd*[6] and *Carillion Construction v Devonport Royal Dockyard*.[7]

The TCC has, during the last year, seen a few changes in personnel, with Mr Justice Ramsay becoming Judge in charge from 1 September 2007, Mr Justice Akenhead being appointed from 2 October 2007 and His Honour Judge Coulson QC becoming Mr Justice Coulson in January 2008.

In this article I review some of the key issues to have appeared in case law during the last year under the following headings:

1. Letters of Intent/section 107 contracts evidenced in writing.
2. Basis for the recovery of legal costs on enforcement.
3. Staying proceedings to adjudication.
4. Set-off against an adjudicator's decision.
5. Late decisions.
6. Severability of an adjudicator's decision.

1. Adjudication Reporting Centre Report No. 8 November 2007.
2. Adjudication Reporting Centre Report No. 8 November 2007.
3. Adjudication Reporting Centre Report No. 8 November 2007 page 2.
4. The Technology and Construction Court Annual Report for the year ending 30 September 2006 (392 cases).
5. Annual Report of the Technology and Construction Court 2006/2007.
6. [2004] EWCA (Civ) 1418
7. [2006] BLR 15.

7. Section 111 a review of Melville Dundas.

8. Natural justice.

9. What dispute is being decided?

10. Crystallisation of a dispute.

Letters of Intent/section 107 contracts evidenced in writing

Last year there were two cases regarding section 107 of the HGCRA, *Mast Electrical Services v Kendall Cross Holdings Limited*[8] ("Mast Electrical"), a decision of Mr Justice Jackson, and *Harris Calnan Construction Co Ltd v Ridgewood (Kensington) Limited*[9] ("Harris Calnan"), a decision of His Honour Judge Coulson QC.

In *Mast Electrical*, Mr Justice Jackson considered an application by a subcontractor for a declaration that certain documents passing between the subcontractor and main contractor constituted a contract in writing for the purposes of section 107 of the HGCRA. The documents related to three separate projects on which Mast Electrical Services ("Mast") had carried out work for Kendall Cross Holdings Limited ("Kendall"). The defendant, Kendall, had previously defended the adjudication brought by Mast on the basis that there was no contract in writing between the parties and therefore the adjudicator did not have jurisdiction. The adjudicator, Mr Timothy Bunker, following a submission from Kendall agreed and resigned by a letter dated 21 December 2006.

In each of the three separate projects, Mast essentially argued that the contract was evidenced in writing by the tender enquiry documents, quotation, letters between the parties including letters from Kendall and, in two cases, by copies of pre-start meeting minutes. Mr Justice Jackson, on reviewing the law, set out a two-stage test:

1. whether there was a contract; and

2. whether the contract satisfied the requirements of section 107 of the HGCRA to be a contract evidenced in writing.

Mr Justice Jackson reiterated the Court of Appeal's decision in *RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited*[10] where the Court of Appeal held that an oral agreement insufficiently recorded in writing did not satisfy the requirements of section 107. As is well known, Ward LJ stated:

> 12 certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. *The adjudicator has to start with some certainty as to what the terms of the contract are.*
>
> 13. The second category, an exchange of communications in writing, likewise is capable of containing *all that needs to be known about the agreement*. One is therefore led to believe by what used to be known as the ejusdem generis rule that the third category will be to the same effect namely that the evidence in writing is *evidence of the whole agreement*.
>
> 14. Subsection (3) [of s.107 HGCRA] is consistent with that view. Where the parties agree by reference to terms which are in writing, the legislature is envisaging that *all of the material terms are in writing* and that the oral agreement refers to that written record.
>
> 15. Subsection (4) [of s.107 HGCRA] allows an agreement to be evidenced in writing if it (the agreement) is recorded by one of the parties or by a third party with the authority of the parties to the agreement. What is contemplated is, thus, a record (which by subsection (6) can be in writing or a

8. [2007] EWHC 126 17 May 2007.
9. [2007] EWHC 2738 15 November 2007.
10. [2002] EWCA Civ 270.

> record by any means) with anything which has been said. *Again it is a record of the whole agreement*. [Emphasis added]

Here Mr Justice Jackson found in every case that the exchange of documents did not evidence an agreement which entitled the court to find that there was a contract. Indeed, the court was quite clear that the documents relied on could not evidence all of the material terms in writing.

His Honour Judge Coulson QC in *Harris Calnan* also considered whether a Letter of Intent could constitute a contract in writing for the purposes of section 107 of the HGCRA.[11] The contractual letter, the subject matter of the dispute, was accepted by both parties as being a Letter of Intent. The court referred to the recent cases where Letters of Intent had been found not to be contracts as they did not evidence all of the terms in writing.[12]

The adjudicator when considering jurisdiction (neither party having reserved its position or objected to the adjudicator making a decision on his own jurisdiction) had stated: *"There appears to be nothing left for the parties to agree."*[13] The judge agreed and held that where a Letter of Intent evidences all of the terms necessary for a contract to be formed then a Letter of Intent can itself constitute a contract for the purposes of section 107 of the HGCRA.

The *Harris Calnan* case shows that it is not what the document is titled that is important for the purposes of section 107 of the HGCRA, it is that the document must evidence both that all of the material terms have been agreed by the parties and that a contract has been formed. In contrast *Mast Electrical* shows that although parties may have exchanged documents confirming price, this does not mean that you have agreed all of the terms. If this is the case, there is no contract in writing and therefore no right to adjudicate.

Basis for the recovery of legal costs on enforcement

The courts have, in the last year, reviewed the position on the basis of the recovery of legal costs on enforcement applications, in particular His Honour Judge Coulson QC in *Harris Calnan*.[14] *Harris Calnan* was a case where, as set out above, there was a dispute over whether or not there was a contract in writing. The adjudicator during the adjudication determined his own jurisdiction, a decision that went unchallenged, and the court agreed with the adjudicator. It should be noted that the defendant did not attend and was not represented at the hearing before the Judge although the defendant had previously instructed solicitors.

The Judge, after giving his substantive judgment, reviewed the issue of costs and compared this case with the case of *Gray & Sons (Builders) (Bedford) Ltd v The Essential Box Co Ltd*[15] *("Gray")* in which the defendant adopted a similar approach of denying liability but in that case stopped denying liability the day before the hearing. In *Gray*, Judge Coulson had ordered that indemnity costs would be appropriate. In *Harris Calnan*, he also considered that indemnity costs would be appropriate as the defendant ought to have known that it had no defence to the claim to enforce the decision and that it was unreasonable behaviour for the defendant to continue to give the impression that the application would be resisted causing the claimant to incur additional legal costs. Judge Coulson in this case ordered that the defendant should pay the entirety of the claimant's costs as claimed.

This approach can be contrasted with the approach taken by Mr Justice Ramsey in his Judgment in the case of *Ledwood Mechanical Engineering Limited -v- (1) Whessoe Oil and Gas Ltd (2) Volker Stevin Construction Europe BV*.[16] In this case the facts of which are set out in greater detail in section 4 below, there was a dispute over whether the defendants, who were a Joint Venture, could set off sums under a risk/reward scheme against an adjudicator's decision. It

11. [2007] EWHC 2738.
12. *Bennett Electrical Services Limited v Inviron Limited* [2007] EWHC 46 and *Mott McDonald Limited v London and Regional Properties Limited* [2007] EWHC 1055.
13. Paragraph 12.
14. [2007] EWHC 2738.
15. [2006] EWHC 2520.
16. [2007] EWHC 2743 20 November 2007.

was not a challenge to the enforcement of an adjudicator's decision on what one might call the normal basis of natural justice or lack of jurisdiction but on the basis of right of set-off which was an important issue between the parties.

Mr Justice Ramsey determined that the appropriate way of dealing with costs was to allow the claimant 70% of their costs and summarily assess those on a standard basis. There were some initial criticisms made by the defendants of the claimant's Summary Assessment Schedule, including duplication of attendance and work done on documents, which led to the court reducing the claimed sum of £26,974 down to £25,500 and then allowing 70% of that sum. Reading between the lines of the judgment, the Judge accepted that there was a clear issue between the parties and that therefore the successful party should only recover its costs on the standard basis.

It is a matter of judgment for a judge to determine whether it was reasonable and appropriate to challenge the enforcement or whether the purpose of the challenge was little more than a delaying tactic. Where the court considers it is a delaying tactic it appears likely that the defending party will be ordered to pay costs on an indemnity basis rather than on a standard basis. In reality what this means is that there is a high probability that you will be ordered to pay the legal costs claimed if you are seen by the court to be using the court process to delay payment.

Staying proceedings to adjudication

His Honour Judge Coulson QC in the case of *DGT Steel and Cladding Limited v Cubitt Building and Interiors Limited*[17] considered the question of whether court proceedings once issued should be stayed to allow for an adjudication to proceed.

Here the claimant *DGT Steel and Cladding Limited* (*"DGT"*), having lost adjudication proceedings against *Cubitt Building and Interiors Limited ("Cubitt")* where they were seeking £193,815, commenced proceedings in the TCC seeking £242,547 plus VAT and interest. There was a dispute between the parties as to the degree of overlap between the original adjudication and the court proceedings. Cubitt argued that as it was a term of the adjudication clause in the contract that any dispute "shall" be referred to adjudication first, the proceedings should be stayed to allow for an adjudication to be conducted as the proposed adjudication dealt with most of the issues in the proceedings.

The court had to consider whether the disputes were the same for the purposes of a further adjudication and then to determine whether a temporary stay should be granted to restrain court proceedings to allow the adjudication to take place.

The court confirmed that if the parties have agreed on a particular method by which their disputes are to be resolved then the court has an inherent jurisdiction to stay the proceedings brought in breach of that agreement.[18] The court referred to His Honour Judge LLoyd QC's judgment in *Cape Durasteel Ltd v Rosser and Russell Building Services Ltd*[19] in which the Judge found that where there was a binding adjudication agreement it was appropriate to stay proceedings to allow for the adjudication. From a slightly different angle Dyson J in his judgment in *Herschel Engineering Limited v Breen Property Limited*[20] refused an application for a stay of enforcement of an adjudicator's decision to allow for ongoing proceedings. Having considered the case law above, Judge Coulson determined that there are three principles for contracts containing a binding adjudication agreement as follows:

(a) The Court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings even if there is already Court or arbitration proceedings in respect of the same dispute

17. [2007] EWHC 1584 4 July 2007.
18. *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 which was followed in the case of *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540.
19. [1995] 426 ConLR 75.
20. [2000] BLR 272.

(b) The Court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate

(c) The Court's discretion as to whether or not to grant a stay should be exercised in accordance with the principles noted above. If a binding adjudication agreement has been identified then the persuasive burden is on the party seeking to resist the stay to justify their stance.

The court confirmed that in this case where there was a mandatory adjudication agreement and if it was not the same dispute as in the previous adjudication then the matter should be referred to adjudication. The court also indicated in an obiter comment that even if there was no such agreement in the Contract, section 108 provided for adjudication and there should still be a stay unless there was a very good reason why not.

Set-off against an adjudicator's decision

Mr Justice Ramsey, in the case of *Ledwood*[21] considered an attempt by Joint Venture partners (*Whessoe Oil and Gas Ltd and Volker Stevin Construction Europe BV*) to setoff part of the risk/reward in the Joint Venture Agreement against an adjudicator's decision. The defendant sought to set off sums by making an adjustment to Payment Application 22 when the adjudication had been in respect of Application 19.

The defendants argued that the deduction of sums under the agreed risk/reward regime was similar to the deduction of LADs as set out by Mr Justice Jackson in the case of *Balfour Beatty Construction v Serco*[22] paragraph 53:

> I derive two principles of law from the authorities, which are relevant for present purposes.
>
> (a) Where it follows logically from an adjudicator's decision that the Employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the Employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the Employer has given proper notice (insofar as required).
>
> (b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the Employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator would depend upon terms of the contract and the circumstances of the case.

The court had to consider whether it followed logically from the risk/reward regime that the payment could be adjusted.

The court found that as the calculation of risk/reward was not the same as calculating LADs the sum was not indisputable and it could not be treated in the same way as LADs. Therefore the adjudicator's decision was enforceable in full and no set-off could be made against the adjudicator's decision.

Late decisions

The issue of whether an adjudicator's decision has been issued late has been a question brought before the courts on a number of occasions over the last few years as defendants seek other grounds to resist the enforcement.

The enforcement of a potentially late decision came before the court most recently in the case of *AC Yule & Son Limited v Speedwell Roofing & Cladding Limited*.[23] The case came before His Honour Judge Coulson QC who commented that following the cases of *Amec Capital Projects Ltd v Whitefriars City Estate Ltd*[24] and *Carillion Construction v Devonport Royal Dockyard*[25] the overall number of disputed applications to enforce adjudicators' decisions had

21. [2007] EWHC 2743 20 November 2007.
22. [2004] EWHC 3336.
23. [2007] EWHC 1360 31 May 2007.
24. [2004] EWCA (Civ) 1418.
25. [2006] BLR 15.

fallen.

The court then went on to review the cases on late decisions including the Court of Session's Decision in *Ritchie Brothers (PWC) Ltd v David Philp (Commercials)*,[26] *Hart Investments Limited v Fidler and Another*[27] and *Cubitt Building and Interiors Limited v Fleetglade Limited*,[28] *Epping Electrical Company Ltd v Briggs and Forrester (Plumbing Services) Limited*[29] and *Aveat Heating Ltd v Jerram Falkus Construction Ltd*.[30] All of these judgments led to the same conclusion that an adjudicator shall give his decision within 28 days or any longer agreed period. Therefore, an adjudicator's decision is only enforceable if made within 28 days or any agreed extended period.

The adjudication in question was commenced on 20 February 2007 and therefore the 28-day period would have come to an end on 20 March 2007. At some stage, although it is not clear when from the judgment, the adjudicator was given a further 14 days to 3 April to make his decision. The limit of the Referring Party's right to grant a unilateral extension of time for a decision. On 3 April, for reasons explained in detail in the judgment, the adjudicator asked for a further two days to 5 April to issue his decision. The claimant agreed in writing; the defendant did not respond.

The adjudicator made his decision and communicated this to the parties on 4 April 2007. In paragraph 4 of the decision the adjudicator stated: "The parties agreed to extend the date of issue of my Decision. My Decision is to be issued on 4th April 2007." The defendants stated somewhat belatedly on 14 May 2007 that they were going to take the point that the decision was a nullity as a result of being a day late. The decision was certainly a day later than on the written evidence the decision was due. The court, however, looked at the facts surrounding the potentially late decision and noted that a Request for Information had been made to the defendant on 2 April, a request that was only answered late on 3 April. Further, the defendants did not challenge the adjudicator's stated intention in an email on 4 April to provide his decision that day.

It was argued before the court that the defendant had acquiesced by their silence to the agreement of an extension of time. Indeed, the adjudicator had asked for an extension of time to 5 April which the claimant had agreed to. It was simply the defendant who had not formally confirmed its agreement to the extended period in writing. The court found that the defendant had not just, by its silence, agreed to extend time but by its conduct made it plain that they had in truth accepted the request for an extension. The reasons for this were as follows:

(a) continuing with the adjudication after the adjudicator's request;

(b) failing to respond to the adjudicator's request for the information thus causing a delay;

(c) promising to provide information which would allow the decision in time and then failing to produce it until late on the afternoon the award would otherwise have been due;

(d) not confirming on the day they provided the information that they considered 3 April to be the date for the decision;

(e) not challenging the adjudicator's decision on 4 April.

The court said that the defendants were estopped from denying that the adjudicator's decision was now late. The court then reaffirmed its view that the 28-day period was mandatory.

26. [2005] BLR 384.
27. [2006] EWHC 2857.
28. [2006] EWHC 3413.
29. [2007] BLR 1126.
30. [2007] EWHC 121.

Two points arise from the judgment. First, if you are going to challenge an adjudicator's decision on the basis of it being late you must, during the course of the adjudication, make it clear that you have not agreed to the requested extension of time. Second, if you are the cause of the decision being late, the court may still enforce the decision if it is against you. One must wonder, of course, that if you do refuse to grant an extension of time, whether this will affect the adjudicator in his determination of the dispute.

Severability

It has often been asked whether it is possible to sever elements of an adjudicator's decision and for the remaining elements to be enforceable. The position was reviewed by Mr Justice Akenhead in *Cantillon Limited v Urvasco Limited*.[31] In his judgment, Mr Justice Akenhead, as part of an obiter comment, reviewed the severability of elements of an adjudicator's decision and stated his view, following a review of the cases, that there is a six-stage test for severability as follows:

1. Ascertain what dispute or disputes has or have been referred to adjudication.

2. Was it open to a party to an adjudication agreement to seek to refer more than one dispute or difference to an adjudicator?

3. If the decision properly addresses more than one dispute and a successful challenge is made on part of the decision which deals with one such dispute or difference this will not undermine the validity and enforceability of that party the decision which deals with the other.

4. The same logic must apply to the case where there is a non-compliance with the rules of natural justice which only deals with one dispute or difference.

5. Three and four is subject to the proviso that if the decision as drafted is not severable in practice the whole decision will not be enforced.

6. In all cases where there is a decision on one dispute and the adjudicator acts materially in excess of jurisdiction or in breach of the rules of natural justice the decision will not be enforced by the Court. The decision, although not binding on any other Court, is a helpful explanation of how and when decisions of adjudications might be severable.

This leads to some interesting questions and decisions for an adjudicator when coming to his or her decision. In his judgment, Mr Justice Akenhead said that the adjudicator can only proceed with resolving more than one dispute if there is no objection. It is not clear whether, if there is an objection, the adjudicator should resign? Another interesting question for an adjudicator determining multiple disputes where there are challenges to his jurisdiction, will be whether to issue clearly severable decisions or combine all decisions so that they are not severable. In the writer's view, although of interest, severability will not be a major concern in virtually all adjudications, as if there is a breach of natural justice or lack of jurisdiction, this is likely to taint the whole decision.

Section 111 a review of Melville Dundas

His Honour Judge Coulson QC in the case of P*ierce Design International Ltd v Mark Johnston and Another*[32] *(Pierce Design)* applied for the first time the House of Lords' decision in *Melville Dundas Ltd (In Receivership) and Ors v George Wimpey (UK) Ltd & Anr*[33] *(Melville Dundas)*. In this case, the defendants were the owners of a property who had entered into a contract

31. [2008] EWHC 282, 27th February 2008.
32. [2007] EWHC1691 17 July 2007.

with the claimant to carry out construction works at their property. The contract incorporated the JCT Standard Form of Building Contract With Contractor's Design 1998 Edition with some amendments. The relevant clauses were clause 30, payment and clause 27, determination. There were problems with payments, and in particular Interim Valuations 8, 9, 10 and 12.

The works substantially overran and as the contract went into 2007, difficulties began to emerge. A notice of default under the contract was served on 7 March 2007 and on 30 March 2007 the defendants purported to determine the employment of the claimant in accordance with the contract. It should be noted that the determination was disputed. Following the determination, the defendants obviously had a number of potential cross-claims, most notably the cost of completing the works. The question before the court was whether clause 27.6.5.1 was in accordance with section 111 the same clause discussed in *Melville Dundas*. The key factors here were that the breaches of contract and the opportunity to raise withholding notices had occurred some considerable time prior to the determination of the contract and there was no issue of the contractor being insolvent.

The court considered arguments in respect of clause 27.6.5.1 and it was argued in court that the clause fell foul of section 111 of the HGCRA and should therefore be struck down and that section 111 did not apply as in the *Melville Dundas* case and previous cases.[34] The court considered the proviso in clause 27.6.5.1 and set out what in its view were the three questions which needed to be answered in the affirmative before the clause could be relied upon by the contractor; these questions were set out in paragraph 29 of the judgment as follows:

(a) Were the amounts properly due to be paid by the Employer to the Contractor?

(b) Did the Contractor's rights to those amounts accrue 28 days or more before the date of determination?

(c) If so, has the Employer "unreasonable not paid" those amounts?

What the court seems to be saying in this case is that one can only withhold payments after the due date for payment where no withholding notice has been issued, when these three questions are answered in the affirmative. The key to these being that if a sum is due and the period is less than 28 days and there is a reasonable reason why no payment has been made then the sum could be withheld. Clause 27.6.5.1 therefore only rectifies a wrongful withholding within 28 days of that withholding. It will be interesting to see whether other courts maintain the same position.

Natural justice

Following the decisions in *Amec Capital Projects Ltd v Whitefriars City Estates Ltd*[35] and *Carillion Construction v Devonport Royal Dockyard*[36] the overall number of disputed applications to enforce decisions of adjudicators involving issues of natural justice has reduced. There has, however, been an important judgment with regard to natural justice and a couple of other cases dealing with issues of natural justice.

The substantive case is Mr Justice Akenhead's judgment in *Cantillon Ltd v Urvasco Ltd*.[37] This was the fourth in a series of adjudications relating to works at the Silkin Hotel in London. The adjudicator, Dr Mastrandrea, it was argued, had no jurisdiction to make the decision he did. The key facts were that the claimant in the adjudication had sought an extension of time of 13 weeks and the costs associated therewith. The adjudicator determined a shorter period but had related this and the cost to a different period from that claimed. At

33. [2007] UK HL18, [2007] 1WLR1136.
34. See for example *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* [2001] 17 Const LJ 170 and *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522.
35. [2004] EWCA 1418.
36. [2006] BLR 15.
37. [2008] EWHC 282 27 February 2008.

no time was the adjudicator's jurisdiction challenged during the adjudication itself although the defendant's solicitors did suggest that the claimant was asking the adjudicator to make an alternative case on time. It was argued in particular that the adjudicator had no jurisdiction to address or resolve any issues relating to any delay occurring and any prolongation costs incurred in a period other than the specific 13-week period identified by the claimants, and that the adjudicator had failed to give the defendant any or any reasonable opportunity to make submissions and produce evidence in relation to the amount of costs being incurred in this other period.

Mr Justice Akenhead, in reviewing the law, stated that there are essentially two principle grounds for avoiding the enforcement of an adjudicator's decision:

(a) that the Adjudicator had no jurisdiction or exceeded his jurisdiction;

(b) that the Adjudicator failed in reaching his decision to apply the rules of natural justice or was biased.[38]

The court commented that the Court of Appeal in particular showed a sense of impatience with attempts to avoid enforcement of adjudicators' decisions. The learned Judge quoted from the *Carillion* case and the following extracts are extremely pertinent:

> 86 It must be kept in mind that the majority of Adjudicators are not chosen for their expertise as lawyers.
>
> 87 In short, in the overwhelming majority of cases, the proper course to 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. If he does not accept the Adjudicator's decision is correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge an Adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense. [39]

The court then reviewed the case law on what is a dispute and the extent to which this needs to be defined prior to an adjudication. Finally, the Judge identified the following in relation to breaches of natural justice in adjudication cases:

(a) It must first be established that the Adjudicator failed to apply the rules of natural justice.

(b) Any breach of the rules must be more than peripheral; they must be material breaches.

(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Ltd -v- The Camden* [London (sic)] *Borough*

38. para 51.
39. para 52.

> *of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.[40]

In this case as the defendant had not come back to the adjudicator it was held not to be a breach of natural justice.

Essentially, the court here summarised the view that due to the nature of adjudication, breaches of natural justice are likely to occur and therefore some leniency should be shown to adjudicators where that breach is minor. When, on the other hand, the breach is substantial/material then the court will intervene and hold a decision unenforceable. Indeed, this case can be seen as supporting the inquisitorial nature of adjudicators as well.

Natural justice has been raised again in the recent decision of Mr Justice Coulson in *Edenbooth Limited v Cre8 Developments Limited*[41] where the defendants defended the action on a number of bases, one of which was that there had been poor communication with the adjudicator. The court considered this as a question of fairness and determined, having looked at the adjudicator's decision, that the adjudicator expressly dealt with this issue. Indeed, the adjudicator determined that at least some of the problems were self-inflicted by the defendant, for example the fact that the defendant did not have a fax machine or email. The Judge also noted that the defendants had received the advice of solicitors. Finally, he noted that submissions had been made in response after the adjudicator had given the defendant more time. The court therefore decided that this was not a breach of rules of natural justice and that the issues with communication had been overcome by the adjudicator giving additional time for submissions.

What dispute is being decided?

There has been a considerable number of challenges to an adjudicator's jurisdiction on the basis that the adjudicator has determined the wrong or at least a different dispute from that which was referred to him. This recently came before two Lord Justices of Appeal in the case of *David and Theresa Bothma T/a Dab Builders v Mayhaven Healthcare Limited*.[42] This was an appeal against the refusal of leave to appeal on paper for leave to enforce an adjudicator's decision. At first instance His Honour Judge Havelock-Allan QC had refused the application to enforce the adjudicator's decision. The Judge decided that the adjudicator had purported to determine two unrelated disputes, (1) the correct figure for Valuation 9 and (2) the contractor's entitlement to extension of time and validity of a Certificate of Non-Completion. The Employer resisted the claim on the basis of clause 8(1) of the Scheme which states: "The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract." The Employer did not take this point during the adjudication but did generally reserve its position. At the enforcement hearing the Judge decided that the adjudicator did determine two unrelated disputes and refused enforcement on this basis.

The Court of Appeal on paper agreed with the Judge below and rejected the Appeal. The contractor appealed against this decision and the Court of Appeal confirmed that they would not allow the Appeal. This of course ties in with the point on severability and natural justice dealt with in the *Cantillon v Urvasco* case above. Lord Justice Waller, in refusing the application, did express some concern about the Employer taking a technical point but because the Employer had throughout the adjudication reserved its position on jurisdiction in particularly wide terms the Employer had not waived their rights to challenge jurisdiction on any basis and therefore this defence was still available. Lord

40. para 57.
41. [2008] EWHC 570 13 March 2008.
42. [2007] EWCA Civ 527 14 May 2007.

Justice Waller still rejected the Appeal.[43]

Crystallisation of a dispute

Mr Justice Akenhead in *Ringway Infrastructure Services Limited v Vauxhall Motors Limited*[44] considered the issue of whether a dispute had crystallised. The key facts of the case relevant to the judgment are as follows. The claimant by Interim Application No. 11 submitted an Application of Payment for works at the defendant's Ellesmere Port Plant. There had been some considerable correspondence between the parties over a period of approximately one year. However, on 16 May 2007 Interim Application No. 11 was sent. The letter was headed up Interim Application No. 11 and there was a substantial document attached running to almost 350 pages. Interim Application No. 11 evoked no written response of any sort until 27 June 2007, albeit there was telephone contact between the parties between these dates.

On 27 June a written response was issued and there were various exchanges until 13 July 2007 when a Notice of Adjudication was issued.

The adjudication was founded on the basis of a failure to serve notices in accordance with clause 30.3.3 and/or clause 30.3.4 of the JCT Standard Form of Building Contract with Contactor's Design 1998 Edition (incorporating Amendments 1 to 5). In the Referral greater detail was provided including reliance on clauses 30.3.3 to 30.3.7. In the Response the defendants took the point on jurisdiction and then argued the valuation.

The judge found that the Application was a valid one and that payment should be made. There were four challenges made to the jurisdiction of the adjudicator as follows:

(i) that the reference was not of the amount due under Application No. 11 but of the amount of the defendant's ultimate entitlement on a Final Account;

(ii) that no dispute had crystallised prior to the reference to adjudication because no demand had been made for payment for the amount claimed;

(iii) the claimant had not prior to the reference referred to or relied upon the provisions in clause 30.3. Therefore no dispute existed or could exist in relation to claims made in respect of Application No. 11; and

(iv) that sums claimed by the claimant were not due at the date of the Notice of Adjudication; alternatively, the mechanism contained in clause 30.3.5 had not been activated by the time of the Notice of Adjudication.

The Judge then reviewed the law and restated the basic principles set out by Jackson J in *Carillion* and then the Court of Appeal decision in *Amec* regarding a dispute. Mr Justice Akenhead then drew the following conclusions from these authorities, at least, as he puts it, in the context of the current case:

1. Existence of a dispute or a difference may be inferred from what is said or not said by the party in receipt of what may be termed "a claim".

2. There does not have to be an express rejection of a claim by the recipient

3. A "claim" for the purpose of giving rise to a dispute or difference may not be a claim for money or for the payment of money

4. One needs to determine whether there is a "claim" and whether or not that claim is disputed from the surrounding facts, circumstances and evidence pertaining up to the moment that the dispute, subsequently referred to adjudication (or arbitration), has crystallised.[45]

The court decided, based upon these tests, that a dispute had crystallised and

43. cf with *Harris Calnan* above.
44. [2007] EWHC 2421 23 October 2007.
45. para 55.

that a dispute was in existence and was capable of being determined by an adjudicator.

This judgment is helpful in that it goes to assist in the understanding of what is a dispute and when a dispute crystallises.

Conclusion

In conclusion, therefore, the number of disputes over the enforceability of adjudicators' decisions are reducing. However, it is clear that there are still issues to be determined by the courts. The courts are producing clearer guidance to allow the parties to ascertain whether or not they have a decision capable of enforcement; however, disputes continue to arise. Adjudication is now some ten years old and there are approximately 1,500 adjudications every year with only about 70 to 80 going to enforcement, which is just over 5% of all adjudications. In other words, nearly 95% of all adjudications reach a conclusion which both parties, whether temporarily or permanently, are willing to live with and therefore adjudication is clearly succeeding in its stated claim. The HGCRA is due to be amended shortly and, indeed, has been under review now in one way or another for over five years. It is anticipated that the amendment will take out a number of the issues still existing which lead to challenges to the jurisdiction of adjudicators, thus further reducing the number of disputes and allowing the process of adjudication to continue to grow and be accepted by all involved in the construction industry.

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