Fenwick Elliott

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IS ADJUDICATION FIT FOR PURPOSE?

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THE STATUS OF AN ADJUDICATOR'S DECISION

Introduction

An issue that is not yet fully resolved is the status of an adjudicator's decision. Does an adjudicator's decision create a debt, following *VHE Construction plc v RBSTB Trust Co. Limited*[(2)] and arguably the underlying rationale of *Levolux AT Limited v Ferson Contractors Limited*,[(3)] such that it is to be enforced in its own right without set-off. In other words, does an adjudicator's decision create, independent of the contract between the parties, a cause of action in its own right (first scenario)?

Alternatively, when seeking to enforce the decision of an adjudicator, is the cause of action the right or obligation in dispute by reference to the contract between the parties, rather than the decision itself (second scenario)? A further possibility sits somewhere between the two, i.e. the cause of action arising from the express (or implied) contractual promise between the parties that the adjudicator's decision is to be enforced, but not as an independent cause of action (third scenario). This further possibility was considered by His Honour Judge Hicks QC in *VHE* and by the Court of Appeal in *Levolux*.

The status of an adjudicator's decision is important for a variety of reasons. First, if subsequent contractual terms supersede the contractual machinery upon which an adjudicator has based his or her decision (for example the final account machinery superseding the interim payment machinery),

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(1) A lecture that included this topic was delivered in February 2003 to the Part D students of the MSc in Construction Law at King's College, London, and a paper considering this area was published in (2005) *Construction Law Journal* 435-455. I gratefully acknowledge Professor Phillip Capper and Robert Fenwick-Elliott for their thoughtful comments on an earlier draft of this paper.

(2) 13 January 2000.

(3) [2002] EWCA Civ 11

then in what circumstances (if any, given *Levolux*) can those terms nullify the decision of an adjudicator?

Second, if there are a series of (potentially but not necessarily conflicting) adjudicators' decisions requiring enforcement, then does one enforce by claiming the overall financial balance by (i) say, for example, reducing the amount of the first decision by the amount of the second decision, or (ii) claiming the amount of the first decision in full and then immediately repaying the difference between the first and second decision? This approach may of course lead to a different outcome if the earlier decision contains an error or errors which were rectified (or not, or indeed compounded, as the case may be) by the later decision. If, adopting the second rationale (and so treating each decision like a debt), then a simple balancing calculation is carried out such that any errors in earlier decisions will not be eradicated.

Third, how should one plead the case for the enforcement of an adjudicator's decision? Can it be done by simply referring to the adjudicator's decision in itself, or is one relying upon the underlying contract and in particular its terms? Fourth, there may be limitation issues. If a limitation defence is available in respect of a cause of action under the contract itself, then will that defence be available in respect of a later (still within time, thus potentially avoiding the limitation defence) adjudicator's decision. Will it be sufficient simply to rely upon the decision as creating a valid cause of action that will not be defeated by a limitation defence under the contract? Fifth, how does one deal with abatement and common law or equitable set-off?

Sixth, what is the position with regard to express competing contractual terms or set-off provisions? This last question may in part have been answered by the approach in *Levolux*, where the Court of Appeal held that the decision would be enforced regardless of competing contractual terms.

In the first scenario the cause of action for enforcement proceedings is the contract between the parties and not the adjudicator's decision itself. The court is being asked, usually in the context of CPR Part 24 summary judgment proceedings, to review the "package" of contract terms, the sequence of events and the adjudicator's decisions. In the second scenario the court is taking the view that it is the adjudicator's decision in itself that is being enforced (albeit in the circumstances of the contract between the parties) but to the exclusion of any terms of the contract, and so is treating the adjudicator's decision (one that decides that a payment is to be made by one party to the other) like a debt. Or, in the third scenario, as an express or implied contractual promise to pay pursuant to the contract, although the decision is not a cause of action in its own right.

An adjudicator's decision as a debt

Little guidance is given in the Act as to the status of an adjudicator's decision. Section 108(3) merely states that decisions of the adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or litigation or by agreement. Section 108(3) does not, therefore, deal directly with enforcement but with the relationship between adjudication and arbitration or litigation (and of course settlement) in respect of the same dispute. It does, however, lay the ground for enforcement by use of the words "until final determination the decision is binding". Quite what this means in terms of enforcement is not entirely clear, but rationally it could be taken to mean that until the contractual dispute between the parties, which is the subject of an adjudicator's decision, is heard afresh in litigation or arbitration (or an amicable settlement is

reached), that adjudicator's decision shall contractually bind the parties. If this is right then the cause of action for the enforcement of any adjudicator's decision is arguably the contract between the parties.

By comparison, the Arbitration Act 1996 sets out a fairly detailed code, in sections 66-71 inclusive, dealing with the powers of the court in respect of arbitral awards. Section 66 provides that:

> an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court.

In section 67(3) the court may enforce an arbitration award, vary it, or set it aside in whole or in part if there is a question of substantive jurisdiction. The Housing Grants, Construction and Regeneration Act 1996 makes no such provision for enforcement.[4]

It now appears to be settled law that an action to enforce an arbitral award is an independent cause of action, notwithstanding that it arises from the breach of an implied term of the contract to honour the award.[5] The question is whether adjudication as a method of dispute resolution has been singled out from the other dispute resolution techniques by virtue of the statutory footing thus being elevated to a similar status of arbitration such that an adjudicator's decision enjoys the right to be independently enforced. The pre-HGCRA position was that any adjudicator's decision given under the previous editions of the DOM/1 form of contract was "ephemeral and subordinate" making "it impossible for a decision to describe as an award on an arbitration agreement".[6] On the other hand, there is nothing to stop the court from deciding that an adjudication process is in fact arbitration. It is the substance of the procedure not merely the form. In the pre-HGCRA case of *Cape Durastell Limited v Rosser & Russell Building Services Limited*[7] it was held that a contractual adjudication procedure could well amount to an arbitration agreement depending upon its construction. What then is the post-HGCRA position?

In the case of *VHE Construction plc*, VHE applied for summary judgment for sums claimed by way of enforcement in respect of two adjudications.[8] Several issues arose, the third of which was whether VHE were automatically entitled to the amount applied for, or whether RBSTB were entitled to pay a lesser amount by relying on a right of abatement or a "proper" assessment of the valuation to clause 30.1 and 30.2a of the contract in question. His Honour Judge Hicks QC considered that this raised the two questions. First, the construction and effect of the decision in this particular case, and more importantly, second whether the adjudicator's decision gave rise to an independent obligation for the payment of money, which was distinct from the contractual obligations in dispute. The second question was not merely confined to the facts of the particular case but concerned the status of adjudicators' decisions in themselves.

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(4) This is not strictly true. Paragraph 24 of the Scheme provides that section 42 of the Arbitration Act 1996 shall apply subject to certain modification which simply rewords Section 42 of the Arbitration Act so as to make it available in adjudication. The paragraph, therefore, as reworded in the Scheme provides that unless the parties agree otherwise then the court can make an order requiring a party to comply with the decision. This provision is rarely if ever relied upon, and is viewed by many in the industry as somewhat obscure.

(5) *Agromet Motoimport Limited v Maulden Engineering Co (Beds) Limited* [1985] 2 All ER 436 and *IBSSL v Minerals Trading* [1996] 1 All ER 1017.

(6) *Cameron Limited v John Mowlem & Co.* (1990) 52 BLR 24, CA.

(7) 47 Con LR 75.

(8) 13 January 2000

In *VHE Construction*, there had been two sequential adjudications. In the first adjudication the adjudicator accepted the defendant's submission that it was entitled to withhold money until VHE delivered a VAT invoice in accordance with the payment provisions in the contract. The delivery of a VAT invoice was a condition precedent to payment. The adjudicator decided that VHE would be entitled to payment within 28 days of receipt of the VAT invoice. The defendant argued that the decision could only amount to a declaration as to the effect of the contractual provisions. If that approach was right, then VHE would need to commence a court action under the contract in order to obtain the payment. Proceedings to enforce payment of the decision would be a waste of time. His Honour Judge Hicks QC considers that it was implausible that the statutory purpose of section 108 of the Act would be that "either of the parties or the adjudicator intended his decision to be vacuous", and went on to state:

> …so far from that being the case here the evidence is predominantly, if not entirely, the other way. I therefore conclude that the effect of Mr Linnett's decision was to require RBSTB to pay the sum of £1,037,898.05 to VHE within 28 days after receipt of the appropriate VAT invoice, that is to say, in the event, by 4th November 1999.[(9)]

In effect, summary judgment was given for the payment of a sum not actually due at the date of the decision because of an unfulfilled condition precedent in respect of the awaited VAT invoice. But, there had been a second adjudication. In that decision the one million pound odd had been revalued to £254,831.83. The judge therefore had to consider the effect of the second adjudicator's decision. There were two views as to its effect. First, the amount of the first decision was reduced to the amount of the second decision, or, second, the amount of the first decision was to be paid in full, and the difference between the first decision and the second was to be immediately repaid. His Honour Judge Hicks QC preferred the second option. This appears to be on the basis that the second adjudicator did not have any jurisdiction to revise the first adjudicator's decision. He therefore concluded that the first adjudication decision remained valid and enforceable.

His Honour Judge Hicks QC came to the conclusion that enforcement proceedings in respect of an adjudicator's decision were "proceedings to enforce a contractual obligation, namely the obligation to comply with the decision".[(10)] This initially appears to be consistent with the first approach to the analysis of the implication of the second adjudication upon the first. Arguably however, the implication of this rationale is that the decision of an adjudicator should be enforced pursuant to the contractual rights of the parties, but it is not the contractual obligations between the parties in respect of the determination of the amount due that is being reassessed and then enforced. It is His Honour Judge Hicks QC's view that each decision remains valid and enforceable that leads one to conclude that this judgment supports the proposition that an adjudicator's decision creates a debt that must be paid regardless of the terms of the contract between the parties and any set-off.

An adjudicator's decision not in itself a cause of action

However, this approach was not followed in the case of *Glencot Developments and Design Co. Limited v Ben Barrett and Son (Contractors) Limited.*[(11)] In that case His Honour Judge LLoyd QC

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(9) Paragraph 43

(10) Paragraph 34

(11) (2000) BLR 207.

held that the cause of action was the right or the obligation in dispute. In other words, the cause of action was and is the underlying contract not the adjudicator's decision itself. The same judge had to consider this same issue again in the more recent case of *David McLean Housing Contractors Limited v Swansea Housing Association Limited*.[12] This time His Honour Judge LLoyd QC was referred to the approach of His Honour Judge Hicks QC in *VHE Construction*, and in particular to His Honour Judge Hicks QC's statement that a residual right to set-off liquidated damages does not exist against an adjudicator's decision. Adopting this rationale, the claimant argued that the adjudicator's decision created a debt, and so the cause of action was in respect of the payment of that decision pursuant to the contract. His Honour Judge LLoyd QC did not agree, considering that his approach in *Glencot* was correct such that the summary judgment application in *McLean* was not strictly for payment of the adjudicator's decision, but was a claim for the unmet claim for payment application 19 which was supported by the adjudicator's decision. Enforcement was therefore sought for the right under the contract that had not been met by the defendant, and that was the claimant's right to payment under the contract. He supported this view with five arguments:

1. An adjudicator does not have power under "the Scheme"[13] to modify a contract. Therefore, the adjudicator makes a decision about the dispute under the contract, or in connection with it in respect of some rules. So the adjudicator's decision is about the rights and liabilities of the parties under the contract.

2. Paragraph 20 of the Scheme expressly allows the adjudicator to review certificates. Without this power the adjudicator would not be able to review those certificates, as the adjudicator would merely be making a decision about matters in dispute under the contract at a particular time.

3. The only manner in which an adjudicator can modify the contract is in respect of the time for compliance with his decision. This is because a shorter time may be appropriate in respect of payment, as the amount should have been paid.

4. Chadwick LJ's analysis in *Bouygues v Dahl Jensen*[14] in the Court of Appeal supported His Honour Judge LLoyd QC's view by considering that adjudication is a "summary procedure for the enforcement of payment provisions due under a construction contract"[15] and "an adjudication decision is capable of being re-opened in subsequent proceedings".[16]

6. There is a distinction between arbitration and adjudication, in that the decision of an adjudicator is not an arbitration award, and does not enjoy the status of an arbitrator's award. Further, arbitration awards may be final in that they are usually given a long time after the work has been completed and in respect of all matters in dispute between the parties. On the other hand, adjudicators' decisions are given along the way and often in respect of discrete matters, which may continue to resurface during the project and after completion.

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(12) 27 July 2001

(13) Scheme for Construction Contracts (England & Wales) Regulations – SI 649 (1998)

(14) [2000] BLR 522

(15) Page 525 of Chadwick LJ's judgment in *Bouygues*

(16) Page 525 of Chadwick LJ's judgment in *Bouygues*

His Honour Judge LLoyd QC held that the decision was not in itself a cause of action. The decision was of temporary effect and should be enforced, but the claimant may, at some future date, have to establish its rights, and cause of action pursuant to the contract in respect of its particular claim. An action to enforce an adjudicator's decision is an action to enforce the right or the liability that has been upheld by the adjudicator in the adjudicator's decision not the decision itself.[17]

This is of course one approach, which, it is respectively submitted, has much to commend it. If one were to enforce each adjudicator's decision without question then important issues that may come to light during the course of the progression of a project could be potentially ignored. Further, attempting to unravel the complexities of multiple decisions, all of which must be treated as enforceable, could lead to unjust results in the face of mistakes not just between the parties in respect of valuation, payment notices and withholding notices, but also in respect of the reasoning at the time of the adjudication decisions, perhaps based on incomplete information and argument. It certainly makes more sense to treat an adjudicator's decision as a *highly persuasive snapshot* of the rights and obligations between the parties at a particular time during the chronology of the project. The problem, of course, is that an adjudicator's decision is not according to the HGCRA a *highly persuasive snapshot*, but is "binding until the dispute is finally determined by legal proceedings, by arbitration….. or by agreement".[18]

The important distinction between the approach of His Honour Judge Hicks QC and that of His Honour Judge LLoyd QC is that the latter's approach appears to be that a claimant seeking summary judgment in respect of an adjudicator's decision is asking the court to enforce the obligation between the parties on the basis that an adjudicator has decided what those obligations mean at a particular time during the project and has decided what sum is due. From this perspective, it is the rights, obligations and adjudicator's decision that are being enforced as a "package".[19] According to this approach, the court is not giving judgment for the sum set out in the adjudicator's decision regardless of the obligations between the parties. So in this respect the enforcement of an adjudicator's decision is unlike the enforcement of an arbitrator's award.

However, the ramifications of this approach are that a subsequent valuation (where periodic monthly valuations apply) could in effect supersede the decision of an adjudicator in respect of the previous valuation. A carefully constructed valuation and/or withholding notice might therefore effectively nullify an adjudicator's decision just in time for the paying party to avoid the effects of enforcement.

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(17) Paragraph 19

(18) Section 108 (3)

(19) The "package" approach remains consistent with the Court of Appeal's approach in *John Roberts Architects v Parkcare Homes (No 2) Limited* [2006] EWCA Civ 64, CA. That case concerned the awarding of inter-party costs in an adjudication. The contract provided that "The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision." Parkcare withdrew from the adjudication before the adjudicator issued his substantive decision. John Roberts claimed its costs. At first instance HHJ Havery QC in the TCC held that there could be no award of costs because there had been no substantive decision (from which costs could be directed) and once the adjudication was at an end the adjudicator was *functus offico* and so lacked jurisdiction to direct the payment of costs. The Court of Appeal did not agree. They held that "as part of his decision" meant no more than as part of that which the adjudicator could decide. Further it did not make commercial sense that a party could abandon its claim at the eleventh hour with no cost consequences. Where the adjudicator has a contractual power to direct the payment of legal costs as part of his decision he can then direct that payment after the giving of his written decision. That direction will be enforced as part of his decision, the cause of action being the underlying express contract.

So, how will the court deal with the enforcement of an adjudicator's decision and a conflicting subsequent interim certificate, or subsequent withholding notice arising from a subsequent interim certificate, or two adjudicators' decisions in respect of sequential interim valuations? Assume that the payment mechanism of the contract requires a gross valuation, subject to deduction for (amongst other things) previous amounts paid.[20] Each monthly valuation therefore values the project afresh in order to reduce the chance of a duplication of errors. If, for example, the contractor, considering that its work had been undervalued, referred the matter to adjudication and received a favourable decision, the decision would not be issued until after the next valuation.

If a similar "under valuation" occurred at the next valuation, then the contractual machinery requires that this next valuation supersedes the previous valuation, and so if the cause of action is the contract and the adjudicator has been asked to decide (or has already decided) the amount of the first valuation the subsequent valuation should nullify the adjudicator's decision. This is because the adjudicator is deciding the amount due pursuant to the contract and in particular the terms of the contract dealing with valuation.[21] If this month's gross valuation supersedes last month's gross valuation then this month's valuation must supersede an adjudicator's decision if that decision is merely a restatement (albeit the adjudicator's restatement) of last month's valuation based on the contract terms.

There is an exception to this general principle. If the adjudicator had jurisdiction to decide (and did decide) some point of valuation principle (rather than merely the valuation amount) such as, by way of two examples, the applicable star rates[22] for certain work or whether a part of the works was defective, then that part of the adjudicator's decision could bind the parties in respect of subsequent valuations. Much will therefore turn on the nature of the dispute and the drafting of the notice of intention to refer that dispute to adjudication. If the question is how much should be paid for the interim valuation the entire decision will be superseded by the subsequent valuation. If certain points of principle are decided, for example the fixing of star rates, then that part of the decision must be binding for the purpose of future valuation whether carried out by the parties or by adjudication.

The Court of Appeal case of *Parsons Plastics (Research & Development) Limited v Purac Limited*[23] touches on the question of the status of an adjudicator's decision, although not directly. This was an appeal from the TCC, which refused to enforce an adjudicator's decision in favour of a sub-contractor, and refused a stay to arbitration. The Judge granted the main contractor respondent

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(20) This is most commonly encountered in the industry and the standard forms of contract. For example, arguably the most widely used standard form of contract is the JCT Standard Form of Building Contract 1998 edition, which states at clause 30.2 "the amount stated as due in an interim certificate, …. shall be the gross valuation …". The majority of the JCT family of standard form of contracts adopt a similar approach. The JCT With Contractor's Design 1998 Edition provides the alternatives of stage payments or periodic payments, but both are based upon the gross valuation method.

(21) See *William Verry Limited v North West London Communal Mikvah,* unreported 11 June 2004 TCC, HHJ Thornton QC. That case concerned an adjudication in respect of the release of retention. The adjudicator was wrong to consider that he was bound by an earlier adjudicator's decision relating to the previous interim valuation. The contractual valution machinery required the works to be valued gross, before then considering the amount of retention and whether any other adjustment was required due to an allegation of defects.

(22) A "star rate" is a rate (amount of money per measurement unit) inserted against a new item in a valuation or final account because that item was not included in the priced bill of quantities or schedule of rates. The rate is therefore identified by an asterisk so that the other party's surveyor can easily identify the rate and agree it or negotiate an acceptable rate.

(23) 12 April 2002

summary judgment for their money claim, and ordered an interim payment of £12,000 in their favour.

The main contractor, Purac Limited, was engaged by Anglia Water Services for the design and construction of a sewage treatment plant. Purac then engaged Parsons Plastics as a subcontractor for an odour control package. The subcontract works progressed slowly. In addition and at the request of the subcontractor, Purac paid the sum of £30,963 direct to the subcontractor's steel supplier. On 20 December 2000 the subcontractor applied for a payment, claiming £261,749.76 in respect of a certain milestone. The main contractor declined to pay, claiming on 21 December that the works had not reached the required stage. On 11 January 2001 Purac gave notice that they were taking over the works, and employing others to complete the works. The following day the subcontractor was ejected from site.

An issue arose in respect of the jurisdiction of the adjudicator on the ground that the work was not a "construction operation" as defined in the Act. However, Purac's solicitor confirmed that they would submit to the jurisdiction of the adjudicator, and there was therefore an ad hoc referral.

The adjudicator's decision was given on 17 May 2001. He decided that the subcontractor was entitled to a payment of 40% of the value of the completed works. In addition, he also decided that Purac's letter of 21 December 2000 was not a payment notice, nor a withholding notice within the terms of the contract. On 23 May 2001 Purac issued a notice of its intention to withhold payment of the sum awarded in the adjudicator's decision. They claimed £303,000 which had been paid to another subcontractor who had completed Parsons' work. The central issue in the Court of Appeal was whether Purac was entitled to the defence of the set-off raised after the date of the adjudicator's decision.

Lord Justice Pill (Mummery and Lathom agreeing) concluded that the Judge had reached the correct conclusion. He stated that it is acceptable for the respondent to set-off against the adjudicator's decision "any other claim they have against the appellants which had not been determined by the adjudicator". The adjudicator's decision could not be re-litigated in other proceedings but, on the wording of this subcontract, could be made subject to set-off and counterclaim. The appeal was therefore dismissed.

Care is, however, needed in respect of this case. It could be said that it turns on its own facts, in particular the terms of the contract in question. It was not a statutory adjudication, but was a contractual adjudication. Further, decisions of the contractual adjudicator were to be "final and binding" and so not subject to the usual potential for a fresh hearing in arbitration or litigation.[24] The contract, however, provided that set-off and abatement were always available, and so the common law rights to equitable common law set-off were quite clearly available. It may be this last feature that led the Court to accept a set-off against the adjudicator's decision. Nonetheless the Court of Appeal did not specifically address nor answer the question of the status of an adjudicator's decision. What is clear is that there is arguably a distinction in status between a decision of an adjudicator covered by the HGCRA and a purely contractual adjudication outside of the HGCRA.

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[24] In light of the House of Lords decision in *Beaufort Developments v Gilbert Ash (NI) Limited* [1999] 1 AC 266 HL; [1998] 2 WLR 860; 1998 2 AER 778; 83 BLR 1; (1998) CILL 1386 it is highly likely that a court will find that the parties are bound by a decision or certificate that is expressed to be "final and binding" or "final and conclusive".

The case of *Bovis Lend Lease Limited v Triangle Development Limited*[25] deals directly with the issue of the status of a decision because in that case His Honour Judge Thornton QC has to consider two conflicting adjudicators' decisions. Bovis was a management contractor employed by Triangle for the fit-out of three Victorian schools into three residential apartments. The contract was in the form of the JCT Standard Form of Management Contract 1998 Edition. The contract contained, at clause 7.6.4.1, a clause which stated that any further payment or release of retention would not apply as a result of the determination of the contractor's employment.

A dispute arose in respect of the valuation of two interim certificates, in which the architect had reduced certain sums so that each of the two certificates certified a negative value to Bovis. The architect also served a notice on Bovis to the effect that they were failing to proceed regularly and diligently with the works. Triangle then issued a withholding notice in respect of liquidated and ascertained damages following a certificate of non-completion. Bovis claimed that Triangle had repudiated the contract by engaging new contractors, and that Bovis had accepted that repudiation.

During this period three adjudications were being progressed. The first related to the negative interim certificates, the second in respect of Triangle's claim that Bovis was in breach for a requirement to provide documents and the third relating to the question as to whether the contract had been repudiated.

A variety of questions arose, but one central question related to the status of an adjudicator's decision. The first adjudicator's decision was in conflict with the third in respect of the payments of sums due. The first decision related to the interim valuation, whilst the third related to payments of sum due as a result of the accounting process arising from the determination of the contract. His Honour Judge Thornton QC held:

1. That as a general rule, the decision of an adjudicator that money must be paid gave rise to a separate contractual obligation of the paying party to comply with the decision;

2. That an effective withholding notice, given before the adjudication notice was given, or in some instances before the decision was issued, would normally be required in order to withhold against an adjudicator's decision;

3. It was possible for the contractual terms between the parties to supersede or provide a right to deduct from a payment directed to be made by an adjudicator;

4. If such a superseding contractual right had existed then an earlier decision of an adjudicator would not be enforced or would be stayed;

5. In this case Triangle was entitled to rely on clause 7.6.4.1 (or the adjudicator's third decision) in order to withhold sums against the first adjudicator's decision;

6. A contention that the determination of Bovis' employment was invalid or a nullity was not sufficient to entitle Bovis to defeat Triangle's reliance on clause 7.6.4.1 unless there was an adjudicator's decision, or sufficient evidence.

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[25] 2 November 2002.

The Court of Appeal has now considered the status of an adjudicator's decision when it conflicts with "superseding" clauses in the contract in the case of *Levolux AT Limited v Ferson Contractors Limited*.[26] This was an appeal from the summary judgment decision of His Honour Judge Wilcox on 26 June 2002 enforcing an adjudicator's decision. The question in this appeal was whether the adjudicator's decision should be enforced in derogation of contractual rights which could be in conflict with the decision.

The defendant raised several issues by way of appeal. First, they argued that the contract had been validly terminated, and so the adjudicator's decision was inconsistent with the determination. Lord Justice Mantle held that that argument was rejected, as the judge had held that there had plainly been no valid determination. It was the adjudicator's first instance decision that payment should be made, on the basis that the withholding notice was invalid. That meant that the subcontractor had a right to suspend such that the contractor did not have a right to determine the contract for wrongful suspension.

Second, the defendant argued that there were some exceptions to the principle that an adjudicator's decision is binding and enforceable pending final resolution by arbitration or litigation. In respect of this appeal, one of those exceptions was that the terms of the contract take precedence over the obligation to make a payment in accordance with the adjudicator's decision. This exception was based upon His Honour Judge Thornton QC's judgment in *Bovis Lend Lease v Triangle Developments*.[27] Lord Justice Mantell considered that case and the cases upon which *Bovis* relied. He came to the conclusion that the logic in the cases relied upon by His Honour Judge Thornton QC was insufficient to support the conclusion reached in *Bovis*, and then stated:

> But to my mind the answer to this appeal is the straightforward one provided by Judge Wilcox. The intended purpose of s.108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and His Honour Judge Thornton are right, that purpose will be defeated. The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out a particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision.[28]

Lord Justice Mantle therefore construed the terms of the contract so as to give effect to the adjudicator's decision, and so held that the determination clauses must be read as not applying to amounts due by reason of the adjudicator's decision. As a result he therefore dismissed the Appeal. Lord Justice Longmore and Lord Justice Ward agreed. Lord Justice Longmore also stated that the parties had agreed in their contract to be bound to honour the adjudicator's decision by virtue of clause 38A.9. That clause stated that the parties had agreed to comply with any decision of an adjudicator notwithstanding the arbitration clause. Lord Justice Longmore considered that if Ferson had a genuine grievance with the enforcement of the decision then that grievance should be referred to arbitration but a stay in respect of the litigation for the purposes of the summary

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(26) 22 January 2003, [2002] EWCA Civ 11, Court of Appeal (Civil Division).

(27) 2 November 2002.

(28) Paragraph 30

judgment enforcement of an adjudicator's decision would not be ordered because of the terms of clause 38A.9.

Lord Justice Longmore gave effect to the terms of the contract, by which the parties had agreed in clause 38A.9 to pay an adjudicator's decision. On the other hand, Lord Justice Mantle favoured the view that the purpose of the HGCRA is that the decision of an adjudicator must be paid and that any conflict with that principle under the terms of the contract could mean that the conflicting term of the contract is struck out or preferably read as not applying to the adjudicator's decision. In effect, the express agreement to pay an adjudicator's decision was given precedent above all other terms between the parties. But, in the absence of an express obligation to honour an adjudicator's decision, will the court imply an overriding obligation to pay an adjudicator's decision in order to give effect to Parliament's intention?

Many have argued that *Levolux* supports the proposition that providing the adjudicator has jurisdiction then all adjudicators' decisions are to be strictly enforced (in the expert determination sense). This is regardless of the wider circumstances of the contractual relationship between the parties. The approach of the Court of Appeal in *Levolux* suggests that non-payment of a single adjudicator's decision provides sufficient grounds in the vast majority of cases for the service of a statutory demand or winding-up petition as a potentially economic method for persuading the other party to part with its money. Could, however, a statutory demand be issued in respect of a series of adjudicators' decisions? The rationale of His Honour Judge Hicks QC in *VHE* and that of the Court of Appeal in *Levolux* suggests so. In that scenario, each and every decision is being fully enforced with a simple balancing calculation identifying the final amount to be paid.

An exception to this proposition may occur where the payment provisions provide that the final date for payment is, say, 28 days after the delivery of a valid VAT invoice for the amount certified. If an amount is not certified and the party applying for the certificate seeks an adjudicator's declaration as to the amount of the certification, obtains a declaration as to the amount of the valuation and then issues a VAT invoice, the responding party can issue a withholding notice (subject to the terms of the contract) five days before the final date for payment. There is therefore a period of 23 days for the receipt of the VAT invoice during which the responding party can issue a withholding notice and thereby defeat the declaration as to the amount of the valuation in the adjudicator's decision. This is precisely what happened in the recent case of *Shimizu Europe Limited v LBJ Fabrications Limited.*[29]

Her Honour Judge Kirkham considered that the adjudicator relied upon the payment mechanisms and did not purport to restrict Shimizu's right to withhold against that valuation even though the Adjudicator decided that that amount should be paid "without set-off". The adjudicator declared that the sum should be paid 28 days after the service of a valid VAT invoice. Her Honour Judge Kirkham therefore held that it was possible to withhold against the adjudicator's decision as a result of the payment mechanisms of the contract. The adjudicator clearly could not decide whether Shimizu's withholding would be valid as the withholding notice would not be issued until after the adjudicator had issued his declaration, (and was *functus officio*), and it was not possible for the adjudicator to decide liability and quantum in respect of some future withholding. At paragraph 31 Her Honour stated:

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[29] 2003] EWHC 1229 (TCC)

> I recognise the practical difficulties, namely that the VAT invoice would have to be raised before the amount of the interim payment had been ascertained, so that LBJ might have issued an invoice for a sum greater than that which they were awarded, and that, if LBJ had submitted a VAT invoice with their application, it would have advanced the date on which they would have had to account for VAT (which would have cash flow consequences). I accept that that is a harsh position, but it is one which neither the sub-contract nor the Act dictates you should not apply.
>
> I conclude that Shimizu were entitled to serve a withholding notice in relation to the sum which the Adjudicator decided would become due on delivery of the VAT invoice.[30]

The subcontractor could of course have issued a VAT invoice with its application in order to commence time running for the purposes of the payment mechanism. The liability for VAT in those circumstances is a very real and practical concern for subcontractors in that situation. Nonetheless, a credit note could be issued once the true valuation had been determined by the adjudicator. This, of course, would not stop a slight redrafting of the payment mechanism in order to defeat the subcontractor's pre-emptive service of a VAT invoice by requiring not merely a valid VAT invoice but a VAT invoice in precisely the amount of the valuation before the 28 days commences.

How then is the enforcement of sequential adjudicators' decisions to be approached?[31] In *Quietfield Limited v Vascroft Contractors Limited*, Mr Justice Jackson considered, amongst other things, the enforcement of the third adjudication between the parties. The interesting aspect of this case is that it was the contractual mechanism in respect of the extension of time that provided the answer to the question about whether the adjudication had jurisdiction in the first place.

There were three adjudications between Quietfield Limited (employer) and Vascroft Contractors Limited (contractor). During the works, Vascroft made two applications for an extension of time. In the first adjudication they sought an extension of time, but the adjudicator refused to declare that Vascroft were entitled to the extension of time. In the second adjudication Quietfield claimed liquidated damages in respect of the contractor's delay. Vascroft responded claiming an extension of time. A second notice of adjudication was not pursued. In the third adjudication they submitted a substantial 400-page document setting out numerous causes of delay. The adjudicator refused to consider Vascroft's submission on the basis that the extension of time had already been determined in the first adjudication.

Vascroft argued in these proceedings that the adjudicator's decision should not be enforced because the adjudicator had breached the rules of natural justice by refusing to consider Vascroft's submission in respect of the extension of time.

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(30) *Shimizu Europe Limited v LBJ Fabrications Limited* (29 May 2003) per Her Honour Judge Kirkham at paragraph 31 and 32.

(31) Unreported 2 February 2006, TCC.

Mr Justice Jackson reviewed case law[32] involving multiple adjudications in respect of similar issues before concluding that four principles should apply in respect of successive adjudications in relation to extensions of time:

1. If the contract permits successive applications for an extension of time on different grounds then, if dissatisfied, that issue can be referred to successive adjudications. The dispute will constitute the difference between contentions of the aggrieved party and the decision of the architect or contract administrator;

2. If successive applications for extensions of time are made on the same ground then this cannot be referred to successive adjudications;

3. If a contractor is resisting a claim for liquidated damages then the contractor may by way of defence rely upon an entitlement to an extension of time; and

4. A contractor cannot rely by way of defence in an adjudication upon an alleged entitlement to an extension of time, which has already been considered and rejected in a previous adjudication.

In this case Mr Justice Jackson concluded that the 400-page document was substantially different from the initial claims made for an extension of time in the first adjudication. As a result the adjudicator should have considered Vascroft's substantive defence, but he had failed to do so. On this basis, Mr Justice Jackson refused to enforce the adjudicator's decision even on a temporary basis.

The interesting aspect of this case is that it was the contractual mechanism in respect of the extension of time provisions that provided the answer to the question about whether the adjudicator had jurisdiction in the first place. The adjudicator has jurisdiction to deal with a second extension of time claim providing that it is made on different grounds from the first. In this respect, the adjudicator has jurisdiction to consider the dispute in the same way that the contract administrator has an obligation to consider the extension of time claim based upon the new ground.

Several recent judgments have considered whether to enforce an adjudicator's decision when decisions are awaited from adjudicators in respect of subsequent adjudications. In the case of *Interserve Industrial Services Limited v Cleveland Bridge UK Limited,*[33] Interserve sought summary judgment in order to enforce an adjudicator's decision. The defendant argued that they were entitled to withhold payment because they were pursuing a further adjudication, and they reasonably intended to recover an equivalent sum in that subsequent adjudication. Rule 4 of the CIC Model Adjudication Procedure provided that:

> The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

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(32) *Emcor Drake & Scull Limited v Costain Construction* [2004] EWHC 2439 (TCC), *David McLean Contractors Limited v the Albany Building Limited,* unreported 10 November 2005, and *William Verry (Glazing Systems) Limited v Furlong Homes Limited* [2005] EWHC 138 (TCC).

(33) 6 February 2006.

Cleveland Bridge argued that exceptionally clear words must be used in order to remove a right of set-off.[34] Further, that section 49(2) of the Supreme Court Act 1981 provided that every court must give effect to all legal rights of whatever nature subject to all claims and demands of whatever nature. However, section 49(2) is "subject to the provisions of any other Act".

The Honourable Mr Justice Jackson held that those words in section 49(2) of the Supreme Court Act 1981 took effect subject to the 1996 HGCRA. Sections 110 and 111 imposed limitations on what could be withheld from payments due under a construction contract. Even in a situation where there were successive adjudications, then:

> At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reached this conclusion both from the express terms of the Act, and also from the line of authority referred to earlier in this judgment (paragraph 43).

The award should therefore be enforced, and a stay of execution would not be granted. The case of *William Verry Limited v Northwest London Communal Mikvah* [2004] 1 BLR 308 was based upon special circumstances, and there would be no delay in drawing up the order in respect of this judgment in respect of *Interserve v Cleveland Bridge*.

The case of *William Verry Limited v The Mayor and Burgesses of The London Borough of Camden*[35] concerned the enforcement of an adjudicator's decision, but raises the issue of the status of an adjudicator's decision as a result of the operation of the final certificate provisions in the contract and a claim for defects that had not been considered by the adjudicator. In essence, could Camden defeat the adjudicator's decision because of a subsequent valuation and a claim for defects?

The building contract was for the refurbishment of a Victorian housing scheme in Holborn. The contract was in the form of a JCT Intermediate Form of Contract 1998 Edition incorporating Amendment 1 and TC/94/IFC. At practical completion, Verry had been granted an extension of time of 27 weeks and 5 days. There had been two adjudications. The first concerned an application for payment in June 2003 and the second, this time brought by Camden, concerned specific items of valuation. These enforcement proceedings concerned the third adjudicator's decision. That decision confirmed the extension of time, calculated the amount due at practical completion, the amount of retention, the amount of liquidated damages and then, identified a net payment, to Verry, together with interest.

Verry commenced a fourth adjudication in respect of the final certificate and Camden a fifth adjudication in respect of defects. The fourth adjudication had been stayed by consent, and at the time of the judgment, decision number five had not yet been issued.

Camden resisted the summary judgment application on three grounds:

1. The final certificate showed an amount due of £46,020.11 which was extinguished by Camden's liquidated damages claim;

2. The decision in the fifth adjudication in respect of defects was imminent; and

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(34) Relying on the House of Lords decision of *Modern Engineering v Gilbert Ash* [1974] AC 689.

(35) [2006] EWHC 761 (TCC).

3. Camden was concerned about Verry's financial ability to pay any amounts that may become due in Adjudication No. 4, should a repayment be ordered.

The first two questions concerned the status of an adjudicator's decision. In other words, could an adjudicator's decision be somehow defeated by the contract between the parties or a counterclaim for defects that had not been considered by the adjudicator?

Mr Justice Ramsey considered that the intention of Parliament was that adjudicators' decisions should be enforced, pending final determination, because of the use of the word "binding" in section 108(3) of the Act. He held that the word "binding" was intended to provide "a similar degree of compliance" to that of an arbitrator's award, while recognising that adjudication is not arbitration as a decision is not "final" but is "interim". He referred to and relied upon *Macob Civil Engineering Limited v Morrison Construction Limited*[(36)] and *Ferson Contractors Limited v Levolux AG Limited*.[(37)] He went on to say at paragraph 24:

> The intention of Parliament must be that the decision is binding and enforced at an interim stage. If the decision were no more than another contractual obligation, which could be breached or could be reduced or diminished by other contractual obligations, then the fundamental purpose of providing cash-flow in the construction industry will be undermined.

He was, therefore, following the approach of Lord Justice Mantell (at paragraph 31 of *Ferson v Levolux*) rather than the approach of HHJ Thornton QC in *Bovis Lendlease v Triangle Developments Limited*.

The question of whether the employer could deduct liquidated damages from an adjudicator's decision, had been considered by HHJ LLoyd QC in *David MacLean Housing Limited v Swansea Housing Association Limited*[(38)] and Mr Justice Jackson's subsequent decision in *Balfour Beatty Construction v Serco Limited*.[(39)] Two principles were derived by Mr Justice Jackson:

1. If it follows logically from an adjudicator's decision that an employer is clearly entitled to recover a specific amount by way of liquidated damages, then the employer may set that sum off against any money payable to the contractor pursuant to the adjudicator's decision. This will be subject to the employer giving the proper notices if and as so far as they might be required; and

2. If the amount of liquidated damages has not been determined (expressly or impliedly) by the adjudicator's decision, then the entitlement of the employer to set-off liquidated damages against the adjudicator's decision would depend upon the terms of the contract and circumstances of the case.

These principles were determined against the circumstances of *Parsons Plastic v Purac*[(40)]. In that case, an overriding contractual provision provided that Purac retained its equitable and common law

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(36) [1999] BLR 93
(37) [2003] BLR 118
(38) [2003] BLR 125
(39) (2004) EWHC 336
(40) [2002] BLR 334

rights of set-off. More importantly, the contract fell outside of the definition of a construction contract under the Housing Grants, Construction and Regeneration Act 1996, and therefore was not caught by the provisions of section 108. *Parsons Plastics,* therefore, turned upon the wording of the contract, section 108 having no impact upon the contract at all.

Mr Justice Ramsey referred to an adopted approach of HHJ Gilliland QC in *David MacLean Contractors Limited v The Albany Building Limited*[41] where he said "that there was a danger that an adjudicator's decision could be effectively rendered nugatory by simply raising a cross-claim which might or might not succeed at the end of the day.".[42] He went on to to make a distinction between a cross-claim that of course would be genuine but was not established and was therefore not a legal set-off, and a defence in equity and so an equitable set-off according to the principles of *Hanack v Green.*[43]

In respect of the final certificate, Mr Justice Ramsey considered that the subsequent issuing of the final certificate should not prevent the contractor from being paid properly at practical completion. The contract envisaged that an interim payment would take place at practical completion and that the contractor would be paid the amount properly due. The mechanics of the final certificate and final payment operated after the payment of the amount properly due at practical completion. He held that an adjudicator's decision should not give way to a disputed final certificate valuation. There were a number of reasons for this conclusion:

1. An adjudicator's decision should, *prima facie*, be enforced;

2. If an adjudicator's decision were subject to the view of a contract administrator or quantity surveyor at a subsequent decision, then the intention of Parliament would be defeated;

3. Clause 9A.7.2 requires the parties by agreement to comply with the decision. The preserved rights were not prejudiced by compliance as compliance was on an "interim provisional basis";

4. Sums due under Clause 4.3 at practical completion could not be prevented from payment on the basis of subsequent operation of the final certificate; and

5. Adjudication No. 4 was commenced within 28 days of the final certificate. As a result, the final certificate could not be said to be conclusive.

In respect of defects, Mr Ramsey noted that Camden did not raise the issue of defects in Adjudication No. 3. As they had not been raised, Camden could not be in a better position by attempting to set-off a "disputed, unliquidated counter-claim against the adjudicator's decision". Camden therefore could not resist payment of Adjudication No. 3 on the basis of the unliquidated disputed counter-claim for defects, nor on the basis of a final certificate which did not have a conclusive effect.

Finally, Verry demonstrated that they were a company of substance and so a stay was inappropriate.

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(41) Unreported 10 November 2005

(42) Paragraph 29 of the judgment

(43) [1958] 2 QB9

This is a useful decision for Mr Justice Ramsey in respect of the status of an adjudicator's decision. An adjudicator's decision is almost elevated to that of an arbitrator's award on the basis that the decision is "binding" under section 108(3) of the Act and so the intention of Parliament must have been that an adjudicator's decision was provided with a similar degree of compliance by the parties. The distinction between an adjudicator's decision and an arbitrator's award was that an adjudicator's decision, whilst binding, was "interim" not "final".

The more interesting aspect is that the decision should be enforced regardless of the subsequent final account valuation procedures. The quantity surveyor did not agree with the adjudicator's approach and so in the subsequent valuation, adopted different values to many of the items. Verry argued that the quantity surveyor was now bound by the detail of the adjudicator's interim valuation and had to adopt the values given to each specific item. This is an interesting question which frequently arises where there has been an interim account adjudication and the employer is attempting to claw back those items where there is a perceived over-valuation.

Mr Ramsey's approach was that a subsequent interim certificate did not prevent the contractor from being paid properly at practical completion. It is a small step of logic therefore to suggest that a subsequent interim certificate does not stop a contractor being properly paid for a previous valuation. The amount being paid is the sum properly due at the date of the valuation. An adjudicator's decision in respect of the next valuation would be required in order to defeat the first adjudicator's decision, bearing in mind that subsequent adjudicator's decisions are bound by previous adjudicators' decisions.

While this case touches on the issue of an adjustment to the value in a subsequent valuation, it does not deal with how a quantity surveyor is to approach that subsequent valuation. The most sensible approach is that the quantity surveyor should really adopt the approach of the adjudicator, as a subsequent adjudicator will be bound by the decision of the first.

Where a series of adjudicators' decisions have been given, then what if some of the adjudicators' decisions contain errors? Those who afford *Levolux* wider interpretation argue that the court will enforce all of the decisions, errors and all, in order to establish what amount if any is due to be paid and to whom. The purpose of superseding contractual machinery within construction contracts, in particular the final account process taking precedence over the frequently encountered gross monthly valuation machinery, was to provide an opportunity at the end of the project to flush out such errors during the final account process.

Further, the gross monthly valuation process is also designed to provide an opportunity to correct errors that may have crept into previous valuations. It is important to remember that the Court of Appeal in *Levolux* was only considering the position with regard to one adjudicator's decision by comparison to the terms of the contract. It will be interesting to see how the Court of Appeal deals with a conflict in adjudicators' decisions, for example like those faced by His Honour Judge Thornton QC in *Bovis*.

Nonetheless, it appears clear from *Levolux* that a party who considers that events subsequent to an adjudication have nullified or superseded the decision may need to commence a further adjudication if there is to be any chance of persuading a court that the first adjudication has been superseded. While this might be possible during the course of the project in respect of interim

valuations, it is unlikely in respect of a final account given the timescales required by contracts for the preparation and settlement of the final account, of course remembering that those processes must be exhausted before a dispute can crystallise for the purposes of adjudication.

Until finally resolved in summary judgment?

In certain circumstances it may be possible to adopt the alternative approach of considering the conflicting issues afresh in summary judgment. The usual method of enforcement is to commence litigation pursuant to Part 7 or Part 8 of the CPR and then immediately applying for summary judgment in accordance with Part 24.[44] The basic question is, should the decision be enforced in the summary judgment proceedings? If the basis of enforcement is the underlying contract (rather than the decision itself) then it must be possible to hear afresh any element of the dispute provided that the argument is before the court and the court has adequate time to deal with it in the limited time available for summary judgment applications.

Since *Macob*, the frequent practice of enforcing the decision of an adjudicator has been to commence proceedings in court (usually the TCC) and then immediately apply under CPR Part 24 for summary judgment. The grounds for summary judgment are set out in CPR Rule 24.2:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed at trial.

The claimant, when contending that the decision of an adjudicator should be enforced summarily, therefore has to satisfy two hurdles. First, that the defendant has no real prospect of successfully defending his failure to comply with the decision, and the second, there is no other reason why the case should not go for trial. If successful then the judgment may be enforced like any other court judgment.

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(44) For the enforcement of an adjudicator's decision a claimant does not need to comply with the Pre-action Protocol for Construction and Engineering Disputes. If the contract contained an arbitration clause then a party must in theory be able to apply pursuant to section 9 of the Arbitration Act 1996 for a stay of litigation based upon the approach of the Court of Appeal in *Halki Shipping Corporation v Sopex Oils Limited* (1997) CILL 1278. A section 9 stay is practically mandatory, so one would then be forced to enforce the decision in arbitration, presumably asking for an immediate interim award that can then be enforced in the court if necessary. Most of the adjudication cases that have been reported or are available have arisen under the default mechanism of the Scheme in the absence of an arbitration clause, or under a standard form that has been carved from the arbitration clause such that they can be enforced in the court. For example, see Article 7A of the JCT 1998 Edition which states "… if any dispute or difference …, except in connection with the enforcement of any decision of an Adjudicator appointed to determine a dispute or difference thereunder, shall arise between the parties … it shall be referred to arbitration …". Presumably, if the decision were enforceable in its own right independent of the contract then if there were an arbitration clause in the contract (without the exception) the decision could be enforced in the court.

The prospect must be "real" in that the court will ignore arguments that are fanciful or imaginary. It essentially means that the defendant has to have a case that is better than merely arguable.[45]

On the other hand, one does not need to show that the case will probably succeed at trial. The hearing of a summary judgment application is not a "mini trial" nor a "summary trial". The court only considers the merits of the case to the extent necessary to determine whether there is sufficient merit to allow the case to proceed to trial.[46] For a defendant to successfully obtain the dismissal of the application he must show that his chances of success of trial are "realistic" rather than "merely fanciful".[47]

The large majority of cases dealing with the enforcement of an adjudicator's decision are dealt with under the summary judgment procedure set out at CPR Part 24. The initial cases before the court dealt with enforcement issues in a very purposive and robust manner, and that trend has in the main continued.

In one of the early adjudication cases of *Outwing Construction Limited v H. Randell & Son Limited* HHJ LLoyd QC found that it was acceptable for a claimant to abridge time for service for acknowledgement to just two days after the return date of the summons and abridge time down to seven days for the defendant to adduce evidence in opposition to the summons when applying for summary enforcement of an adjudicator's decision.[48] His Honour Judge LLoyd QC made it clear that it might not be appropriate to abridge time in every case, but the practice is now frequently followed.

There may also be an express contractual provision requiring payment. For example, Lord Justice Mantell in the case of *Levolux AT Limited v Ferson Contractors Limited* held that the terms of the contract must be construed so as to give effect to the adjudicator's decision.[49] In doing so he held that the determination clauses must be read as not conflicting with an adjudicator's decision, but also noted that the parties had expressly agreed to be bound by the decision of an adjudicator.

While summary judgment may be given for the whole of the claim or a particular issue, it may also be advisable to consider requesting an interim payment application at the same time as seeking summary judgment. This would only occur if there were some doubt as to the enforceability of the adjudicator's decision, and it appeared clear that in any event an amount of money should be paid because of an absence of a defence for a particular sum. Providing a request for an interim payment is made (usually at the time of applying for summary judgment) then the court may if the summary judgment is unsuccessful order a payment in any event.[50]

It is, therefore, possible to deal with the dispute afresh, or some element of the dispute afresh in a summary judgment application, and this is what HHJ Lloyd QC did in *Alstom Signalling Limited (t/a Alstom Transport Information Solutions) v Jarvis Facilities Limited*.[51] Alstom had been engaged as main contractor by Railtrack to design, manufacture and install plant for an extension to the Tyne

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(45) *International Finance Corporation v Utexafrican SRPL* [2001] LTL May 16.

(46) See Lord Woolf MR in *Swain v Hillman* [2001] All ER 91

(47) *Swain v Hillman*.

(48) Unreported (15th March 1999)

(49) [2002] EWCA Civ 11

(50) *Glencot Development & Design Co. Limited v Benn Barratt & Son (Contractors) Limited* [2001] BLR 207.

(51) [2004] EWHC 1285 (TCC), HHJ LLoyd QC.

and Wear Metro. Jarvis were subcontractors to Alstom for the design, supply, installation, testing and commissioning of signalling and telecommunications equipment. The form of contract was the IChemE Model Form for Process Plant, Sub-Contract, Second Edition 1997. A target cost summary applied. A dispute had arisen about the existence of and/or operation of a "pain/share" or "pain/gain" clause that was the subject of separate proceedings.

The matter was referred to adjudication and as a result Alstom complied with the decision paying Jarvis £1,695,501.50 and interest. The decision was expressed to be provisional and it was hoped that there would be dialogue between the parties in order to resolve the final account. Application No. 32 was then made in May 2003. Alstom asked that all documentation be sent to their Birmingham office in order to avoid delay. This was not done. Two notices of adjudication were served by Jarvis in January 2004 and in response Alstom cross-adjudicated. The separate enforcement proceedings were consolidated.

Jarvis argued that the decision in their favour should be enforced without further consideration. HHJ LLoyd QC held that there was not an absolute right to have an adjudicator's decision paid. Apart from jurisdictional challenges or the fact that a decision could be initiated by a failure to comply with the concepts of fairness (breaches of natural justice), a judge when considering a summary judgment application also needed to consider the overriding objective of CPR Part 1. To consider one summary judgment application in respect of an adjudicator's decision and then at a second summary judgment application to track back over old ground was inconsistent with the overriding objective of CPR Part 1. Further, if it were possible to resolve a point of law and determine it finally by way of summary judgment then the interests of the parties would be best served.

His Honour therefore considered how the payment provisions of the HGCRA operated and came to the conclusion that the decision of the adjudicator should not be enforced. This was because the adjudicator was asked to decide what sum was "due". The adjudicator decided that in the absence of a withholding notice Jarvis's application should be paid, but HHJ LLoyd QC held that the amount "due" was the amount identified in Alstom's certificate not the payment application of Jarvis.

The important point was that, when faced with an application to enforce a decision of an adjudicator, HHJ LLoyd QC considered that in a summary judgment application under CPR Rule 24, he could in reliance upon the overriding objective in CPR Rule 1 consider the arguments afresh in order to avoid the need to consider the facts and the law of the matter at an inevitable later stage.

Judicial review

The second Court of Appeal decision relating to adjudication, and touching on section 111 withholding notices was *C&B Scene Concept Design Limited v Isobars Limited,* 31 January 2002. The case concerned the jurisdiction of the adjudicator, and appeared to focus on appendix 2 of the JCT WCD. In the absence of the selection of either payment alternative A or B, the judge decided that the payment mechanism fell away and was replaced with the Scheme. The result was that the decision was not enforced.

At the summary judgment application in the TCC, three reasons for non-compliance with the adjudicator's decision had been advanced. First, since the parties had failed to select alternative A or B, the whole of clause 30 fell away, the provisions requiring the employer to give notice also fell

away, and the provisions of the Scheme applied. Second, failure to give notice did not preclude the employer from arguing that sums are not "due under the contract". Third, the adjudicator had asked the wrong legal question by failing to appreciate that clause 30 had been superseded by the Scheme.

Sir Murray Stuart Smith considered that the real question was whether the error on the part of the adjudicator went to his jurisdiction. He applied the law which has developed in respect of expert determination, citing the test set out by Knox J. in *Nikko Hotels (UK) Limited v MEPC plc*;[52]

> If he answered the right question in the wrong way, his decision will be binding. If he had answered the wrong question, his decision will be a nullity.

Sir Murray Stuart Smith concluded that the adjudicator was asked to decide the amount of the interim application number six. Within the scope of that referral the adjudicator may have made some errors of law along the way, but he had not exceeded his jurisdiction. He had decided the matter put to him and the decision would be enforced.

The Court of Appeal does not deal with the issues but instead refers to the law on expert determination and makes its decision on that basis. The question of whether clause 30 of the contract, or the payment provision of the Scheme, were to apply (and so a consideration of whether a valid withholding notice had been given) was not considered. Instead, the adjudicator had jurisdiction to consider which terms where to apply, and whether right or wrong, his decision would be enforced.

How "wrong" must a decision be before the court will intervene, if indeed the court would intervene at all? For example, if the parties delete the clause from the standard form in its entirety such that the only sensible conclusion must be the Scheme applies. However, the adjudicator nonetheless based his decision on the terms of the deleted provision. Can that "wrong" decision be one that is within the adjudicator's jurisdiction, or is it a decision that no reasonable adjudicator would make, such that a court would invoke the public law *Anisminic* principles? In the case of *Anisminic Limited v The Foreign Compensation Commission* Lord Reid said:[53]

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

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[52] [1991] 2 EGLR 103
[53] [1969] 2 AC 147

The courts have at first instance given some consideration to the applicability of the public law principles to adjudication. Lord Reed in the case of *Ballast plc v The Burrell Company (Construction Management) Limited* considered that Lord Reid's principles were applicable to adjudication, and provided some useful guidance for determining when an adjudicator might be able to make a decision that was both wrong in law and in fact, but should nonetheless be upheld, and those situations where the line had been crossed such that the decision was in excess of jurisdiction and unenforceable.[54] However, HHJ Seymour QC in the more recent case of *Shimizu Europe Limited v Automajor Limited*[55] rejected the public law approach of *Anisminic* or the *Wednesbury* principles.[56] This appears to be on the basis that the judicial review principles, whilst applicable in Scottish Law were not applicable in English law.

Another case considering judicial review is *London & Amsterdam Properties Limited v Waterman Partnership Limited*.[57] The Waterman Partnership Limited had been engaged by a deed of professional appointment dated 2 November 1998 to act as LAP's structural and civil engineers and traffic consultants for the development of Mid-Summer Shopping Centre in Milton Keynes. LAP maintained that Waterman failed to release substantial design information by specific dates and therefore had caused critical delay to the works. LAP claimed that Waterman were professionally negligent. The matter was referred to adjudication, and on 6 May 2003 the adjudicator decided that Waterman were to pay the sum of £708,796.95 (including interest), together with the fees of the adjudicator.

Waterman applied under CPR Part 8 for a declaration that the adjudicator did not have jurisdiction or exceeded his jurisdiction. LAP applied under Part 24 for summary judgment for the full amount of the adjudicator's decision.

Waterman argued that the adjudicator did not appreciate the distinction between an error and a finding of professional negligence. They argued that the judicial review cases of *Anisminic, O'ReilI v Mackman* and *ex parte Page* demonstrated that the adjudicator's decision should be reviewed. What other purpose would there be in the adjudicator ascertaining the relevant law if he were empowered to ignore it and then decide the decision on the basis of his own ideas? Waterman argued that the approach of *Macob* and the Court of Appeal cases (including *Bouygues v Dahl-Jensen***)** were inconsistent with the House of Lords' decisions in respect of judicial review, which were of higher authority. HHJ Wilcox considered that it was not within his power to interfere with the adjudicator's finding as he was bound by *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited*.[58] Neither was he prepared to come to a final view on this matter. He noted that "a review as to the working of the Act in practice is perhaps now timely".

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(54) 21 June 2001

(55) 17 January 2002

(56) *Wednesbury* unreasonableness relates to "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Per Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 734 House of Lords referring to *Associated Provincial Picture House Limited v Wednesbury Corporation* [1948] 1 KB 223.

(57) 18 December 2003, TCC, HHJ David Wilcox

(58) [2000] BLR 522

Gillies Ramsey Diamond and Gavin Ramsey and Philip Diamond v PJW Enterprises Limited is interesting because Lord MacFadyen has by this stage changed his mind about *Homer Burgess Limited v Chirex (Annam) Limited.*[59] This was a reclaiming motion from an interlocutor of Lady Paton in a petition for judicial review of an adjudicator's decision. The petitioners, Gillies Ramsey Diamond were a firm of building surveyors.[60] They had been employed by the respondents, PJW Enterprises Limited, as contract administrators for a building contract at 40 Stanley Street, Glasgow. PJW had entered into a building contract with R&R Construction (Scotland) Limited, the contractor.

During the course of the works there were five adjudications. As a result, PJW became liable to the contractor for additional payments. PJW alleged that this was caused by a breach of contract on the part of Gillies Ramsey Diamond. PJW commenced an adjudication, and the adjudicator found against Gillies Ramsey and awarded PJW damages in the sum of £29,119.80.

Gillies Ramsey raised five challenges, one of which was that a court can review an error of law even if it is *intra vires.* The opinion was delivered by Lord Justice Clerk. He considered the question as to whether the court could review those errors. Reference was made to the judicial review case of *Anisminic v Foreign Compensation Commission* and other related cases.[61] He considered that those authorities were irrelevant as they lay in the field of public law, and adjudication was not an aspect of public law but was a contractual dispute resolution process. Therefore, the adjudicator had asked himself the correct question and his decision was not reviewable.[62] He noted that the decision was obviously wrong but that there was no redress in the present proceedings, so that the legislation had in effect created a new set of problems.

Lord Caplan agreed, as had Lord MacFadyen. Lord MacFadyen added with interest that he was wrong in *Homer Burgess Limited v Chirex (Annam) Limited*[63] to treat an adjudicator as being in a similar position to that of a statutory decision-maker and thus apply judicial review considerations.

The courts are, at least for the moment, clearly unwilling to entertain the possibility for a "public law" judicial review of an adjudicator's decision. The danger, of course, is that many decisions would be challenged on such a basis, which would thwart the pay now argue later rationale behind the HGCRA. How the House of Lords deals with the applicability of judicial review remains to be seen. On the other hand, HHJ LLoyd QC's approach in *Alstom* of *finally deciding* the matter in summary judgment will provide the opportunity to judicially review some or all aspects of competing, or even individual decisions, in appropriate circumstances.

In some respects parallels can be drawn between the question as to the status of an adjudicator's decision and the early 1970s approach of the courts to certificates for payment issued under building contracts. The Court of Appeal in the case of *Dawnays Limited v F C Minter Limited and Trollope and Colls Limited*[64] held that as cash was the lifeblood of the industry, payment certificates were to be treated as if they were negotiable instruments. In other words, they were to be paid without any set-off whatsoever; the only exception to payment being fraud.

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(59) 24 December 2003, Second Division, Inner House, Court of Session, Clerk LJ, MacFadyen L, Caplan L

(60) 27 June 2002

(61) [1969] 2 AC 682

(62) *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2001] 1 All ER 1041

(63) 2000 SLP 277

(64) [1971] 1 WLR 1205; [1971] to All ER 1389.

A series of cases followed *Dawnays*, until the *Dawnays* rule against set-off was overturned by the House of Lords in *Modern Engineering (Bristol) Limited v Gilbert Ash (Northern) Limited*.[65] In that case the House of Lords held that building contracts, and indeed certificates issued pursuant to building contracts, were not in a class of their own, but were subject to the ordinary rules of set-off. There are, of course, many distinctions between payment certificates issued under a building contract and an adjudicator's decision. Nonetheless, it was not until a case came before the House of Lords that the legal relationship between a payment certificate and set-off was eventually determined.

Conclusion

In conclusion, it seems that the status of an adjudicator's decision is that it arises from the contract between the parties either by virtue of the express terms of the contract (as in *Levolux*) or potentially because of an implied term to be bound by and honour the decision (arising from section 108(3) of the HGCRA). However, it cannot enjoy the same status as an arbitrator's award, not just because a decision is not elevated to judgment status in the HGCRA, but because a decision does not arise from a process like arbitration, which can deal with all issues arising under or in connection with the contract. Adjudicators' decisions are by their nature arrived at quickly and it is possible for there to be a series of decisions which may conflict.

On this basis a decision should be enforceable by way of summary judgment, although if there is clearly no defence then a statutory demand or even immediately winding-up procedures are available. A decision under the HGCRA will be enforced regardless of any contractual terms to the contrary (determination, set-off, etc.) or indeed because of the existence of a term that the parties have agree to abide by the decision.[66] This is unless the terms of the contract truly supersede the decision.[67] In respect of set-off or abatement that has not been decided it may be possible to delay judgment for a period to allow those matters to be decided, thus providing the opportunity to obtain a further adjudicator's decision that will address the problem.[68]

Levolux has only gone part way to answering the question as to whether an adjudicator's decision is a cause of action it its own right, and so should be enforced regardless of the terms of the contract between the parties, any counterclaim, set-off or abatement, or alternatively whether the cause of action is in fact the contract between the parties such that there is a potential for recognition of some classes of set-off or abatement against an adjudicator's decision. It appears from *Levolux* that an adjudicator's decision will be enforced regardless of (but as a result of) the contractual machinery between the parties. If this is right a subsequent adjudicator's decision will be required in order to defeat an earlier decision, even where the machinery of the contract can be said to have overtaken that earlier decision.

However, the Court of Appeal in *Levolux* only considered the specific circumstances of the terms of the contract and the single adjudicator's decision before them. While according to *VHE* one cannot

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(65) 1974] AC 689

(66) *Levolux*

(67) *Shimizu Europe Limited v LBJ Fabrications Limited,* above

(68) *William Verry Limited v North West London Communal Mikvah,* unreported 11 June 2004 TCC, HHJ Thornton QC, see 20 above.

withhold against an adjudicator's decision, *Shimizu* demonstrates at least one exception to that apparent strict rule, based upon the terms of the contract and the inability of the Adjudicator to deal with a withholding scenario that may arise in the future; in other words after the date of his or her decision. It remains to be seen whether the Court of Appeal will strike down such provisions or how they will deal with multiple conflicting adjudicators' decisions. It is not until a party is faced with enforcing several competing decisions that the status of an adjudicator's decision becomes of crucial importance.

The author submits that His Honour Judge Thornton QC's approach in *Bovis* provided a practical and pragmatic approach to the problem, providing a judge with the opportunity to take account of the underlying contractual machinery between the parties when considering the requirements of Part 24 during a summary judgment application for payment pursuant to an adjudicator's decision. Further, the "package" enforcement approach of His Honour Judge LLoyd QC in *McLean* further supports that approach, and the court's ability to adopt and enforce the more recent superseding adjudicator's decision in preference to earlier decisions depending on the circumstances. It is submitted that this approach will ultimately lead to a more rational and practical approach for the industry as a whole, especially when dealing with the more complex scenario of a variety of competing issues and potentially conflicting decisions. It is not until a party is faced with enforcing several competing decisions that the status of an adjudicator's decision becomes of crucial importance.

If the matters in dispute are sufficiently before the court during summary judgment proceedings and the court is able to deal with them in the limited time available for a summary judgment application, as HHJ LLoyd QC did in *Alstom,* then it may be possible to hear the dispute or a crucial element of the dispute afresh in order to finally resolve the matter.

Further, it remains to be seen whether a clear distinction will be drawn between decisions that are made under the HGCRA and contractual adjudication outside of the HGCRA. Should decisions made under the HGCRA be subject to judicial review because they arise from a decision-making process that, albeit is contractual, is in reality statutory-based? Should *all* contractual adjudicators' decision, be subject to the strict expert determination rationale as they arise only from the contract between the parties, unless the decision is final and binding in which case it may be reviewed in order to correct errors that would not otherwise be capable of correction? Currently, it appears that an adjudicator's decision escapes judicial review and enjoys enforcement regardless of a substantial error.

The more recent cases referred to in this paper dealing with the enforcement of adjudicators' decisions touch on the status of an adjudicator's decision. However, the appeal courts are yet to define the circumstances within which the contractual machinery, a counterclaim, set-off and/or abatement or some other process may be used to unravel two or more competing adjudicators' decisions during summary enforcement proceedings. It is most likely that the Court of Appeal will adopt the approach of Mr Justice Ramsey in *William Verry v Camden* and so treat a decision as if it were an award, albeit that a decision is "interim" rather than "final".

For present purposes the status of an adjudicator's decision is then: a temporary but conclusive and binding contractual demand surpassing all other terms of the contract (unless the mechanics of the contract provide for an effective "*Shimizu*" withholding notice), subordinate only to the final award of an arbitrator or judgment of the court.

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