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YOU HAVE JURISDICTION:

FIVE FATAL WAYS TO LOSE IT

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ADJUDICATION: INTENSELY PRACTICAL ISSUES
CENTRE OF CONSTRUCTION LAW: KING'S COLLEGE LONDON

You have jurisdiction; five fatal ways to lose it

1. **Late referral, late decision**
2. **Real possibility of bias**[1]
3. **Natural justice**[2]
4. **A decision which the adjudicator had no power to make**
5. **Deciding a question not referred to him**

In the beginning

Jurisdiction, rather like a reputation, can be lost on a one-night stand and in any number of permutations or scenarios!

As many of us know, some jurisdictional challenges are plain daft,[3] a real try-on; some challenge the adjudicator's adjudicating skills, others what he does not do, others what he

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[1] Whilst to purists this is not a jurisdictional matter per se, invariably it is wrapped up in the arguments.

[2] As above footnote

[3] See Mr Buckingham's attempts to extricate himself in *Allen Wilson Shopfitters* v *Mr Anthony Buckingham [2005]* EWHC 1165 (TCC):
(a) There was no written contract in respect of the works which were the subject matter of the adjudication;
(b) Any contract had been terminated and was therefore irrelevant and could not give the Adjudicator jurisdiction;
(c) The works concerned the refurbishment of a dwelling house and were therefore excluded from the adjudication provisions set out in the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"); and
(d) Any agreement to adjudicate was contrary to the Unfair Terms in Consumer Contracts Regulations 1999. Or in *Connex South Eastern Ltd* v *M J Building Services Group plc* [2005] BLR 201 CA the Respondents argued that the Notice of Adjudication was an abuse of process.

does do. As sports go, "*resourceful losing party*"[4] challenges to adjudication decisions in the field of battle are still popular with respondents, and probably always will be, although jurisdictional and natural justice challenges have become more difficult and the number of disputed applications to enforce adjudication decisions has fallen over the last two years.

The courts of course gave adjudication a good "leg-up" at the start of its invocation as a dispute process. The majority of those cases adopt the purposive and robust approach of Mr Justice Dyson in *Macob*.

Once the Act was brought into force on 1 May 1998, the central question was whether the courts would enforce a decision of an adjudicator. Section 108(3) of the Act states that the "*contract shall provide that the decision of the adjudicator is binding"*. At the time, there was some concern about the appropriate way to enforce a decision of an adjudicator, and in particular whether summary judgment would be available or whether the court would hear the matter afresh in a full trial thus defeating the purpose of adjudication. The first case of *Macob Civil Engineering Limited* v *Morrison Construction Limited*[5] swept away those concerns. Mr Justice Dyson delivered his judgment on 12 February 1999 confirming that the decision of an adjudicator was enforceable summarily regardless of any procedural irregularity, error or breach of natural justice. The Judge adopted a purposive approach to the construction of the word "decision", refusing to accept that the word should be qualified.

This robust and purposive approach was reinforced by the first Court of Appeal decision of *Bouygues* v *Dahl-Jenson (UK) Limited.*[6] The Court of Appeal delivered its judgment on 31 July 2000, upholding the first instance decision of Mr Justice Dyson. They confirmed that the purpose of the adjudication procedure set out in section 108 of the Act was to provide the parties to a construction contract with a speedy mechanism for resolving disputes, which, although not finally determinative, could and should be enforced through the courts by way of summary judgment.

More importantly, even where an adjudicator had answered the question put to him in the wrong way, the court would not interfere with that decision but would enforce it. The decision of an adjudicator was and is being treated much like the decision of an expert resulting from an expert determination. Provided that an expert, and by analogy an adjudicator, has asked the right question then the decision will be enforced regardless of any errors made along the way. A point we shall be coming back to. It is only if the expert (and therefore the adjudicator) has answered the wrong question, or acted obviously in excess of his jurisdiction, that the decision would be a nullity.

Given the continuing ingenuity and inventiveness of those on the receiving end of adverse adjudicators' decisions in seeking to find ways of challenging their validity, this paper will now concentrate on five scenarios (there are many more) where jurisdiction was there at inception and lost thereafter. Note that I do not in this paper address jurisdiction that "I" never had at the outset[7] for that would be a subject in its own right and represent me not

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[4] Coined by HHJ Coulson QC in *AC Yule & Son Ltd* v *Speedwell Roofing & Cladding Ltd*.

[5] [1999] All ER (D) 143.

[6] (2001) 3 TCLR 2.

[7] For example there is no need to go to the likes of *Tally Wiejl* v *Pegram Shopfitters* as it concerned lack of jurisdiction de novo and a battle of the forms nor the no dispute cases.

answering the right question![8] No, I speak to those occasions where the adjudicator had jurisdiction but lost it by going beyond his powers, breaching the "rules" of natural justice, or more recently failing to make a decision within the time available.

So my five ways to lose jurisdiction all stem from fundamental objections to the way in which the adjudicator has travelled and arrived along the short path and decided the dispute; that he has acted in excess or outwith his jurisdiction. So we are not concerned with the adjudicator who has no authority to act, but an attack on the validity of the decision he has made and the process by which he got there. The aim of the *resourceful losing party* is after all to have the decision declared a nullity or, if the adjudication is stayed,[9] sent back to the adjudicator to reconsider.

Before I do so, some perspective is necessary, for adjudication is truly successful when viewed objectively. The robustness of the courts in dealing with a great many of the jurisdictional challenges and the court's willingness to enforce adjudicators' decisions by way of summary judgment must certainly have contributed to the enormous growth and widespread use of adjudication. Research suggests (I thank Nicholas Gould for drawing it to my attention) that the number of adjudications arising from nominations by the Adjudicator Nominating Bodies ("ANBs") amounts to just under 8,700 in the UK.[10] This figure arises purely from ANB appointments. Many ad hoc adjudications are now taking place, and the figure may well be far in excess of 10,000, perhaps being as high as around 15,000.[11] The courts have now heard at least 350 cases relating solely to adjudication. A simple comparison between the figures suggests that adjudication is successful and effective. In other words, arguably only 1% of the disputes referred to adjudication go on to the courts for the purposes of enforcement.

What do we mean by jurisdiction in this context?

The answer is that the adjudicator's jurisdiction is derived from the terms of his appointment as agreed by the parties[12] and any rules of procedure and law to which he is subject.[13] This is therefore a question of construction to which ordinary principles apply, including the temporal requirements, the application of procedural fairness and natural

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[8] Per the test formulated by Knox J. in *Nikko Hotels (UK) Limited v MEPC plc* [1991] 2 EGLR 103*: "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."*

[9] See *Baldwins Industrial Services plc* v *Barr Limited* where HHJ Judge Kirkham referred to CPR 47 rule 1 which provided that where a judgment was given for the payment of money, and the court was satisfied that there were special circumstances which rendered it inexpedient to enforce the judgment, then the Court may stay the execution of judgment absolutely or for such period and on such conditions as the Court thought fit. She observed that the Court had a wide discretion to stay execution of judgment. The exercise of that discretion was governed by compliance with the overriding objective set out in CPR Part 1 which required that every case must be dealt with justly.

[10] Glasgow Caledonian University Reports on Adjudication/Adjudication Reporting Centre.

[11] Miller, J. (2002) Adjudication Update Seminar, Savoy Hotel, 13 May, predicted a figure of 10,000 adjudication based on the 6,000 reported by the ANBs.

[12] See *Fastrack Contractors Ltd* v *Morrison Construction Ltd* [2000] B.L.R. 168; *KNS Industrial Services (Birmingham) Ltd* v *Sindall Ltd* (2000) 75 Con. L.R. 71; *Edmund Nuttall Ltd* v *R G Carter Ltd* [2002] B.L.R. 312; and *Joinery Plus Ltd* v *Laing Ltd* [2003] B.L.R. 184 which at 195 contains a very useful distillation of the applicable principles.

[13] The parties to a construction contract confer the necessary jurisdiction on an adjudicator in one of two ways. They can agree a contract which contains express written provisions concerning the resolution of disputes by adjudication. Alternatively, if they have a construction contract in, or evidenced in, writing, which contains no express adjudication provisions and which is not otherwise excluded from the operation of the 1996 Act, then the adjudication provisions set out in the 1996 Act will be incorporated and will apply.

justice to the dynamics of the "how he got there" variety, so far as the latter can be accommodated in a 28-day procedure. Obviously the adjudicator will only have jurisdiction to determine a dispute[14] referred to him arising out of a *construction contract*[15] entered into after 1 May 1998 and satisfying the formal requirements as to *agreements in writing* under s.107[16] (yes the nightmare of most referring parties) and which is not otherwise an *excluded contract.*[17] If any of these requirements are absent, any decision is a nullity and is not binding on the parties.[18]

Can he decide his own jurisdiction?

An adjudicator has no authority to decide his own jurisdiction by statute (without express say-so of both parties who may vest it, but rarely do[19]) as the question whether the adjudicator has the necessary jurisdiction is not itself a dispute arising under a construction contract.[20] Any such decision of an adjudicator on his jurisdiction is not binding (unless the

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[14] As to crystallisation of a dispute, as is clear from *Halki* v *Sopex* (which, although relating to arbitration, has been held to have application to adjudication), it is necessary that:

- a claim has been made by one party and either rejected by the other or not responded to after that party has had a reasonable opportunity to do so: and
- the Responding Party is properly notified of the nature of claim, and the claim contained in the Notice to Adjudicate is the same as first advanced by the Referring Party before the proceedings.

Crystallisation of a dispute is necessary as the very nature of adjudication is to decide disputes; as such, it can be distinguished from other processes such as valuation. Further, it is not for the adjudicator to try to establish the nature of the parties' dispute: it is for him to decide the dispute once its nature and scope have been established by the parties.

[15] The need for a construction contract is self-evident: without it, statutory adjudication is not compellable - it can only be instituted by agreement of the parties.

[16] We live in hope it is soon to be repealed. The Government has not exactly shown perfect consistency from paper to paper, either. In March 2005, it said it did not intend to consult on extending the Act to oral and partly oral contracts in December 2006 there was a volt face as confirmed in this latest consultation. Concern has been expressed as to when any proposals might be enacted, given that they might require an act of parliament during a busy legislative programme. Watch this space and attend SCL meeting on 19 July 2007 in London when Paul Smith of the DTI will speak upon his Department and the Welsh Assembly Government second consultation, "Improving payment practices in the construction industry" on amendments to Part II of the HGCR Act and the Scheme for Construction Contracts (England and Wales) Regulations 1998.

[17] The classes of contracts excluded by The Construction Contracts (England and Wales) Exclusion Order 1998 are:

1. Certain agreements under statute
2. Private finance initiative agreements
3. Finance agreements
4. Development agreements

[18] See, e.g. *The Project Consultancy Group* v *Trustees of the Gray Trust* [1999] B.L.R. 377.

[19] See HHJ Gilliland QC in *Fence Gate Ltd* v *James R Knowles Limited* "*First it is not in my judgment open to one party unilaterally to confer jurisdiction on the adjudicator to determine his own jurisdiction. If the adjudicator is to have ad hoc jurisdiction to decide the issue of his jurisdiction so as to bind the parties, the request must be assented to by the other party in circumstances where it is appropriate to conclude that both parties have agreed to confer that power upon the adjudicator"* See also Rule 14 of the TeCSA adjudication rules which proved that "*The Adjudicator may rule upon his own substantive jurisdiction, and as to the scope of the Adjudication*."

[20] Although much might be said for an analogous power as provided under s.30 (aka the tribunal may rule on its own substantive jurisdiction) of the Arbitration Act 1996 to accommodate the doctrine of "Kompetenz-Kompetenz".

parties agree).[21] As Sir Murray Stuart-Smith said in the Court of Appeal in *C&B Scene Concept Design Limited* v *Isobars Limited:*[22]

> 29 The Adjudicator's jurisdiction is determined by and derives from the dispute that is referred to him. If he determines matters over and beyond the dispute, he has no jurisdiction"

What should a party do if it seeks to challenge jurisdiction?

Seven years ago in *Fastrack Contractors* v *Morrison*[23], His Honour Judge Thornton QC said,

> If a party challenges the entire jurisdiction of the adjudicator, as Morrison does, it has four options [all of which are relevant also to any jurisdictional challenge arising after an adjudicator has been appointed]:
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> Firstly, it can agree to widen the jurisdiction of the adjudicator so as to refer the dispute as to the adjudicator's jurisdiction to the same adjudicator. If the referring party agrees to that course, and the appointed adjudicator accepts the reference to him of this second dispute, the jurisdiction of the adjudicator could then be resolved as part of the reference
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> Secondly, **refer the dispute as to jurisdiction to a second adjudicator**. This would not put a halt to the first adjudication, if that had already led to an appointment, since the adjudicator has a statutory duty, unless both parties agree otherwise, to decide the reference in a very short timescale
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> Thirdly, **seek a declaration from the court** that the proposed adjudication lacked jurisdiction. This option is of little utility unless the adjudicator has yet to be appointed or the parties agree to put the adjudication into abeyance pending the relatively speedy determination of the jurisdiction question by the court. The Technology and Construction Court can, for example, resolve questions of that kind within days of them being referred to it.
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> Fourthly, the challenging party could **reserve its position**, participate in the adjudication[24] and then challenge any attempt to enforce the adjudicator's decision on jurisdictional grounds. That is the course adopted by Morrison.

Where the adjudicator's jurisdiction is contested, custom and practice shows the appropriate approach is for the adjudicator to *enquire into his jurisdiction* and if he is satisfied that he has jurisdiction he should continue with the adjudication unless and until the court orders otherwise. This much is clear from the Court of Appeal in *Thomas-Fredric's (Construction) Ltd* v *Keith Wilson,*[25] where Brown LJ took the opportunity to comment on a suggestion made in the Building Law Reports that there was a danger, following cases such as the decision of Judge Dyson (as he then was) in *The Project Consultancy* v *Trustees of the Gray Trust*, that any arguable challenge to jurisdiction would result in an adjudicator's decision that was not summarily enforceable and that this in turn would have the effect of

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[21] Note in *Balfour Beatty* v *Lambeth* [12 April 2002] HH Judge LLoyd QC: "It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed."

[22] [2002] E.W.C.A. Civ.46.

[23] [2000] BLR 168 at 178

[24] See *Thomas-Fredric's (Construction) Ltd* v *Keith Wilson* [2004] BLR 23, CA the Respondent became, arguably, unwittingly bound by an Adjudicator's decision. The Respondent sought to reserve its position on jurisdiction, after the decision had gone against it. The Court of Appeal decided that even though the Respondent had not submitted to the Adjudicator's jurisdiction in the strict sense, by taking part in the Adjudication and allowing the Adjudicator to rule on his own jurisdiction, the Respondent was still bound by the decision particularly as the Adjudicator's ruling on jurisdiction was correct (notwithstanding that the decision was wrong on the substantive issues).

[25] EWCA Civ 1494

undermining one of the prime objectives of the Act, namely the prompt resolution of disputes. Lord Justice Brown said the following:

> Let me now return briefly to the editors' commentary in the Building Law Reports. I readily recognise the concern lest this salutary new statutory power to promote early payment in construction contract cases be emasculated by jurisdictional challenges. The solution, however, seems to me not in finding defendants too readily to have, in the full sense, submitted to the adjudicator's jurisdiction, which if properly advised they plainly would not do. Rather, as Dyson J observed in paragraph 8 of his judgment in the Project Consultancy Group case, it is for courts (and adjudicators) to be "vigilant to examine the arguments critically". It is only if the defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him.
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> The position can, I think, be summarised in the following two propositions. (1) If a defendant to a Part 24(2) application has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue. (2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Part 24(2) summary judgment upon the award if the adjudicator's ruling on the jurisdictional issue was plainly right.

The above debate of course concerns the public policy issue of how far the courts should police the decisions of adjudicators. If the Adjudicator is to be treated the same as any other statutory decision-maker, then established law in this area will allow the courts to examine the manner in which the decision was taken and either set it aside or refuse to enforce the decision. However, that path has not been followed.

In *Gillies Ramsay Diamond* v *PJW Enterprises Limited*[26] the Scottish Inner House was referred to the judicial review case of *Anisminic* v *Foreign Compensation Commission*[27](and other related cases). The court 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. Applying this to the facts, the adjudicator in the professional negligence case of *Gillies Ramsay* had asked himself the correct question and his decision (which was wrong) was not reviewable (per *Bouygues (UK) Limited* v *Dahl-Jensen (UK) Limited*[28]). Lord Justice Clerk noted that the decision was obviously wrong but that there was no redress in the present proceedings, as an *intra vires* error of law made by the adjudicator was not reviewable by the court, so the view was that the HGCR legislation had created a new set of problems. For example, where the adjudicator erroneously rejects a party's well-founded claim or defence (*Sherwood & Casson Ltd* v *Mackenzie* [2000] 2 TCLR 418), the subsequent vindication of that party's position may be rendered futile by an intervening bankruptcy (*e.g. Bouygues (UK) Ltd* v *Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041).

Lord Caplan agreed, as did Lord MacFadyen. Lord MacFadyen added with interest that he was wrong in the Court of Session case of *Homer Burgess Limited* v *Chirex (Annam)*

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[26] [2002] BLR 48

[27] [1969] 2 AC 682

[28] [2001] 1 All ER 1041

Limited[29] to treat an adjudicator as being in a similar position to that of a statutory decision-maker and thus apply judicial review considerations.

This tension might explain why this April their Lordships in the first Scottish-derived HL adjudication case in *Melville Dundas Ltd (in receivership)* v *George Wimpey UK Ltd*[30] decided by a majority that the contractual provisions in the parties' contract dealing with determination and insolvency, namely clause 27.6.5.1 of JCT WCD 98, effectively trump the statutory provisions governing the need to issue a Withholding Notice under section 111 of the HGCR Act because to rule otherwise was 'wrong'.[31] However, it is a perverse decision and maybe, as we lawyers say, special to its facts. In England one might expect a different result such as a stay.

So the position seems to be that *Anisminic* and the non-adjudication listed matters of Lord Reid which might cause a decision of a tribunal to be a nullity are not of direct or automatic application to construction adjudications even though his listed matters included giving a decision in bad faith, failing to comply with the requirements of natural justice, deciding a question not referred to him, refusing to take account of something he should have taken into account or basing his decision on a matter that was not a matter under the contract.

Of course in the final analysis, most of the cases arising from adjudication turn upon the specific facts of the particular case.

Whilst a lack of care or legal knowledge by the adjudicator may be a common issue, more often than not, the real problem is the relatively short time within which the adjudicator is to make his decision and the increasing amount of information and substantive submissions being provided by the parties as the adjudication proceeds. However, in summation it is possible to discern from the reported authorities the emergence of an approach founded in common sense, tempered with a concern to uphold the principles of natural justice. The courts have helped establish adjudication's place as the pre-eminent first-stop method of resolving construction disputes which is credible, cost-effective and speedy. This has been achieved very largely by enforcing adjudicators' decisions unless they fall foul of very limited reasons for refusing to enforce it which I shall turn to below.

The most recent tack is what the TCC has recently considered now in a number of cases concerning allegedly late adjudicators' decisions and temporal misdemeanour.

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[29] 2000 SLP 277

[30] 2007 UKHL 18-25 April 2007.

[31] As a contractor going into receivership was a lawful ground for withholding payment, when it was not possible for notice to have been given within the statutory time frame.

1. Late referral what a difference a day makes:
Hart Investments Limited v Fidler and Larchpark

Let's look at how the adjudicator lost his trousers[32] here in *Hart Investments Limited* v *Fidler* and *Larchpark (2006).*[33] Hart contracted with Larchpark to carry out building works at Muswell Hill and Fidler was retained by Hart as the Engineer. One of the many issues between the parties which ended up in court in this Scheme-based adjudication was the enforcement of a decision which Hart had obtained against Larchpark. Larchpark challenged the validity of the Adjudicator's Decision on the basis that the Adjudicator lacked jurisdiction. As a matter of fact it was agreed that the Referral Notice had been served eight days after the Notice of Intention to Refer, rather than the seven days. According to paragraph 7(1) of the Scheme, the referring party shall refer the dispute to an adjudicator "*not later than seven days*" from the date of the notice of adjudication.

His Honour Judge Coulson QC noted that there were no reported Decisions on the consequences of late service of a Referral Notice.[34] The Court spent some time considering the various Decisions dealing with an adjudicator's failure to provide a Decision within 28 days. Judge Coulson expressly agreed with the decision of the Inner House of the Scottish Court of Session in *Ritchie Brothers* v *David Philip (Commercials) Ltd*[35] where the Court held that the 28-day limit meant what it said and thus in that case, a decision not provided until a day after the expiry of the 28 days was a nullity. Here, the Judge's initial reaction was to consider that in the overall scheme of things, it is difficult to say that a delay of one day in the provision of the Referral Notice should be accorded great significance.[36] But what if the delay were longer? He pointed to the main aim of adjudication which was one of speed

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[32] As opposed to the American judge whom Sky News reported last month as running out of court in tears during a £27m lawsuit against a dry cleaner who allegedly lost his trousers. The bulk of his demand came from his strict interpretation of the DC Consumer Protection Act, which imposes fines of £760 per violation, per day Judge Pearson counted 12 violations over 1,200 days, and then multiplied that by three defendants!

[33] [2006] EWHC 2857 (TCC)

[34] The writer knows of one, HHJ Thornton QC's in *William Verry Ltd* v *North West London Communal Mikvah* [2004] BLR 308.

This case arose from a contract governed by JCT 98. There was provision for disputes to be resolved by adjudication and to be referred within seven days of the notice of adjudication. However, the contract also provided that the adjudicator was able to set his own procedure. Notice of adjudication was served on 3 December 2003. An adjudicator was appointed and he directed that the referral notice should be served by 11 December 2003. The notice was served within the time limit specified by the adjudicator. However, this was one day late by reference to the time limit set out in s.108 (1) (b) of the Housing Grants Regeneration and Construction Act 1996.

An application to enforce the adjudicator's decision was opposed on several bases including late service of the referral notice. It was held that the timing of service of the referral notice did not invalidate the adjudicator's decision. The basis for this was that the wording of s.108(1)(b) was not mandatory in the sense that it only requires a contract to allow a referring party to serve a referral notice within seven days of the notice of adjudication. This was contrasted with the language of s.108(1)(c) which requires the adjudicator to reach a decision within 28 days.

There were other issues in the case including an abatement claim based on alleged defects. The adjudicator concluded, wrongly in the court's view, that these arguments need not be taken into account in deciding the amount due to the contractor. Although the court held that this was an error of law which did not invalidate the adjudicator's decision, it was a very close call. His Honour Judge Thornton QC adopted the pragmatic approach of directing that the judgment should not be drawn up for six weeks, thus allowing the defendant time to commence a fresh adjudication concerning the defects.

[35] [2005] CSIH 32

[36] Contrast more liberal view taken in the earlier case of HHJ Havery QC in *Bennett* v *FMK Construction Ltd,* 30 June 2005, where the appointment of adjudicator within seven days and service of Referral were said to be directory not mandatory in a dispute where a Final Certificate was also issued but in this case between a first Notice of Adjudication and a second.

given its precedence over accuracy what matters is a quick decision. Therefore there must be a summary timetable with which everyone must comply. In addition, if *Ritchie* is a correct statement of the position[37] at the end of the adjudication process under the Scheme, it followed that the same principle must be applied to the event which signalled the commencement of the adjudication process.

The Court found the Referral Notice was irregular / invalid because it was not served in accordance with the HGCR Act or paragraph 7 of the Scheme. Hart were entitled therefore to refuse to waive that irregularity. The Adjudicator, therefore, had no jurisdiction to enter on the reference and the award was a nullity.

As JCT 05 contracts now all require adjudication to be conducted under the Scheme, this important point of clarification is to be noted by all.

Late Decisions: *Cubitt Building and Interiors Limited v Fleetglade Limited*[38]

My next case is a close shave one; it was that of my colleague, Dr Julian Critchlow, *Cubitt Building and Interiors Limited* v *Fleetglade Limited* which cures the divergence that had existed until December 2006 between English and Scottish Authorities on the effect of late Decisions. It also revisited the subject of late Referral Notices.

Cubitt was Fleetglade's main contractor engaged under a Contract incorporating the JCT 98 Standard Form of Building Contract. On 20 September 2006, which happened to be the last day to challenge a Final Certificate, Cubitt issued an adjudication notice at 4.42 p.m. and applied to the RICS the following day for the nomination of an adjudicator. The RICS failed to make an appointment until late on 27 September (day 7). Cubitt's solicitors offered Fleetglade's solicitors a copy of the referral notice without the accompanying documents; the offer was refused. The referral notice (with documents) was served on 28 September (day 8). Fleetglade contended that the referral notice was served out of time. *Cubitt* therefore concerned both late service of the Referral (eight days after the Notice of Adjudication) and the validity of an Adjudicator's Decision issued a day later than the extended date for the Decision to be reached. In other words, it had two problems, not one, and the time bomb of the Final Certificate in the background.

Clause 41A.4.1 of the Contract required that if the Adjudicator is appointed within seven days of the Notice of Adjudication then the Referring Party shall provide its Referral within seven days of the Notice. Judge Coulson considered that a failure to comply with the mandatory requirement would render the Adjudication a nullity. However, he pointed out that the clause goes on to say that if the Appointment is not made within seven days of the Notice then the Referral shall be made immediately upon such Appointment. The Judge said that the twist in this case arose in the facts. The RICS had been unusually slow in securing the Appointment of the Adjudicator (I gather the RICS are not wholly to blame) who confirmed his appointment to the parties at 5.35 p.m. on the seventh day after the

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[37] It was followed by HHJ Havery QC in *Epping Electrical Company Ltd* v *Briggs and Forrester (Plumbing Services) Limited* [2007] BLR 1126, and *Aveat Heating Ltd* v *Jerram Falkus Construction Ltd* [2007] EWHC 121 (TCC). The Judge considered that given that it was a decision of an appellate court, it was appropriate for him to follow it. He therefore concluded that the decision had to be completed within the 28 days or any agreed extended period.

[38] (2007) 110 Con LR 36 TCC and with electronic media no real excuses exist re post.

Notice. The Referral was served the following day. On the facts, Judge Coulson decided that the Referral was valid. He considered that the bulk of the delay was caused by the RICS and the Referring Party should not be penalised for this, and, more importantly, the terms in clause 41A.4.1 needed to be interpreted sensibly such that an Appointment of an Adjudicator right at the end of the business day meant that service of the Referral the following day amounted to service immediately upon the Appointment.

Judge Coulson then considered the validity of the Decision issued by email after midday on 25 November 2006, the day after it was due to be reached. On the day before, the Adjudicator had advised the parties by email late at night that he had completed his Decision (ergo reached it) but it was subject to a final proof and arithmetical checking. He also indicated that he was considering exercising a lien. Given the time, neither party responded and the Adjudicator decided to issue his Decision the following day, i.e. without waiting for confirmation of payment. His Honour Judge Coulson confirmed that the requirement of an adjudicator to reach a Decision within the timescale is mandatory, and a failure to do so will result in the Decision being a nullity and, in accordance with the Contract, the Decision should be communicated forthwith.[39] Judge Coulson stated obiter that adjudicators do not have the jurisdiction to extend without the express consent of both parties and he warned adjudicators that if their time management was so poor that they failed to provide a Decision in the relevant period and they had not sought an extension, then their Decision may well be a nullity. The significance of adjudicators' default in such circumstances should not be underestimated.

However, in the final analysis here as to whether the Adjudicator's Decision was communicated "forthwith", the Court found, as a matter of fact, that the Adjudicator had reached his decision late on 24 November and would have communicated his decision on that day but for his mistaken belief that he could exercise a lien. The Adjudicator considered that he was entitled to a lien on his fees as a result of his terms of appointment. It was held by the Court that the Adjudicator was not entitled to a lien, either as a matter of contract or as a matter of law.

There are a number of important principles that the Judge set out in the Decision:

- It is not correct to say that a Decision is not a Decision until it has been communicated. There is a two-stage process involved in an Adjudicator's Decision, which is expressly identified in clause 41A. Stage 1 is the completion of the Decision, Stage 2 the communication of the Decision to the parties which must be done forthwith.

- An Adjudicator must reach his Decision within 28 days or any agreed extended date; a Decision which is not reached within 28 days or any agreed extended date is probably a nullity.

A Decision which is reached within 28 days or an agreed extended period, but is not communicated until after the expiry of that period, will be valid, provided that it can be shown that the Decision was communicated forthwith (which means no more than 24 hours

[39] A distinct move away from the more liberal line taken in *Simons Construction Ltd* v *Aardvark Developments* [2004] BLR 117.

or so). Thus he followed HHJ LLoyd QC in *Barnes & Elliott* v *Taylor Woodrow,*[40] in the sense that even if the decision had been issued late, it had been reached in time.[41]

A lesson for adjudicators

The Judge stressed that the events of 23/25 November 2006 nearly caused a serious problem for the Adjudicator himself not least because his immunity may well have been waived. For example if the Judge had a reached a different conclusion, the Adjudicator's failure to comply with the timetable might irredeemably have deprived Cubitt of its right to challenge the Final Certificate which would have been the Adjudicator's fault. Hence the Judge concluded adjudicators can only accept nomination and appointment if they can complete the task within 28 days or an agreed extended period – otherwise they lose jurisdiction and become *functus officio.* To be on the safe side, although completion is a two-stage process (completion of the Decision and the communication of it to the parties), the adjudicator must aim to do both no later than the 28th day or the agreed extended day.[42] Only in truly exceptional circumstances will the court consider Decisions which were not communicated until after that period and in no circumstances will a court consider a Decision that was not even concluded during that period.

Lien

As for lien, Judge Coulson agreed with the Decision in *St Andrew's Bay* v *HBG Management*[43] and said that the Adjudicator was not entitled to a lien on his fees, either at contract or law.[44]

Summary

The Judgment in *Cubitt* makes a number of important points concerning the operation of adjudication, including the following:

- The juridical nature of this adjudication (and unarguably all adjudications) is contractual not statutory and the focus in some report cases has been too much on the 1996 Act and not enough on the relevant terms of the parties' contract;[45]

- The essence of adjudication is speed; the ultimate correctness or otherwise of the Decision matters less because the Decision is not binding in that it can be challenged in a court or arbitration;

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[40] [2003] EWHC 3100

[41] See, too, James Leabeater's arguments before HHJ Havery QC in *Epping Electrical Company Ltd* v *Briggs & Forrester (Plumbing Services) Ltd* [2007] EWHC 4 (TCC).

[42] It also means that where a responding party refuses to allow any further time beyond 14 days that can be granted by the referring party this may mean the adjudicator in a large-volume case may have to recuse himself.

[43] 2003 SLT 740

[44] See, too, recent decision of HHJ Thornton QC in *Mott MacDonald Ltd* v *London & Regional Properties Ltd* [2007] EWHC1055(TCC) where the adjudicator had made his decision but put off signing and issuing his decision until he had received confirmation of payment by the referring party. Thornton J held that the adjudicator's decision must be delivered to the parties as soon as possible after he has reached his decision by rule 19(3) of the Scheme. The adjudicator may not impose a lien on his decision or reasons and not deliver it pending the payment of his fees because he would be restricting himself from complying with that obligation.

[45] HHJ Coulson QC said, "It seems to me that if the contractual adjudication provisions comply with the Act, then they must be at the forefront of the court's consideration of the parties' respective rights and liabilities. I would respectfully venture the opinion that, in some of the reported cases, the focus has been too much on the 1996 Act (and s.108 in particular) and not enough on the relevant terms of the parties' contract."

- The adjudication timetable will be construed strictly, even to the extent that it is contractual, albeit that the provisions as to time must be construed sensibly. An adjudicator who decides late may lose his immunity from suit;

- Reaching a Decision and publishing it are two separate events subject to the parties' agreement; a Decision reached in time will be valid if published out of time provided that the publication is forthwith as in this case. But, forthwith means within a few hours at most;

- Time periods in adjudication will normally encompass full days and not merely business days. The CPR does not provide an analogy in this regard;

- Those who framed the 1996 Act may be surprised that adjudication is applied in extremely complex cases;

- Adjudicators cannot hold a lien over their Decisions, even when they make provision in their terms of acting;

- It is incumbent on nominating bodies such as the RICS, which have generated considerable revenue from nominating, to act promptly when fulfilling their function;

- There is no reason in principle why adjudications should not proceed concurrently with curial or arbitral proceedings

Next we go to another late decision case, the most recently reported; it has been coined in my office as a "by the grace of God" scenario for this adjudicator. The case is *AC Yule & Son Ltd* v *Speedwell Roofing & Cladding Ltd.*[46] It is another case of HHJ Coulson QC. Yule sought to enforce an adjudicator's decision that they were entitled to payment of £191k. Speedwell claimed that as the decision was provided after the agreed extended period, it was a nullity.

Here, it appeared that the decision was out of time. Having been granted a 14-day extension, the time for completion of the decision was 3 April. Yet it was provided on 4 April. The Judge, having reviewed the authorities, concluded that paragraph 19 of the Scheme required that the adjudicator reach his decision within 28 days (and/or the agreed extended period). In order to be valid, an adjudicator's decision must be completed within this period.

Judge Coulson then took a closer look at the facts. On 27 March, Yule provided a number of responses to queries raised by the adjudicator. Later that day, Speedwell sought time to respond. On the same day, the adjudicator agreed that Speedwell could have two days to respond but he required agreement that he be given two more days to issue his decision. Yule expressly consented to the request which took the time of completion of the decision to 5 April. Although Speedwell made no response to the request for further time, it did comment on the substantive issues. The adjudicator read these and raised various queries.

[46] [2007] EWHC 1360 31 May 2007.

Both parties made it clear that they could not respond over the weekend and would have to wait until Monday 2 April. On the morning of 2 April, the adjudicator asked Speedwell for copies of invoices. Speedwell promised those that afternoon. They were not in fact provided until lunchtime on 3 April. They ran to 65 pages.

On the morning of 4 April, the adjudicator indicated that he would provide his decision that day. There was no response from either party. There was no suggestion from Speedwell that this might mean the decision was out of time. Indeed, it was not until 14 May, that Speedwell first suggested that they were going to take the point that the decision was a nullity because it was late. The Judge noted that this was "hardly an argument awash with merits" although it did fall within the guidance provided by the legal authorities. However, unlike the CA in the *Bothma* case, set out below, the Judge did not accept Speedwell's case for three reasons. The first was that the Court had to be mindful of the difficulties imposed upon adjudicators by the timetable. There may be times when, late in the day, new information made it necessary for an adjudicator to ask for more time. This is exactly what happened here. When an adjudicator makes such a request, the Judge thought there was a clear obligation on both parties to respond plainly and promptly. If a party did not respond, there must be a strong case for saying that they had accepted, by their silence, the need for the extension.

An adjudicator can do no more than work out that he needs a short extension and seek agreement for that. The Judge duly inferred here that by their silence, Speedwell had accepted that the time was extended to 5 April. Second, Speedwell did more than acquiesce to an extension by silence. They, said the Judge, "participated in a process which made it impossible" for the decision to be provided by 3 April. For example, they failed to respond to a request for information causing the delay, then they promised further documentation but supplied it a day late and when they did supply it, did not indicate that in their view, 3 April was the last day for the adjudicator to complete his decision.

In other words, their conduct was consistent with having agreed to an extension. The Judge felt that Speedwell were estopped from denying that the decision of 4 April was a valid decision. They had failed to say in terms that they did not agree to the extension and they had participated in the exchange of information all the way through to the latter part of 3 April.

Finally, the Judge commented on an argument made by Yule that even if the decision was completed outside the extended period, it should still be enforced. This was an argument made in reliance upon an Australian decision called *Brodyn* v *Davenport.*[47] Although his comments do not form part of the ratio of his decision, and so are not binding, HHJ Coulson QC said that what was important was that the benefits of speed and certainty underpinned the statutory requirements that the decision of an adjudicator "shall" be provided within 28 days (or the agreed extended period) and not thereafter. In other words, if the Judge had concluded that the adjudicator's decision was a day late, it would have been a nullity.

[47] [2004] NSWCA 394

2. The dead adjudicator and real possibility of bias

It is fair to say that it is uniformly accepted that the purpose of the HGCR Act is to provide a speedy mechanism to decide construction disputes. Many attempts have been made to frustrate this purpose by arguing that the adjudicator's decision breaches the rules of natural justice on the ground of apparent bias. In *AMEC Capital Projects Ltd* v *Whitefriars City Estates Ltd*[48] the Court of Appeal (upholding Mr Justice Jackson on all essential points below) clarified the requirements for successfully resisting enforcement of an adjudicator's award based on apparent bias of the adjudicator.[49] It also deals with a sad situation where the contract named adjudicator had died by the time notice to concur was served.

This decision delivered a much required warning to those who participate in adjudication of the dangers of relying on this ground and accounts in my opinion for the downturn in such challenges. The key message from the decision is that only where the defendant has advanced a properly arguable objection based on apparent bias will he succeed in resisting enforcement.

As most lawyers reading this will know, in order to determine whether apparent bias exists, the court must enquire whether the material circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, that the decision-maker was biased.

Examples abound but one is of the starkest are first *Glencot Development and Design Co Ltd* v *Ben Barrett & Son (Contractors) Ltd.*[50] Here, an adjudicator performed the role of mediator before deciding to proceed with the adjudication. The adjudicator, at the request of the parties, had participated in a number of lengthy and private discussions with the parties to assist them in reaching a negotiated settlement of the dispute. It was held that these actions led to the conclusion that there was a real possibility of the adjudicator being biased.

A second is *Discain Project Services Limited* v *Opecprime Development Limited*[51] where an adjudicator had a number of telephone conversations with the claimant's representative and these conversations were not recorded or communicated to the other side.

Arbitration Law Monthly[52] summarises the *AMEC* v *Whitefriars* case well. In the case the court was faced with a Scheme adjudication where the same dispute had been referred to the same adjudicator for a second time. The court was required to determine whether the adjudicator's decision should be declared invalid on the ground of apparent bias.

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[48] [2005] BLR 1 CA

[49] See, too, in *A&S Enterprises Limited* v *Kema Holdings Limited* [2005] BLR 76 where an adjudicator drew adverse inferences from the non-participation of a particular witness at a meeting. HHJ Seymour QC found there had been a breach of natural justice both because the adjudicator had failed to make clear in advance the importance he was attributing to the non-participation of the witness and because his actions indicated a real possibility of bias.

[50] [2001] BLR 207

[51] [2001] BLR 285

[52] Arbitration Law Monthly, February 2005, pp. 9–11.

The case concerned a two-stage tender for the construction of a complex office in Tudor Street, London. Stage one was for the pre-construction services and procurement of the second stage tender for the construction phase. AMEC was appointed to carry out stage one under a letter of intent, which incorporated the JCT WCD 1998 together with amendments agreed between the parties ("the contract"). The parties were unable to agree the price for the construction phase. Whitefriars therefore terminated the contract and AMEC submitted its final account for payment. No payment was issued and AMEC started an adjudication under the contract. Mr Biscoe was appointed as adjudicator by the RIBA. The adjudicator decided that AMEC was entitled to payment of the full amount claimed. Enforcement proceedings were issued, however Judge Humphrey LLoyd QC held that the adjudicator's decision was invalid as the adjudicator lacked jurisdiction. The adjudicator was named in the contract and required one George Ashworth (sic) to be appointed.

AMEC commenced fresh adjudication proceedings in relation to the same dispute, but found that the adjudicator named in the contract had died (the intended person being the late distinguished quantity surveyor and friend of mine and many here, Geoffrey Ashworth). Therefore, as the mechanism under the contract was inoperable, AMEC commenced a Scheme adjudication. In the interests of saving time and costs, AMEC requested that the RIBA nominate Mr Biscoe again, which it duly did. Mr Biscoe decided the dispute in AMEC's favour and enforcement proceedings were again commenced. Both during the adjudication and in the subsequent enforcement proceedings, Whitefriars put up a number of jurisdictional challenges and allegations that the second decision of Mr Biscoe was reached in breach of the rules of natural justice due to apparent bias. HHJ Toulmin CMG QC dismissed AMEC's claim by upholding the second of these grounds as he ultimately decided that *"the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the adjudicator was biased"* (this being the test for apparent bias set out in *Porter* v *Magill* [2001] UKHL 67). So, the Judge held the adjudicator's decision to be invalid. AMEC appealed.

It was held by the CA that there was nothing in the circumstances of the case which would have led the fair-minded and informed observer to doubt that Mr Biscoe would act precisely as he said he would in his letter. Lord Justice Dyson went on to say that an observer would interpret this letter:-

> as showing no more than that Mr Biscoe was showing a resolute refusal to succumb to some rather crude bullying.

If the threat of proceedings were, without more, to lead to a conclusion of apparent bias, the integrity of the Scheme would be undermined simply by making such a threat. Counsel for Whitefriars recognised the danger of such abuse and so only relied on this argument in combination with his other submissions. The court went on to say that it is difficult to conceive of circumstances where such a threat would, of itself, lead to such a conclusion.[53]

[53] The Court cited with approval the Court of Appeal decision in the case of Re Medicaments and Related Classes of Goods (No. 2) [2002] 1WLR 701 at Paragraph 37: *"Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him."*

In conclusion, none of Whitefriars's arguments, whether taken individually or together, justified the conclusion that there was apparent bias in this case. AMEC's appeal was allowed. Whitefriars's application for permission to appeal was refused.

Comment

This decision is important for clarifying what is necessary for establishing apparent bias. In this respect, the courts will critically examine allegations of apparent bias and only properly arguable objections will avoid the enforcement of awards. Where, as in this case, the adjudicator is dealing with a re-hearing, it must be demonstrated that he has done so with a closed mind. In addition, the guidance provided on the question of procedural fairness in relation to decisions on jurisdiction has also provided much needed clarification. This decision was a watershed and has heralded a new approach to adjudication, where adjudicators, the parties and their advisers are diverted, rather less than once was, from the primary task in hand, namely, the speedy resolution of disputes.

Finally, as noted above, Dyson LJ criticised the "crude bullying" by Whitefriars in threatening to seek their costs of defending an adjudication in the event that the adjudicator did not have jurisdiction. He suggested that the adjudicator would be protected from liability provided he acted in good faith. I would suggest that that issue remains open to doubt. If the appointment is not valid, the decision is not made as "adjudicator" and, as such, it is arguable that the immunity[54] provided by the HGCR Act does not apply!

3. *Carillion Construction Ltd v Devonport Royal Dockyard*
The touchstone to nearly all challenges errors of law, fact or procedure by an adjudicator must be critically examined before the court accepts that such errors constitute excess of jurisdiction

This case reinforces the principle that although an adjudicator's decision is an interim resolution, which is binding until the dispute is finally resolved by litigation, arbitration or agreement, it is only in very limited circumstances that an adjudicator's decision can successfully be challenged as being invalid. It is seminal.

Carillion Construction Ltd v *Devonport Royal Dockyard*[55] arises from a project involving the fit-out of a submarine dockyard (No. 9) for Vanguard class submarines. The dispute here arose after completion. It was one of those major disputes, which some commentators have suggested are not really suitable for adjudication. Carillion sought over £10 million and the adjudicator ended up with over 29 lever-arch files of materials. As a consequence, the dispute could not be resolved within 28 days and the adjudicator asked for and received two extensions. He therefore had 10 weeks to come to a decision. Carillion were awarded over £10 million. Devonport declined to pay.

[54] The problem with the immunity given by section 108(4) of the HGCR Act is that it is not a statutory immunity, but an express or implied term of the construction contract. This means that it only binds the parties to the contract, and the adjudicator is not immune from action by third parties. In contrast, the Arbitration Act provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.
[55] [2005] EWHC 788.

Mr Justice Jackson in his judgment reviewed the recent case law and set out four basic principles which he said applied to any attempt to enforce an adjudicator's decision:

The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);

The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;

Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;

Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

In applying these principles, Mr Justice Jackson rejected each of Devonport's challenges and decided that Carillion was entitled to an order enforcing the decision. Mr Justice Jackson then set out the five propositions which bore upon the instant case:

1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* reasonableness grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. This conclusion was also supported by the reasoning of Mr Justice Steyn in the context of arbitration in *Bill Biakh* v *Hyundai Corporation.*[56]

2. Justice Jackson considered that on a careful reading of His Honour Judge Thornton's judgment in *Buxton Building Contractors Limited* v *Governors of Durand Primary School,*[57] it was not inconsistent with proposition 1. If it was inconsistent with proposition 1, then Justice Jackson considered that *Buxton* was wrongly decided and he declined to follow it.

3. It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty* v *the London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions[58] to the parties will constitute such a serious breach of the rules of natural justice that the court will decline to enforce his decision.

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[56] [1988] 1 Lloyds Reports 187

[57] [2004] 1 BLR 474

[58] In that case a challenge to the enforcement of an adjudicator's decision on the basis that the adjudicator prepared his own collapsed as-built analysis in the absence of a delay analysis from the referring party, and reached his decision without giving the responding party an opportunity to comment on his methodology.

4. The principles stated in certain decisions on the duty to give reasons in a planning context (see in particular *Save Britain's Heritage* v *No. 1 Poultry Limited,*[59] and *South Bucks DC and another* v *Porter (No. 2))*[60] were only of limited relevance to adjudicators' decisions for three reasons:

    a. Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).

    b. If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.

    c. Adjudicators often are not required to give reasons at all.

5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in *Gillies Ramsay*, that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice.

These principles were approved on appeal by the Court of Appeal[61] when the matter was brought before Sir Anthony Clarke (The Master of the Rolls), Lord Justice Chadwick[62] and Lord Justice Moore-Bick. Devonport's application contained numerous criticisms of the adjudicator and claimed that Mr Justice Jackson had "fallen into serious error" when analysing the adjudicator's decision. The Court of Appeal wholly endorsed Mr Justice Jackson's judgment in respect of the challenges to jurisdiction and the alleged breaches of natural justice (which was a major turning point in adjudication law) save for one of Devonport's contentions, Mr Justice Jackson had held that paragraph 20(c) of the Scheme for Construction Contracts provided a "freestanding power" that enabled the adjudicator to

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[59] [I991] 1 WLR 153

[60] [2004] 1 WLR 1953

[61] [2005] EWHC Civ 1358.

[62] Lord Justice Chadwick observed that: "The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator." He also stated that the courts should not encourage the approach adopted by Devonport in the present case which he described as "trying to find some argument however tenuous to resist payment". If the unsuccessful party did not accept the adjudicator's decision as correct he could pursue legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he had exceeded his jurisdiction or breached the rules of natural justice, save in the plainest cases, was likely to lead to a substantial waste of time and expense. He went on to consider the role of adjudication in complex disputes, stating that: "The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme."

award interest. Mr Justice Jackson thought that it made obvious commercial sense for an adjudicator to have the power to award interest. This power he found existed irrespective of whether or not there was an express term contained within the contract for the payment of interest.

The Court of Appeal held that paragraph 20(c) of the Scheme gave the Adjudicator certain powers, but only in respect of the matters in dispute. In paragraph 91 Lord Justice Chadwick stated:

> So the Adjudicator may decide questions as to interest if, but only if, (i) those questions are "matters in dispute" which have been properly referred to him or (ii) those are questions which the parties to the dispute have agreed should be within the scope of the adjudication or (iii) those are questions which the Adjudicator considers to be "necessarily connected with the dispute". Questions which do not fall within one or other of those categories are not within the scope of paragraph 20(c) of the Scheme. There is no freestanding power to award interest.

During the adjudication Devonport argued that as there was no sum owing to Carillion the question of interest did not arise. The Court of Appeal took the view that this was significant in that Devonport did not dispute that the adjudicator did not have power to award interest. As a result, they had not taken issue with the adjudicator's power to award interest, and so the parties had agreed that the adjudicator had the power to decide whether interest should be paid.

It is worth looking at some of the details. One of Devonport's contentions was that the adjudicator's decision on defects was reached in breach of the rules of natural justice and was not supported by any, or any adequate, reasons. Here, the adjudicator had reduced the Devonport claim for defects from £2.9 million to £2.3 million. In fact, Devonport suggested that their claim for defects was much greater, but the Judge accepted that the adjudicator had considered this aspect of the Devonport claim and rejected it. Accordingly, even if that decision was wrong, it could not be argued that it was something the adjudicator had failed to address.

In fact, the adjudicator had accepted the original claim for defects, but made a modest reduction in quantum for what the Judge said were perfectly sensible reasons. This reduction amounted to about 20%, a small sum in the context of the overall dispute. The reduction in quantum was said by the Judge to be the result of the adjudicator casting a critical eye over the expert evidence.

This was precisely the kind of exercise which one would expect the adjudicator (who was himself an experienced engineer) to undertake. It was unrealistic in a case such as this, to expect an adjudicator, who may be struggling under tight time limits with a growing mass of evidence and legal submissions, as well as a barrage of intricate correspondence, to contact the parties and to invite their comments on a matter of this nature. Again, the Judge considered that the adjudicator had properly considered the claims put before him.

The case also demonstrates how quickly enforcement cases can move. Here, there were 22 days between the commencement of this enforcement in the TCC and trial and judgment.

Adjudicators using an expert and coming unstuck

RSL (South West) Limited v *Stansell Limite* [63] is a case illustrative this time of how jurisdiction may be lost through breach of natural justice. Stansell in this case successfully argued that the adjudicator's decision was unenforceable because of a breach of natural justice. It argued that the adjudicator had failed to comply with the basis upon which Stansell had agreed to the appointment of the planning expert, and also that the adjudicator had failed to provide Stansell with an opportunity to review the planning expert's final report. Thus, the adjudicator had relied on an unseen report in breach of the rules of natural justice.

Stansell were building contractors carrying out work in Union Street, Bristol. They engaged RSL as subcontractor. The Subcontract was based upon the Standard Form for Domestic Subcontract DOM/2 (1982 edition) (reprinted in 1998) incorporating amendments 1/8. Clause 38 contained adjudication provisions. A dispute arose in connection with the final account and, in particular, a claim for an extension of time and for loss and expense. An Adjudicator was appointed by the RICS.

The Adjudicator asked for the parties' agreement to appoint a planning expert. The parties agreed. The Defendant requested a copy of the letter of instruction to the planning expert, together with his response and copies of any report prepared by that expert. The preliminary advice from the expert was forwarded to the parties. The Defendant did not consider that a response was required because the preliminary advice appeared to show that the Claimant's position was not supported. The Adjudicator then published his decision.

Paragraph 72 of that decision said that it was arrived at after considering the final report of the expert. The Adjudicator awarded RSL 55 working days, and awarded a sum of money. *Stansell* refused to pay. *RSL* applied for summary judgment with, in the alternative, an application for an interim payment.

Stansell contended that the decision was unenforceable because of a breach of natural justice. They said that the Adjudicator had failed to comply with the basis upon which they had agreed to the appointment of the expert, and also that the Adjudicator had failed to provide them with an opportunity to review the expert's final report. They also said that the Adjudicator had wrongfully delegated his decision-making powers to the expert.

Whilst HH Judge Seymour QC held that the Adjudicator had not wrongfully delegated his decision-making powers, *he decided that the Adjudicator had breached natural justice by failing to provide the parties with an opportunity to review the final report*. He said that

> "A further aspect of the requirements for natural justice is that a party to a dispute resolution procedure has a legitimate expectation that he will be afforded opportunities promised to him to present his case."

A noteworthy aspect of the judgment is, however, Judge Seymour's view that the duty to act impartially as contained in section 108 of the HGCR Act and in the Scheme for Construction Contracts 12(a) of Part 1 amounted to a duty to observe the rules of natural justice, and not merely to avoid bias. In English law that requirement has often tended

[63] CILL September 2003

generally to be equated with the necessity to conduct an essentially adversarial process *Town & City Properties Limited* v *Wiltshier Southern Limited & Gilbert Powell.*[64] That interpretation is not self-evident. If that had been Parliament's intention, the phrase to be expected would have been "*fairly* and impartially". The omission of the word *"fairly"* may well have been intentional and intended to indicate that the Adjudicator could act independently of the submissions of the parties. (However, in principle, RSL is firmly in line with the existing authority and undoubtedly represents the current state of English law.)

RSL also sought, in the alternative, an interim payment in respect of those parts of the decision not tainted by the breach of natural justice. Judge Seymour was not, however, prepared to countenance that application: nothing could be "salvaged from the wreckage".

This case is interesting because it demonstrates the dangers for an adjudicator of producing a decision based on a report that the parties have not had the opportunity to review and comment upon. The programming expert produced an interim report, and the parties had an opportunity to review it and comment upon it. However, the adjudicator made his decision based on a final report that the parties had not seen. One can sympathise with the adjudicator because no doubt he was trying to reach a reasoned decision within the limited timescale using the best available material. However, the message seems simple. The adjudicator should have based his decision on the interim report provided to the parties if there was not enough time available for the parties to comment on the final report. Alternatively, the final report should have been provided to the parties and their comments obtained before proceeding to the decision. It sounds simple enough, but trying to strike a balance within the short timescales of adjudication is far from straightforward.

4. A decision which the adjudicator had no power to make: *David and Theresa Bothma t/a DAB Builders v Mayhaven Healthcare Ltd*[65]

As most of you will recall, section 108(1) of the HGCR Act states that: *"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section."* The right is limited to referring "a dispute" not "a dispute or disputes". The Scheme, where this is the applicable procedure for the adjudication, provides at paragraph 8(1) that: *"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."* It is likely that if the referring party refers more than one dispute and the responding party responds to each without complaint then the consent is implied by conduct.[66]

Bothma is an interesting decision and it illustrates that only one dispute may be referred to adjudication unless the responding party consents to the adjudicator deciding on more than one dispute. It shows an adjudicator who decides more than one dispute will be going outside his jurisdiction. However, this case seems to suggest a general reservation of the right to challenge jurisdiction without identifying the specific ground that gives rise to the

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[64] (1988) 44 BLR 114

[65] [2006] Bristol TCC, 16 November 2006 and [2007] Adj. L.R. 01/19

[66] However, note in *David McLean Housing Contractors Limited* v *Swansea Housing Association Limited* [2002] BLR 125 the court decided that in deciding whether the notice refers to one or more disputes, it was appropriate to adopt a "sensible" approach, bearing in mind that a single dispute might well consist of several discrete elements. In this case, each head of claim was part of the same dispute.

later challenge which may be good enough to allow a new challenge to jurisdiction to be raised after the decision has been reached.

Here, the Court of Appeal was asked to consider an application for leave to appeal against the refusal of HHJ Havelock-Allan QC to enforce an adjudicator's decision. The notice of adjudication identified four disputes, namely the completion date, the validity of the architect's instructions, the status of a notice of non-completion and the sum due under valuation 9. Bothma sought a number of remedies including that the adjudicator determine the revised date for completion and the sum properly payable to it.

The adjudicator awarded an extension of time, said that the non-completion certificate was invalid and ordered Mayhaven to pay just over £21k. However, Mayhaven resisted enforcement saying that an adjudicator only had jurisdiction to determine one dispute at a time. At first instance, the Judge held that the adjudicator had decided two unrelated disputes, being the correct figure for valuation 9 and whether the contractor was entitled to an extension of time and thus the validity of the non-completion certificate. On the facts, any challenge to the non-completion certificate was of no monetary consequence to the sum due under valuation 9. LJ Dyson agreed. If interim valuation 9 had included a claim for extended preliminaries or other time-related sums, there would have been a clear link between the figure claimed and the claim for an extension of time. Here, however, no disputes were identified which had any time implications at all.

Although LJ Waller expressed some concern about the application, describing the point taken by the employer as "*somewhat technical*", he accepted it served no useful purpose to allow the appeal to go ahead where the would-be appellant was almost bound to lose. If it did, the CA would be furthering an argument which was described as "*practically hopeless*", and this would simply give rise to further costs being incurred.

Can an adjudicator order a party to pay costs after the adjudication is discontinued?

This was the question in *John Roberts Architects Limited* v *Parkcare Homes (No. 2) Limited.*[67] HH Judge Richard Havery QC considered whether an adjudicator had the power to order one party to pay the costs of the other party in a discontinued adjudication.

The contract between the claimant architects and the employer stated at Clause 29:

> The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision. The Adjudicator may determine the amount of costs to be paid or may delegate the task to an independent costs draftsman.

The employer issued two sets of proceedings against the architects and, in both cases, the employer was forced to accept that the adjudicator did not have jurisdiction. The adjudications were therefore discontinued. However, since the architects had expended £87,000 in dealing with the aborted adjudications, they asked the adjudicator to direct that the employer should pay these costs.

The adjudicator decided that, although he did not have jurisdiction to make an order on the substance of the claim, he did have jurisdiction to make an award of costs. He ordered

[67] [2005] EWHC 1637 (TCC)

the employer to pay £87,000 plus VAT to the architects (which the employer refused to pay).

The employer argued that the adjudicator only had the power under the contractual provision set out above to order costs as part of his substantive decision on the matters set out in the notice of adjudication. Here, there was no such decision, so the adjudicator had no jurisdiction to order costs.

The architects argued that:

- it would be a "*startling conclusion*" if the judge found that the effect of the contractual provision was that a referring party could cause the opposing party to incur heavy costs and then prevent that party by the expedient of discontinuing the adjudication from being able to recover those costs; and
- there was an implied term that the adjudicator should have the power to deal with the parties' costs in such a situation.

HH Judge Richard Havery QC found:

- the clause gave the adjudicator power to make an order in relation to the payment of legal costs as part of his decision on the substantive issues. Since the adjudicator had not made such a decision he had no jurisdiction to decide the question of liability for costs. This was not a **"***startling*" conclusion; and
- there was no implied term that the adjudicator should have the power to deal with the parties' costs in such a situation it was not necessary to imply such a term to give "*business efficacy*" to the contract; nor was it the obvious intention of the parties.

Consequently the adjudicator was functus and on what amounts to a folly of his own. However, it did not end there. In February 2006 the case went to the Court of Appeal. The issue for determination was whether it should enforce the adjudicator's direction resulting from the abandonment that the client should pay the architect's costs of the adjudication. The issue turned on the construction of the agreement for adjudication.

This was on the basis that clause 29 did not limit the adjudicator's power to direct the payment of costs to situations where he made a substantive contested decision on the dispute and that the more natural and commercially sensible meaning of clause 29 in its context was that the power to direct the payment of costs "as part of his decision" meant "as part of what he could decide".

It would have been very odd if the parties by their agreement only gave the adjudicator power to direct the payment of possibly substantial legal costs if he made a substantive contested decision insofar as: (1) there was no reason why parties who had agreed that they should be at risk as to the other party's costs should draw a line where the interpretation of clause 29 contended for drew that line and (2) such an interpretation of clause 29 would mean that either party could abandon the adjudication at the last moment without being at risk of paying the legal costs generated by its conduct where it had

referred an unmeritorious claim or had responded to a claim with an unmeritorious defence. On the correct interpretation of the agreement for adjudication the adjudicator's power to direct the payment of legal costs was not limited to circumstances in which he made a substantive contested decision on the dispute referred to him.

Stretching the elastic of the reference by admitting new material to be considered

We turn next to procedural fairness, an area adjudicators need to watch like a hawk or again any decision reached may slip through their fingers. It is salutary to remind ourselves of *Carter* v *Nuttall* [April 2002] where HH Judge Bowsher said:

> It was accepted before me that the jurisdiction of an adjudicator derives, at least in a case like the present, from the Notice of Adjudication. Put simply, the adjudicator has jurisdiction to decide a "dispute" which is the subject of a Notice of Adjudication, but he has no jurisdiction to decide something, which is not covered by the relevant Notice of Adjudication. It seems to me that what is or is not the subject of a Notice of Adjudication depends upon proper construction of the relevant notice in accordance with the principles of construction enunciated by Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at pages 912H to 913F.

The case I turn to is *AWG Construction Ltd* v *Rockingham Motor Speedway Ltd.*[68]

The background facts are that in August 2000, Rockingham Motor Speedway entered into a contract with AWG Construction, which at that time was known as Morrison Construction, for the design and construction of a new motor racing track near Corby in Northamptonshire. The project consisted of the construction of two race tracks: an oval track for the purpose of staging high-speed motor racing modelled on American-style Indycar racing; and a conventional road racing circuit contained within the oval. In addition, AWG agreed to design and build a four-storey grandstand building next to the track and two pedestrian underpasses running under the oval allowing access to the pit area.

The works were completed approximately one year later, and in September 2001 the oval hosted its first race. Unfortunately, serious problems were discovered with the track. Seepage of water through to the surface of the track caused disruption to the race, which eventually had to be abandoned as it was considered to be too dangerous for high-speed motor racing. Facing a substantial payment certificate for monies due to AWG, Rockingham served a withholding notice for the amount of £2.8m, which it contended would be the cost of remedial works to the track. Discussions took place and eventually, by April 2002, remedial works to the track had been undertaken by AWG. Rockingham released £2.4m, but continued to withhold approximately £400,000, disputing that the remedial works had dealt satisfactorily with the problem. In September 2002, a second race meeting was held at the oval. The race went ahead without problems. Rockingham maintained, however, that this was because of favourable weather conditions, and that the rectification works had not been tested. AWG disagreed and said the problem had been solved. Rockingham continued to withhold £400,000, maintaining that defects in the drainage had not been cured and that in any event it was entitled to be compensated for financial losses caused by the cancellation of the first race.

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[68] [2004] EWHC 888 (TCC)

By May 2003, those disputes had still not been resolved and AWG commenced adjudication to recover the £400,000, which it claimed was being wrongfully withheld. The adjudicator held in favour of AWG and ordered Rockingham to pay the £400,000.

That adjudication had not dealt with Rockingham's wider complaints concerning defects, and it was inevitable, therefore, that a second adjudication would be started by Rockingham in respect of its claims for costs and losses as a consequence of the defects in the track. In October 2003, Rockingham commenced a second adjudication, claiming approximately £2.8m as the cost of remedying the defects. The referral notice explained that the subsoil on the site was clay, which was less permeable than other soils. Rockingham contended that the soil stabilisation method used by AWG was unsuitable in that it had created an impermeable layer under the road surfacing layer in circumstances where a granular sub-base should have been used.

AWG responded to the effect that its use of the stabilised sub-base was not negligent and emphasised that other contractors that had tendered for the works had proposed to use the same design. At this point, Rockingham made further submissions to the adjudicator, maintaining that it was not the stabilised sub-base itself that was the root cause of the problem, but the absence of drainage to that layer. AWG contended that the referring party's case had changed and that it was not being given sufficient time to respond to the new case.[69] Ignoring AWG's protestations, the adjudicator held in favour of Rockingham on its wider case that AWG had been negligent in taking no account of the design of drainage to the sub-base. He did, however, hold that the change in the design from a granular sub-base material to a stabilised soil was not in itself the root cause of the problem.

The matter then came before His Honour Judge Toulmin CMG QC in the TCC. AWG sought an order that the adjudicator's decision should be set aside on the grounds that he had no jurisdiction to consider the additional questions of drainage. He should have restricted himself to the initial matters raised by Rockingham in the notice of adjudication. Alternatively, AWG argued that the adjudicator had failed to act impartially in dealing with these additional matters in circumstances where AWG had not had sufficient time to respond.

Judge Toulmin concluded that the case in which the adjudicator had found in favour of Rockingham was so different from that put forward in the referral notice that it was in essence a different adjudication. He agreed with AWG's submission that the need for additional drainage had not formed part of the original referral and therefore the adjudicator had answered a question that had not been referred to him. Moreover, there was clear injustice in a procedure.

Judge Toulmin overturned an adjudicator's decision on the grounds of the procedural unfairness limb of natural justice, which was a failure to allow the Claimant time to deal

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[69] See *McAlpine PPS Pipeline Systems Joint Venture* v *Transco plc* HHJ TCC (12 May 2004) This case shows that the referral needs to include all matters and evidence to be relied upon but also demonstrates that the adjudicator needs to be very careful in allowing and/or requesting additional evidence that may be unnecessary to decide the dispute as referred. Even if the evidence is within the remit of the dispute as referred the adjudicator must be careful to allow new material where the other party is not given a reasonable opportunity to consider and respond. An extension to the adjudication period may be required: if an extension is not allowed by the parties then either the new material must be rejected or, if that in itself is considered to be unfair, then the adjudicator must resign. To continue in the face of apparent unfairness will lead to an unenforceable decision.

with new material raised by the Defendant. The case is also of interest because this breach of natural justice did not nullify the whole of the Adjudicator's decision and the balance of his decision, which had not formed the subject of the appeal in any event, remained capable of enforcement.

In referring to cases such as *Monmouthshire County Council* v *Costelloe and Kemple*[70] and *Halki Shipping Corporation* v *Sopex Oils Ltd,*[71] HH Judge Toulmin concluded that an adjudicator is not "*confined to considering rigidly only the package of issues, facts and arguments which are referred to him*". However, an adjudicator can go beyond these issues only if he provides the parties with an opportunity to respond to the issues that have been raised and he is responsive to the issues that have been referred to him.

If an adjudicator does act inquisitorially without reference to the parties, this would be a breach of the adjudication procedure and a breach of the rules of natural justice and would render his decision unenforceable either in part or in full. In addition, the adjudicator may render himself liable to a claim of both negligence and having failed to exercise reasonable care and skill contrary to s.13 of the Supply of Goods and Services Act 1982 as amended by the Sale and Supply of Goods to Consumers Regulations 2002.

The position where an adjudicator acts inquisitorially is illustrated by the following statement made by Judge Toulmin:

> in appropriate cases falling short of the case where the issues are wholly different, the concept of procedural fairness should be sufficient to ensure that a party will not be prejudiced by the finding of an adjudicator where the case has developed in the course of the adjudication.

It was found that if an adjudicator based his decision upon material neither referred to him nor the parties, then the basis upon which the adjudicator would find would be "*so different from that put forward in the referral notice that it [would be] in essence a different adjudication"*.

In addition, if an adjudicator answers a question that has not been referred to him and the same impacts upon the adjudicator's decision, that decision in respect of that question may be found to be unenforceable, rendering either the whole or part of the decision (if the offending section of the decision is severable), unenforceable.

Although s.13 of the Scheme permits the adjudicator to "*take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication"*, it must be noted that this is simply a procedural provision and not a power.[72]

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[70] [1965] 5 BLR 83

[71] [1998] 1 WLR 727

[72] C/f HHJ Thornton QC in *Fastrack Contractors* v *Morrison* [2000] BLR 168 who said:

The Scheme [that is the Adjudication Scheme] gives the adjudicator two powers to take the initiative in ascertaining the facts and the law and to resign if the dispute varies significantly from the dispute referred to him. These powers show that it is possible that a dispute that has been validly referred to adjudication can, in some circumstances, as details unfold during the adjudication, become enlarged and change its nature and extent. If this happens it is conceivable that at least some of the matters and issues referred which are not previously encompassed within a pre-existing dispute could legitimately become incorporated within the dispute that is being referred.

Therefore, an adjudicator cannot rely upon s.13 of the Scheme to conduct an inquisitorial process. This is not only because of the established English law as outlined above, but also because s.12 of the Scheme states that the adjudicator *"shall act impartially"* and even if the adjudicator does *"take the initiative in ascertaining the facts and the law"* such can only be in respect of *"the dispute"* stated within the referral.

Therefore, where an adjudicator takes the initiative and uses any of the provisions contained within s.13 of the Scheme, for example s.13(c) *"meet and question any of the parties"*, if during the course of such a meeting the adjudicator advances the argument for one side to the detriment of the other (such as making out its case, even indirectly), without the knowledge of the parties, it is possible that the adjudicator will be found to have demonstrated apparent bias, which is sufficient to render the adjudicator's decision, or part thereof (if the offending section is severable), unenforceable upon the basis that the adjudicator demonstrated apparent bias, which is a breach of natural justice. The lesson for adjudicators is to be wary of "ad hoc" conduct within adjudications which are not agreed by both parties, as being too receptive can invalidate any decision reached.

5. Deciding a question not referred to him and/or wrongly: *Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd*[73]

This decision shows that whilst since *Bouygues (UK) Limited* v *Dahl-Jensen (UK) Limited*[74] an adjudicator's decision will be enforced even if it contains errors of law and fact, in English law it appears to have been accepted that the construction industry prefers an expeditious decision even if it is the wrong decision.[75] The reality is that the construction industry requires a rapid means of dispute resolution which does not suffer from the inadequacies once apparent in TCC litigation (lack of speed and cost) and arbitration, and one that is right most of the time.

The *Humes Building* judgment emphasises the need for adjudicators to carefully consider the legal basis of any claim made and ensure that their decision logically follows from that legal basis. Otherwise they risk meritorious jurisdictional challenges to those decisions.

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[73] (2007) (TCC) HHJ Gilliand QC

[74] [2001] 1 All ER 1041

[75] See, too, *Karl Construction (Scotland) Ltd* v *Sweeney Civil Engineering (Scotland) Ltd* (2000) Crt of Session. This is an important case in the development of the law governing the standards of conduct to be adopted by adjudicators. The essential issue was what is the status of an adjudicator's decision if it is based on deciding a question of law which is not an issue between the parties and on which the adjudicator has failed to seek submissions from the parties? The answer appears to be that the decision will not be in excess of jurisdiction if the finding of law is a necessary step to the decision. It appears to have been left open whether the decision could be challenged on the basis of breach of natural justice or rules of fairness, since these issues were not raised in the enforcement proceedings. Note to Mr Justice Dysons statement in *Bouygues (UK) Limited* v *Dahl-Jensen (UK) Limited:*

> Where the adjudicator has gone outside his terms of reference, the court will not enforce his purported decision. This is not because it is unjust to enforce such a decision. It is because such a decision is of no effect in law. In deciding whether a decision has been made outside an adjudicator's terms of reference, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference. There will be some cases where it is clear that the adjudicator has decided an issue that was not referred to him or her. But in deciding whether the adjudicator has decided the wrong question rather than given a wrong answer to the right question, the court should bear in mind that the speedy nature of the adjudication process means that mistakes will inevitably occur, and, in my view, it should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction.

The facts are these: in 2005 Charlotte engaged Humes as contractor under the new JCT Intermediate Building Contract with Contractors Design 2005 Edition for the construction of a detached house and two ground floor offices with flats above at two sites at Milford in Surrey. Work commenced in October 2005 but was not completed by the contract completion date of March 2006. Charlotte purported to determine the contract by notice in July 2006.

Shortly after the notice Humes submitted its Valuation No. 10 for the value of all work up to the date of the notice comprising £385,000 for measured works and some £180,000 for variations. Its position was that Charlotte had wrongfully terminated the contract and that it was entitled to be paid for work it had executed. Charlotte's position was that the contract had been validly determined, the relevant contract provisions applied (suspending the obligation to make further payment) and that it was also entitled to deduct sums for alleged defects and for liquidated damages.

Humes started adjudication on the premise that Valuation No. 10 was the sound assessment of the work to the purported determination, that practical completion had already occurred and that the purported termination was unwarranted.

The Adjudicator decided that practical completion had not been achieved before the notice of determination. He also decided that the determination was wrongful because none of the alleged defaults had been established. He gave the full extension of time claimed but awarded only part of the prolongation costs because of concurrent delays.

The Adjudicator noted that the architect had not certified any sum in respect of Valuation No. 10 and that no notice of withholding had been provided. He decided that he could only decide the value based on the information provided by the parties but could not take into account any possible set-off or liquidated damages. He referred to Charlotte's report submitted in relation to defects and commented upon by Humes in adjudication, but stated that he could not take it into account because the issue of defects did not form part of the dispute.

The Adjudicator decided that practical completion had not been attained, the total due, after taking into account previous payments for Valuation No. 10, was £158,486 including deduction of 5% for retention and noted that no notice of withholding had been provided. He decided that he could only decide the value based on the information provided by the parties but could not take into account any possible set-off or liquidated damages. He referred to Charlotte's report submitted in relation to defects and commented upon by Humes in the adjudication, but stated that he could not take into account because the issue of defects did not form part of the dispute.

Charlotte did not make payment as ordered by the Adjudicator and Humes commenced the enforcement proceedings before Gilliland J.

Gilliland J referred to the judgment of the Court of Appeal in *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd*[76] (see ante) where it was decided that the HGCR Act and the Scheme required the Court to respect and enforce an adjudicator's decision unless it was plain that the question he had decided was not the question referred to him, or the manner

[76] [2006] BLR 15

in which he had gone about his task was obviously unfair. It was held that the task of an adjudicator was not to act as arbitrator or judge, but to find an interim solution which met the needs of the case. It was observed that the need to have the "right" answer had been subordinated to the need to have an answer quickly and that the scheme of adjudication was not enacted to provide answers to complex questions.

Gilliland J held that the Adjudicator had not acted in excess of jurisdiction in deciding that the termination was wrongful. The issue was raised in the Notice of adjudication and had been the subject of submissions and was wrongful. Gilliland J held that the Adjudicator had given answers to the very matters set out in the notice of adjudication.

It was argued that the Adjudicator should have asked himself what was due to Humes at the determination of the contract, but instead he had treated the dispute as the valuation of the interim application in the form of Valuation No. 10. As a result, it was argued, he was misled into thinking that a withholding notice was required if he was to consider Charlotte's claims for defects and liquidated damages.

Gilliland J considered that since there was no certificate from the architect for Valuation No. 10, the Adjudicator could not properly have concluded that anything was payable on Valuation No. 10. No issue of withholding could arise until monies became due under any interim application. Accordingly, his jurisdiction was to decide the amount due on determination. Gilliland held that the rejection of the claims for defects and liquidated damages was at the most an error of law by the Adjudicator within that jurisdiction.

The Adjudicator had failed to characterise the legal basis of the claim and to make clear what he considered was the legal status of Valuation No. 10. If he had applied the provisions of the contract properly when making his valuations, his valuation may have been different. If, as seemed more probable, he had treated the claim as one for damages, then his view that a notice of withholding was required was wrong. In both cases there were errors of law within his jurisdiction. Reaching a wrong decision because he misunderstood and/or misapplied the law was not a valid ground for refusing enforcement.

Gilliland J held that the Adjudicator had not ruled the report on defects as irrelevant, but rejected its contents as irrelevant because of the absence of a notice of withholding for defects. That was an error of law. Even if he did treat the report as inadmissible, that was a procedural matter. In both cases the treatment of the report was within his jurisdiction even though it may have been wrong.

Whilst that effectively disposed of the arguments on the merits of the Adjudicator's decision, Gilliland J clearly considered that the Adjudicator's decision was wrong in not considering the issues of defects and liquidated damages, something which would likely have made a considerable difference to his award.

Gilliland J then considered the issue of natural justice. The main objection was that neither of the parties had raised the issue of notice of withholding in the adjudication and that the point was taken by the Adjudicator himself. The parties had not been given the opportunity to make submissions on the point.

Gilliland J held that if a court had acted in that way then the decision would have been open to challenge on the grounds of natural justice. The issue was the extent to which those principles applied in adjudication.

Gilliland referred to the propositions of Jackson J in *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* broadly approved by the Court of Appeal, in particular:

If an adjudicator declines to consider evidence which on his analysis of the facts or law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* grounds or for breach of paragraph 17 of the Scheme.

It is not often practical for an adjudicator to put to the parties his provisional conclusions for comment. It will only be in an exceptional case that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the court will decline to enforce his decision.

Gilliland J considered the cases in which the adjudicator's decision had not been enforced due to lack of jurisdiction and held that the question was whether what the adjudicator did was so unfair that the court should refuse to enforce the decision in a summary manner. The following two propositions can be derived from his judgment.

Whether the interests of fairness will require an adjudicator to put a matter which has not been raised by the parties to them for comment will depend upon all the circumstances and no hard and fast rule can be laid down.

The commonsense approach was that the issue which should be put to the parties for comment must be one which is either decisive or of considerable potential importance to the outcome and not peripheral.[77]

Applying the above propositions, Gilliland J held that what the Adjudicator had done was manifestly and seriously unfair to Charlotte, it was outwith his jurisdiction. The failure of the Adjudicator to raise the point with the parties and to invite their comments before issuing his decision was so unfair to the defendant that the court should not enforce the decision summarily. The following facts were decisive.

1 If Charlotte's claim for defects was correct the amount of any award would have been very significantly reduced.

2 The Adjudicator rejected the claim and any balance of the claim for liquidated damages without considering it upon its merits as he should have done.

3 Charlotte had been deprived of any opportunity of persuading the Adjudicator that this view of the law was incorrect and the consequence was that the Adjudicator had excluded a very substantial part of the defence without any consideration of its merits for reasons which were wrong in law.

[77] As per HHJ LLoyd QC in *Balfour Beatty* v *London Borough of Lambeth*, consistent with the approach of both Jackson J and the Court of Appeal in Carillion.

4 There was nothing to suggest that Charlotte should have realised that the Adjudicator might be of the view that a withholding notice was necessary before he could consider its claims.

That was sufficient to dispose of the case consistent with the requirements of natural justice. However, Gilliland J made the comment that it was a strong thing to hold a party to a decision which was obviously wrong on an important part of the defendant's case when the defendant had not had the opportunity to address the Adjudicator on the point.

Commentary

The judgment of Gilliland J emphasises the absolute requirement for adjudicators to identify clearly and early in the process, the legal basis of claims and defences and the essential logic of the legal analysis required. Claims under the contract provisions and claims for damages for breach of contract may need to be distinguished, for instance. It is usually helpful to identify those preliminary issues that need to be decided which may alter the inquiry or investigation necessary. The adjudicator does not need to do this in isolation he can always invite comment and submissions from the parties on these points afterwards. The parties will often have considered the matters for some time. A meeting is an efficient method of dealing with such points. Another method is to identify the main issues to be decided as a preliminary view, for comment and submissions by the parties.

If the adjudicator allows the parties the opportunity to participate in the legal analysis, then he may derive significant assistance in the process and that assistance may help avoid significant errors of law.

The judgment of Gilliland J suggests a movement to consideration of the merits of the analysis by the adjudicator. There was no question in this case of the adjudicator's errors being outside his jurisdiction, but the nature of the errors was sufficient to combine with the lack of opportunity for the parties to make submissions to make the process sufficiently unfair to prevent enforcement.

Closing remarks drawing the strings together!

Jurisdictional challenges at the stage after an adjudicator is seized of a dispute are now far less likely to get off the ground than was the case a few years ago thanks to a firm hand on the tiller from the likes of Mr Justice Jackson, HHJ Coulson QC, and HHJ Lloyd QC before him. It is worth repeating HHJ Coulson QC's recent remarks in *A C Yule & Son Ltd* v *Speedwell Roofing & Cladding Ltd* where he noted that following the *Amec* and *Carillion* cases, jurisdiction and natural justice challenges have become more difficult and the number of disputed applications to enforce adjudication decisions had fallen. Thus, what the Judge termed the "resourceful losing party" has had to look elsewhere and a new common ground was to allege that the adjudicator had not complied with the strict timetable required by the HGCR Act on which I have majored.

12 July 2007

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