Fenwick Elliott

ADJUDICATION:

CURRENT THEMES AND PRACTICE

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The Housing Grants Construction and Regeneration Act 1996 ("HGCRA") came into force in 1998. The stated aim of the Act was to provide more efficient payment mechanisms and to introduce adjudication so as to enable parties to construction contracts to resolve their disputes, at least on an interim basis, swiftly and cheaply. However, in the 5 years or so since the Act has been in force, there have been over 170 reported cases in respect of it, mostly concerning adjudication.

Statistics

There is now sufficient material regarding the working of adjudication to provide some useful statistical analysis. Statistics have been compiled by the Glasgow Caledonian University who have produced a Report compared from information provided by Adjudicator Nominating Bodies. These indicate that the growth of adjudication is reducing. In the second year of adjudication (1999 – 2000) there was a massive 600% increase in adjudications involving appointing bodies, up to a total of 1,309. In 2000 to 2001 growth was at 60% to a total of 1,999. However, in 2001 to 2002 growth has been only 1% up to a total of 1,027. This may suggest that the market is reaching saturation point as the procedure becomes well known.

Other notable statistics are:

- the pattern of adjudications is not constant throughout the year. The highest number of commencements are in November, and February/March; and the lowest numbers are in September and April;
- in March 2001, 9 complaints were made against adjudicators, and one upheld in April 2000 to May 2001 and November 2001 to April 2002 the respective figures for complaints were 16:4 (made: upheld) and 24:3. This represents a dissatisfaction rate of just under 2%;

- evidence from adjudicators indicates that between May 2001 and October 2002 89.8% of appointments were made through an ANB, 9.86% by agreement, and 0.56% by naming in the contract;
- in the same period, adjudicators indicated that they found for the Claimant in 69% of the cases, for the Respondent in 22% of the cases, and gave a split decision in 9% of cases. The success of Respondents is increasing;
- in the same period the subjects of disputes were:
  - valuation of variations 36%;
  - valuation of final account 27%;
  - failure to comply with payment of provisions 24%;
  - loss and expense 7%;
  - extension of time and loss and expense (combined) 3%;
  - defects 2%;
  - entitlement to interest 1%;
  - liquidated and ascertained damages 1%;
- most disputes involve sums between £10,000 and £50,000 but growth was experienced in categories over £100,000;
- 39% of appointments were challenged during the adjudication on the grounds of jurisdiction;
- 4% of adjudicators proceeded to make a decision following a challenge;
- the most common grouping of adjudicator's fees was £76 to £100 per hour followed by £111 to £125 per hour;
- most adjudicators took between 26 and 50 hours to reach a decision;
- experts of whatever kind were only appointed in about 7% of cases.

Jurisdiction

Given the number of jurisdictional challenges as referred to above, it is unsurprising that several of the recent cases respecting adjudication concerned jurisdiction.

A frequently encountered jurisdictional issue arises from the need for a crystallized dispute to have emerged in order for a properly constituted adjudication to take place. After some uncertainty, the dispute requirement was put beyond doubt in respect of English arbitration law (which has been held to be relevant to the law of adjudication) in *Arenson – v- Casson Beckman Rutley & Co [1977] AC 405*. It was recognized in that case that a dispute must be distinguished from a valuation. Thus, for example, a contract for the sale

of oranges at a price to be agreed could give rise to an arbitral or adjudicable dispute if no such agreement were reached. However, a contract for the sale of oranges at a price to be agreed but, in the absence of agreement, at a price to be fixed by a third party, would not give rise to an adjudicable dispute. In the latter case, rather than deciding a dispute, the third party is merely administering the mechanics of the agreement.

The requirement for a dispute is, in respect of adjudication, made express by Section 108(1) of the HGCRA which states that "a party to a construction contract has the right to refer a dispute arising under the contract to adjudication under a procedure complying with this section." And, in the adjudication context, a major issue that has recently been investigated by the Courts is when a dispute has crystallized for the purposes of the Act.

It is clear beyond doubt that, for a dispute to have arisen, it is insufficient for a party to demand payment and then to commence proceedings without allowing the other party the opportunity to respond. The existence of a dispute requires a denial or, alternatively, a failure to make any response after a reasonable time for doing so has elapsed.

The issue is not, however, always so plain in practice. This is illustrated by *Cowlin Construction Limited -v- CFW Architects (a firm) CILL April 2003 1961*.

Cowlin were employed as design and build contractors for the rebuilding of servicemen's housing for the MoD. CFW Architects were the project architects.

Cowlin gave notice of adjudication alleging that CFW had wrongfully repudiated the contract. CFW served a counter-notice to the contrary effect. CFW denied jurisdiction but the adjudicator decided for Cowlin.

Cowlin then claimed additional costs which they said they had incurred as a result of delays by CFW in producing and coordinating drawings. CFW said that there was nothing in Cowlin's 190 sheets, comprising copy invoices and pages of calculations, to explain how Cowlin said that CFW was liable. Cowlin said that it had already supplied sufficient detail to identify the case and the consequences of the alleged failures, and claimed that a dispute had crystallized between them. Cowlin then, after a brief and inconclusive meeting with the loss adjuster appointed by CFW's insurers, applied to the RIBA for the appointment of an adjudicator.

The adjudicator found for Cowlin who then sought to enforce the award by summary judgment.

HH Judge Frances Kirkham held that, by serving a counter-notice, CFW had lost the right to object to jurisdiction. She said that:

> *"CFW made their elections [by serving their counter-notice]. At the time they did so, they were represented by solicitors. Hugh James had been acting for CFW for some time before Cowlin served their notice to adjudicate, as the correspondence demonstrates. Whilst the adjudication process is rapid, the question as to whether there is a relevant contract between the parties and whether an adjudicator has jurisdiction would normally be at the forefront of the minds of those acting for the parties. Hugh James must be taken to have*

understood the rapid nature of the adjudication process and that any challenge to jurisdiction must be taken at the earliest possible opportunity. CFW did have sufficient knowledge to make an election to accept jurisdiction. Hugh James served the counter-notice on behalf of CFW. Hugh James continued to correspond with Lee Crowder and the adjudicator on the assumption that the adjudicator had jurisdiction. Hugh James indicated in the 28 September letter that the adjudicator may not have jurisdiction. They then made their objection to jurisdiction on the first formal opportunity, namely service of their response to Cowlin's Notice of Referral. Miss Jefford submits that, in circumstances where the adjudication process is rapid and often does not permit much time for a responding party to reflect on its position, it would be a harsh result if CFW were estopped from denying the adjudicator's jurisdiction or were found to have waived altogether their right to object, when they had raised their objection at a comparatively early stage. I accept that such a result might be harsh. However, it seems to me that must be the result: a court will generally conclude that, once a party has made an election, he is bound by it and has waived his right to object."

However, although unnecessary to the decision, Judge Kirkham nevertheless considered the question of whether a dispute had arisen. CFW contended that there was no dispute because they had never been fully notified of the basis of the claim. However, it was held that CFW had, in fact, had enough information to know broadly whether they admitted the claim or not. The Judge stated:

"Most disputes stem from claims. But the existence of a detailed claim is not necessary to give rise to a dispute. Many court and arbitral proceedings are begun before the nature of the dispute or difference between the parties has been explicitly set out. In any event, Miss Jefford does not rely on the lack of particularization. Absence of a reply gives rise to the inference that there is a dispute. That is what happened here. That conclusion is reinforced by the fact that Cowlin had delivered an ultimatum. I conclude that by 18 May 2002 a dispute had arisen. Cowlin had made a claim. The nature of the claim had been outlined so that, although CFW did not know the detail, they were aware of the bare bones of it. Although CFW had not expressly rejected the claim, Cowlin had made it clear that, unless CFW made their position clear by 17 May, Cowlin would have to assume that CFW did not accept the claim. In the absence of an acceptance of Cowlin's claim, CFW must be taken to have rejected it so that a dispute had arisen."

The question of crystallization of a dispute arose again in *Lovell Projects Limited -v- Legg and Carver CILL September 2003 2019*.

Legg contracted with Lovell for the refurbishment of a dwelling house. The contract provided that any dispute or difference could be referred to adjudication. In the event that the parties did not agree the appointment of an adjudicator, a nomination would be made by the President of Vice-President of the RIBA. Lovell commenced adjudication proceedings against Legg in relation to :

(i) the alleged failure of the contract administrator to grant an extension of time;

(ii) the alleged wrongful termination of the Contract on 16 January 2003;

(iii) the non-payment of valuations of 10, 11 and 12, for failure to pay upon determination, and interest.

The adjudicator ordered Lovell to pay £85,873.59. Lovell contended that no dispute had been crystallized. The Judge, HH Judge Mosley QC observed that there are two conflicting lines of authority. The first is that upon which the *Cowlin* case had been determined and which stems from the authority of *Halki Shipping Corporation –v- Sopex Oils Limited [1988] 1WLR 726*. The other line of authority appears in *Nuttall –v- Carter[2002] BLR V12, CILL May 2002 1853*.

Halki, as observed above, is an arbitration case held, in the *Lovell Legg* case, to be persuasive. It states that a dispute requires a demand, and either a rejection of the demand or silence.

The *Nuttall* case, however, gave "dispute" a narrower interpretation.

In *Nuttall*, under cover of a letter dated 18 May 2001, Nuttall submitted a claim for an extension of time and loss and expense for £1,979,752.00 ("the May Claim"). There followed a series of correspondence concerning this claim and, at all times, Carter refused to acknowledge that Nuttall had established any entitlement to an extension of time or loss and expense. Accordingly, under cover of a solicitors' letter of 14 December 2001, Nuttall commenced adjudication proceedings for an extension of time and loss and expense.

On 4 January 2002, Nuttall served a Referral Notice accompanied by an expert's Report setting out in detail the claim for an extension of time and details of Nuttall's claim for loss and expense ("the Caletka Report"). Whilst the overall period for the extension of time of 235 days was the same as previously claimed, the factual justification for the extension was significantly different from that previously provided in the May Claim. Further, there were significant differences in relation to the quantification of the claim for loss and expense. The figure now claimed was only £1,253,495.76 and the composition of it was also significantly different from the May Claim. Notwithstanding the objections of Carter, the adjudicator considered the Caletka Report and reached a decision that Carter should pay Nuttall £834,468.90. Carter refused to comply with the decision on the basis that, as the matters detailed within the Notice of Adjudication and/or the Referral Notice had not been brought to their attention, there could not be a dispute in respect of what, in essence, amounted to a different claim.

HH Judge Seymour QC found that a dispute had not crystallized because Carter had not been given the opportunity to consider what, in effect, amounted to a new claim. A party must submit to adjudication the facts and arguments previously rehearsed between the parties. He said:

> *"There must have been an opportunity for the protagonists each to consider the position adopted by the other, and to formulate arguments of a reasoned kind."*

He also said that:

> *"……what a party cannot do, in my judgement, is abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the "claim" remains the same as made previously the dispute is still the same."*

On this basis, he said that a "dispute" is something different from a "claim": *"……a "dispute" can be about a "claim", [but] there is rather more to a "dispute" than simply to a "claim" which has not been accepted."*

So the question arises as to whether *Halki* and *Nuttall* are irreconcilable. It is arguable that they are not. In *Halki*, the distinction between a claim and dispute was not addressed. That may well have been because, in that case, the dispute proceeded upon in the arbitration was not in any way inconsistent with that which had previously been indicated to the Respondent. *Nuttall* may well be correct in deciding that a claim for money brought on a wholly different basis from that originally advanced gives rise to a different dispute. However, *Nuttall* may be on more uncertain ground in deciding that a claim made with insufficient supporting documents cannot found an adjudicable dispute. Not such requirement appears in the Act. Indeed, any judicially imposed requirement to litigate disputes in correspondence prior to commencing an adjudication could be regarded as being inconsistent with the policy of the Act.

This issue awaits a more authoritative determination.

The last year also yields two miscellaneous cases on jurisdiction. The first is *Pegram Shopfitters Limited -v- Tally Weijl (UK) Limited CILL June 2003 1990*.

In this case, Pegram carried out refurbishment works at Tally's retail clothing store in Oxford Street between June and September 2000. Disputes arose as to the value of this work after Practical Completion which the Claimant referred to adjudication in accordance with the statutory Scheme. Tally participated in the adjudication under protest, arguing that a contract had been concluded which incorporated the JCT Prime Cost Standard Form 1998 and that the procedure should, therefore, be governed by the terms of this contract. The adjudication proceeded under the Scheme and Pegram were awarded £95,483.78 plus interest of £11,717.90. Tally refused to pay and Pegram applied to the Court to enforce the decision.

As the Defendant had accepted in the adjudication that there was a construction contract in place, the contrary could not be advanced successfully before the adjudicator. However, the question also arose as to whether the adjudicator lacked jurisdiction because of the dispute as to which adjudication provisions were incorporated.

HH Judge Anthony Thornton QC held that since the applicable rules were not readily ascertainable, the adjudication provisions of the Scheme applied by default. Any other conclusion would defeat the purposes of the Act. Judge Thornton said:

> *"If the parties enter into their construction contract in such a way that its terms are not clearly and unquestionably capable of being identified because, as here, the negotiations consisted of a series of offers and counter-offers and no complete and composite set of contract documents was ever identified and signed, the parties have not produced a construction contract whose terms enable a party to give notice at any time of his intention to refer a dispute to adjudication; nor have they provided a contractual timetable with the object of securing the appointment of an adjudicator within seven days of such a notice….In those circumstances, Section 108 of the HGCRA provides that the Scheme shall apply since the contract does not comply with the statutory requirement that it should enable the party to give notice at any time of his intention to refer a dispute to adjudication; nor does it provide an appropriate timetable for an appointment within 7 days of such a notice."*

It is important to observe that the adjudicator did not have authority to decide his own jurisdiction. It is arguable that, if the Judge's logic were rigorously followed, any decision by the adjudicator that either the rules contended for by Pegram or those by Tally applied, he would have acted without jurisdiction – even if, on close analysis, his analysis as to which rules applied was actually correct: according to this judgment, the uncertainty as to which rules applied was sufficient to bring the Scheme into operation – a potential trap in the future for unwary adjudicators.

A further jurisdictional point arose in *Baldwins Industrial Services plc -v- Barr Limited CILL March 2003 1951.*

In this case, Barr entered into an agreement with Baldwins for the hire of a 50 tonne crane, together with a driver, to be used by Barr in the construction of the new football stadium for Southampton FC. In July 2002 Baldwins commenced an adjudication against Barr claiming unpaid hire charges and the cost of repairing damage to the crane which had occurred as a result of an accident on 19 December 2000. In that adjudication Barr contended that there was no contract. The adjudicator found Barr responsible for the cost of repairs to the crane, unpaid hire charges, transport costs and interest. Barr did not pay. Baldwins went into administrative receivership on 28 October 2002. Baldwins brought proceedings to enforce the adjudicator's decision.

It was held that a contract for the supply of a mobile crane plus driver was a contract for construction operations which formed an integral part of, or were preparatory to, or were for rendering complete, construction operations, as provided for by Section 105(1)(a) of the HGCRA.

Finally on jurisdiction, note *Deko Scotland Limited – Edinburgh Joint Venture and Others CILL July/August 2003 1999*.

The Edinburgh Joint Venture was set up to design and construct a new Royal Infirmary and medical school. Zenith Contract Interiors Limited was a subcontractor to the Defenders for plasterboard partitioning works. A provisional liquidator was appointed to Zenith and the subcontract works became subject to a novation such that Deko Scotland Limited became the new subcontractor.

A dispute arose and the adjudicator issued a decision on 4 September 2002. The adjudication was governed by the ORSA Adjudication Rules 1998 version 1.2, which were subject to a large number of amendments. The question arose as to the adjudicator's power to make an award in respect of the costs and expenses of the adjudication. One of the amendments introduced a new Rule 21A which provided that:

> *"The adjudicator may require either party to pay or make a contribution to the legal costs of another party arising in the adjudication……"*

The adjudicator ordered the Edinburgh Joint Venture to pay half of Deko's costs including their legal costs. They claimed in respect of the claim consultant, surveyor, solicitors, internal costs, and half the share of the adjudicator's fee.

The Court held that Rule 21A empowered the adjudicator to order payment of costs, but those costs were limited to legal costs. However, as legal costs were analogous to judicial expenses, they were subject to assessment (taxation) by the Court.

This judgment was predicated upon the fact that arbitration in Scotland is in effect a form of arbitration and similar rules apply. Lord Drummond Young said:

> *"In Scots law, at least, an adjudication is a form of arbitration. It involves a procedure whereby parties agree to submit their dispute to the decision of a named individual rather than resort to court proceedings. That agreement may be found in an express adjudication clause in the party's contract, or such a provision may be implied by the HGCRA 1996. However the agreement to go to adjudication is created, the critical features of an arbitration are present. The only distinction is that an adjudicator's award is merely provisional, and may be undone by subsequent litigation or arbitration. That does not, however, affect the conclusion that adjudication possesses the critical features of arbitration and is therefore a form of arbitration. It follows that any award of expenses in an adjudication should normally be confined in the same way as an award for expenses in arbitration; that is to say, by reference to the same standard as judicial expenses. Against that background, I am of the opinion that any express or implied part award costs where expenses in an adjudication should be restricted to expenses analogous to judicial expenses unless there is clear wording to the contrary."*

The Judge went on to say that costs in litigation are taxed by the Auditor of Court (in Scotland) and the same procedure is used in arbitration. By the same token, in any adjudication there was an implied power to have an award of costs or expenses taxed by the Auditor. Since, in adjudication, speed is of the essence, it will not usually be desirable to have an account of expenses taxed before the adjudicator's decision is issued. In such a case, the adjudicator may simply make an award of the taxed expenses of the adjudication in favour of one party.

The impact of this case on English law is questionable. There are perfectly respectable arguments to the effect that, philosophically, English adjudication is a distinct process from arbitration. In the first instance, the fact that adjudication usually results in an interim

decision which can be overridden by arbitration or litigation may be regarded as a fundamental distinction. Certainly, that distinction was regarded of extreme significance in *Elanay Contracts Limited -v- The Vestry CILL November 2000 167* (a case concerning the applicability of human rights legislation to adjudication). In that case HH Judge Richard Havery QC said:

> *"In my judgement, Article 6 of the European Convention on Human Rights does not apply to an adjudicator's award to proceedings before an adjudicator and that is because, although they are of a decision or determination of a question of civil rights, they are not in any sense a final determination."*

It is notable that, in *Cowlin,* Judge Kirkham refused the analogy of arbitration in the determination of adjudication issues because "there are too many similarities between the processes". Further, unlike most arbitrations, adjudication is a mandatory provision imposed by statute irrespective of the will of the parties. Consequently, so far as it is like arbitration at all, it has a closer parallel with the statutory arbitrations imposed in certain specialized legislation such as the Agricultural Holdings Act or the Telecommunications Act.

The point has practical significance since upon it may rest other issues concerning the importation of rules relating to arbitration such as natural justice (see below) into the adjudication process.

Set-off

A further point of principle that has recently been ventilated in the cases concerns the relationship between the adjudication process and the underlying contract between the parties. This has been of particular significance regarding the entitlement of a losing party in an adjudication to raise a set-off against the decision. The cases do not apply a consistent approach.

The first is *Bovis Lend Lease -v- Triangle Development Limited CILL February 2003 1939*.

Bovis entered into a management contract with *Triangle Development Limited* for the refurbishment and fit-out of three existing Victorian Schools into three residential apartments. The contract incorporated the JCT Standard Form of Management Contract, 1998 edition. The work was to be completed in 4 phases between 16 October and 16 July 2001. Disputes arose in respect of the valuation of two interim certificates in which the architect had reduced certain items so that each of the two certificates certified a negative value due to Bovis.

On 25 July 2002 the architect served Bovis with a notice to the effect that Bovis were failing to proceed regularly and diligently with the work. Bovis responded by stating that the default notice did not comply with the procedural requirements of the contract and that there was no factual basis for serving the notice.

On 31 July 2002 Triangle issued a Withholding Notice in respect of liquidated and ascertained damages following the issue of a Certificate of Non-Completion. On 7 August 2002 Bovis served a notice that Triangle had repudiated the contract by engaging new contractors, and that Bovis accepted that repudiation. During this period, three

adjudications were being progressed. The first was in respect of the negative interim certificates. The second was in respect of Triangle's claim that Bovis was in breach of a requirement to provide documents for valuation purposes. The third related to the question as to whether the contract had been repudiated. One of the various issues that arose was whether the decision of the adjudicator that money must be paid gave rise to a contractual obligation separate from that contained in the underlying contract and, if so, whether it was possible to withhold against an adjudicator's decision.

HH Judge Anthony Thornton QC held that Triangle were entitled to set off. He concluded that:

> " 1. *the decision of an adjudicator that money must be paid gives rise to a separate contractual obligation on the paying party to comply with that decision within the stipulated period. The obligation will usually preclude the paying party from making withholdings, deductions, set-offs, or cross-claims against that sum;*
>
> 2. *for a withholding to be made against an adjudicator's decision, an effective Notice to Withhold Payment must usually have been given prior to the adjudication notice been given or, possibly the decision being given, and which was ruled upon and made part of the subject matter of that decision;*
>
> 3. *however, where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail;*
>
> 4. *equally, where a paying party is given an entitlement to deduct from or crossclaim against the sum directed to be paid as a result of the same or another adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed."*

Judge Thornton decided that the adjudicator's decision did indeed create a cause of action distinct from the underlying entitlement to be paid according to the terms of the contract. This is consistent with the position in arbitration, notably *FJ Bloemen Pty Limited –v- City of Gold Coast Council [1973] AC 115* where it was held that the arbitrator's award gives rise to such an independent cause of action and that the parties are taken impliedly to have agreed to honour the award.

The point can have important practical significance. An example is in respect of limitation periods. This issue arose in *Bloemen* itself. If the underlying contract was being enforced it was statute-barred but, if enforcement was of the arbitrator's award itself, the action was in time.

However, *Bovis* has, in effect, been overturned in a case that immediately followed being *Levolux AT Limited –v- Ferson Contractors Limited CILL March 2003 1956.*

The Claimant, Levolux AT Limited, was a subcontractor engaged under the GC/Works form of subcontract, with amendments, to supply and fit brise soleil and louvre panels for the Defendant, Ferson Contractors Limited. Levolux served a Notice of Intention to refer a dispute to adjudication, dated 25 March 2002, in respect of failure to pay Application No. 2. Ferson relied upon a Notice to Withhold Payment, but Levolux contended that the Notice was not valid within the meaning of Section 111 of the HGSRA. The Adjudicator issued his decision dated 30 April 2002 deciding that the Withholding Notice did not comply with the Section 111 requirements and, therefore, concluding that payment of £51,659 inclusive of VAT together with interest and costs should be paid by Ferson to Levolux.

Levolux sought summary judgment of the amount of the decision. Ferson's primary case was that it had determined the subcontract and therefore was not obliged to make any further payment.

HH Judge Wilcox held that the amount owing pursuant to the decision should be paid to Levolux. This was on the basis that the parties had accepted, by reference to Clause 38A.7 of the contract, that a decision would be binding pending litigation or arbitration. Therefore, the adjudicator's decision stood to be enforced. Ferson appealed but the appeal was dismissed. A term in the contract stating that no further payment should be made as a result of a determination of the contract should not be read as applying to amounts due by reason of an adjudicator's decision.

The decision appears to rest largely on the point of public policy that any other decision would defeat the purposes of the HGCRA. Otherwise, contractual provisions would readily be drafted which would have the effect of nullifying the adjudicator's decision, eg by providing that such a decision should not be enforced pending a final determination of the matters in dispute in arbitration or in litigation.

The court sought to distinguish the decision of the Court of Appeal in *Parsons Plastics (Research and Development) Limited -v- Purac Limited (2002) BLR 334* where, at Paragraph 15, Pill LJ stated:

> *"It is open to the Respondents (employer paying party) to set off against the Adjudicator's decision and any other claim they have against the Appellants (contractor receiving party) which had not been determined by the Adjudicator. The Adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this Subcontract, can be made the subject of set-off and counterclaim."*

The extent to which the cases can in truth be distinguished is a matter of debate and it may be that this issue awaits House of Lords authority. Certainly, however, decisions made largely in terms of policy have the disadvantage of making it more difficult to determine, from first principles, the parties' rights and liabilities in other cases.

Finally on the issue of set-off, note *Shimizu Europe Limited -v- LBJ Fabrications Limited* CILL September 2003 2015.

Shimizu, as main contractor for work at Oxford Science Park, engaged LBJ as subcontractor for the design, supply and installation of the louvres and cladding. The contract was recorded in a purported letter of intent dated 14 February 2002 stating that the contract would be in the form of the DOM/1 Standard Form Subcontract together with various non-standard amendments.

LBJ made an application for an interim payment which became the subject of an adjudication. The parties agreed to adjudicate in accordance with the TeCSA Adjudication Rules 1999 version 1.3. The Adjudicator's decision of 20 February 2003 valued LBJ's work and the Adjudicator decided that Shimizu should pay the sum of £47,718.39 plus VAT:

> *"……without set-off…….payment to be made not later than 28 days after LBJ has delivered a VAT invoice as required by amended Clause 21.2.4."*

Once the decision had been issued, LBJ sent an invoice to Shimizu Shimizu then served a Withholding Notice in relation to sums due in respect of that invoice. Shimizu argued that, by virtue of Clause 21.2.4, a payment did not become due to the Subcontractor until Shimizu had submitted an invoice. The final date for payment was 28 days after submission of that invoice. The Adjudicator decided that an amount was due, but that the final date for payment was 28 days after receipt of the invoice. Shimizu argued that it was, therefore, able to serve a Withholding Notice no later than 5 days before the final date for payment. LBJ commenced enforcement proceedings.

The question arose that, given that the final date for payment was 28 days after submission of an invoice and the invoice was submitted immediately after the issue of the adjudicator's decision, whether LBJ could then issue a Withholding Notice effective against the Adjudicator's decision.

HH Judge Frances Kirkham held that the Notice was valid. If the contractual machinery requires the issue of an invoice in order to trigger a period leading to the final date for payment, it is possible to serve a Withholding Notice before the final date for payment that will be so effective against the decision. She said that:

> *"It seems to me that, here, the adjudicator's decision gave raise to a right for LBJ to be paid within the context and in accordance with the mechanisms of the Subcontract and the Act. The consequence is that Shimizu was entitled to serve a Withholding Notice after the decision and in respect of the subject matter of the decision."*

To this extent, the judgment appears to be more closely in accord with *Levolux* rather than *Bovis Lend Lease* in indicating that enforcement is of the terms of the underlying contract rather than of a new contractual obligation embodied in the adjudicator's decision.

Again, this is an area of adjudication that requires the authoritative decision of a higher court.

Natural Justice

Two cases have arisen in the last year regarding natural justice which are of importance. The first is *Try Construction Limited -v- Eton Town House Group Limited* CILL May 2003 1982.

Try was employed as main contractor by Eton to convert a former bank headquarters in the City of London into a luxury hotel. The Contract incorporated the JCT 98 Standard Form Private with Quantities with Contractor's Design Portion Supplement, with various bespoke amendments. The completion date was 23 July 2001. Delays occurred and the works were not completed until July 2002. Try submitted two claims to the architect for extensions of time, loss and expense and for the repayment of liquidated and ascertained damages already deducted. These claims were rejected and became the subject of two adjudications.

The Referral Notice in adjudication no. 1 was served on 14 June 2002 and, on the same date, Mr Christopher Linnett of Harold Crowter Associates was appointed Adjudicator by the RICS.

The second Notice of Adjudication was served on 17 June 2002 and, on 19 June 2002, the RICS appointed Mr Linnett as the Adjudicator for adjudication no. 2. On 1 July 2002 the parties met the Adjudicator who informed them of his forthcoming holiday and expressed a wish to obtain assistance from a programming expert, Mr S Lowsley, also of Harold Crowter Associates. The parties agreed. The scope of the agreement became the subject-matter of the proceedings.

A second meeting with the Adjudicator took place on 10 July 2002 respecting adjudication no. 2. At this time, the parties agreed to extend the adjudicator's time for his decision until 2 August 2002 and also agreed that Mr Lowsley was permitted to contact the parties' respective programming experts independently. The Adjudicator wrote to the parties on 31 July seeking further time for his decision. The parties agreed and, accordingly, the Adjudicator's decisions in adjudications 1 and 2 were issued on 6 August 2002.

In Adjudication no. 2 Try was awarded an extension of time together with loss and expense and repayment of liquidated and ascertained damages, plus interest. Eton refused to comply with the decision and Try commenced enforcement proceedings. At the commencement of the trial, Eton pleaded six defences. However, in submissions, their defence was reduced to a single complaint which related to the methodology employed by Mr Lowsley in his delay analysis, and the extent to which the adjudicator accepted his findings without bringing the matter to Eton's attention.

The issue that arose was whether, in appointing a delay analyst to assist him, giving the analyst the ability to interrogate both parties, and then adopting the approach of the analyst, the Adjudicator had breached the principles of natural justice.

When the HGCRA was first introduced, a common view was that, whilst obliged to act fairly, the adjudicator was not constrained by strict rules of natural justice in the manner attributable to an arbitrator. Thus, it would be inoffensive for an adjudicator to talk to

one of the parties direct and proceed in a manner that might broadly be termed inquisitorial. That view has been discounted in cases such as *Discain Project Services Limited -v- Opecprime Develpments Limited CILL May 2001 1739.* However, the Courts have acknowledge that an excessively rigid adherence to natural justice is not always readily reconcilable with the strict time limits of adjudication which call for a more "rough and ready" approach to decision making. Thus, in *Balfour Beatty Construction Limited –v- The Mayor and Burgess of the London Borough of Lambeth (2002) BLR 288* HH Judge Humphrey Lloyd QC stated that *"the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties*" and that *"adjudication is necessarily crude in the resolution of disputes."*

In the *Try* case Judge Wilcox decided that the rules of natural justice had not been transgressed. The Adjudicator had used the services of the programmer exactly as the parties had agreed. As such, the case was to be distinguished from the *Balfour Beatty –v- Lamberth* case, where the Adjudicator had used his own knowledge in effect to make a party's case for it.

The Judge said that the rules for natural justice:

> *"Are not to be regarded as diluted for the purposes of the adjudication process. In the individual case, however, they must be judged in the light of such material matters as time restraints, the provisional nature of the decision, and any concessions or agreement made by the parties as to the nature of a process in the particular case."*

The other case on natural justice of significance for present purposes is *RSL (South West) Limited –v- Stansell Limited* CILL September 2003 2012.

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 HGCRA 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 to generally be equated with the necessity to conduct an essentially adversarial process – *Town & City Properties Limited -v- Wiltshier Southern Limited & Gilbert Powell (1988) 44 BLR 114.*

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".*

Withholding enforcement

Baldwins Industrial Services plc -v- Barr Limited (ante).

The facts were referred to above.

A further aspect of the case was that Barr said that, if they were ordered to pay the sum that the Adjudicator had decided against them then *"what is, and is intended to be, a temporary position will become a final position because Baldwins [would] not be able to reply the money if it [was] ultimately found that Barr [was] not so indebted to Baldwins."*

There were, equally, concerns as to Barr's own financial position. Judge Kirkham considered that she had to carry out a balancing exercise as to whether to grant a stay of enforcement. In the circumstances, she concluded that Baldwins's financial position and the consequent potential injustice to Barr, together with Barr's stated intention to bring proceedings within a month, constituted special circumstances so that Barr was entitled to

a stay on terms. Those terms involved an agreement by Barr to pay the money into Court and an undertaking to commence proceedings within a month.

A similar point arose in *Guardi Shoes Limited -v- Datum Contracts* CILL December 2002/January 2003 1934.

In this case, Datum obtained an adjudicator's decision against Guardi and, on Guardi's failure to pay, presented a winding up petition. Guardi sought to set it aside and produced draft Particulars of Claim indicating that there were triable issues to be determined between the parties and that continuation with the winding up proceedings was an abuse of process. However, Ferris J refused to grant Guardi's application. Guardi had had the opportunity to serve a notice pursuant to Section 111 of the HGCRA in relation to its claims but had failed to do so. The Adjudicator's decision was, accordingly, payable on its face and its presentation was not an abuse of process.

Consumer Legislation

A further issue that has recently arisen in adjudication is the impact of the consumer legislation in circumstances where one of the parties to a construction contract deals as a consumer in respect of a private dwelling house. In this regard it should be borne in mind that, by virtue of Section 106(1) of the HGCRA the payment provisions and adjudication provisions of the Act do not apply to *"a construction construct with a residential occupier"* ie *"a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residents."*

In *Picardi -v- Mr & Mrs Cuniberti CILL May 2003 1980* Picardi was an architect who had provided architectural services to the Cunibertis in connection with the refurbishment of their private dwelling house. Picardi had sent a completed copy of the RIBA Conditions of Engagement/1999 to the Cunibertis with a letter of appointment, but the Cunibertis had never signed the Standard Form. They failed to pay some of Picardi's invoices and Picardi commenced proceedings. The Adjudicator ordered the Cunibertis to pay Picardi £42,862.19 plus £7,500.88 VAT and the Adjudicator's fees of £5,760 plus VAT and interest. The Cunibertis refused to pay and Picardi commenced enforcement proceedings.

HH Judge Toulmin CMG QC held that a contract had not been concluded between the parties incorporating the RIBA Conditions: the contract was required to be signed as a condition of the contract coming into being. Furthermore, the adjudication clause was unenforceable at common law as an onerous or unusual term that was not properly and fairly brought to the Defendant's attention.

Moreover, the adjudication clause should in any event should be declared of no effect by reason the Unfair Terms in Consumer Contract Regulations 1999 Schedule 2(i)(q).

A different decision was reached in *Lovell Projects Limited -v- Legg & Carver* (ante).

Again, the contract was for the refurbishment of a dwelling house. The parties agreed the terms of the JCT Agreement for Minor Building Works (1998 edition) incorporating amendments MW 1-11. The contract provided for disputes to be referred to adjudication.

Lovell proceeded by way of adjudication and obtained a decision against Legg for £85,873.59.

It was held that the adjudication provisions did not offend the Unfair Terms in Consumer Regulations 1999 because the contract did not cause an significant imbalance of the parties' rights and obligations under the contract and, in particular, the form of contract was insisted upon by Legg who had available advice from solicitors and a nominated contract administrator as to the contract terms.

Conclusion

The last year has produced a number of significant decisions relating to adjudication. However, there is some evidence that the Courts are proceeding on a case by case basis, having regard to unpredictable views of public policy, rather than by reference to first principles. This, together with the inconsistency of certain of the decisions may make it increasingly difficult for advisers to predetermine the parties' rights.

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