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WHAT MAKES A BAD DECISION?

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WHAT MAKES A BAD DECISION?

The answer to the question posed by this paper is in many ways a straightforward one. A bad decision is one where you do not get what you want.

Simple, but sometimes a decision is bad for other reasons. It might be a decision where, on the face of it, you get what you want but ultimately you cannot do anything about it because the decision is flawed to the extent where you cannot actually use it.

Thus the purpose of this paper is to discuss what you can and cannot do if the decision turns out to be flawed. In particular, the paper will focus on the following:

- What if the adjudicator gets it wrong?
- What if the adjudicator does not issue his decision in time?
- The extent to which you can exercise a set-off or counterclaim against an adjudicator's decision; and
- Practical ways around a bad decision.

WHAT IF THE ADJUDICATOR GETS IT WRONG?

The Simple Answer – Bouygues Revisited

Again, this is another question, which has an apparently straightforward answer, particularly following the decision of the Court of Appeal in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*[1].

As is well known, in *Bouygues* what went wrong was that in making the calculations to answer the question of whether the payments made under the sub-contract represented an overpayment or an underpayment, the adjudicator overlooked the fact that that

[1] (2002) CILL 1673

assessment should be based on the contract sum presently due for payment, in other words the contract sum less the retention, rather than on the gross contract sum.

This was an error, but an error made within the jurisdiction of the adjudicator. The Court of Appeal held that provided that an adjudicator acts within that jurisdiction, his award will stand and be enforceable, even if a mistake is made. In doing so the Court of Appeal followed Knox J in *Nikko Hotels (UK) Ltd v MEPC Ltd*[2] who said, of an arbitrator:

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

It did not matter that this appeared to be unjust. That was a by-product of the adjudication system. It provided for a quick summary process, which meant that mistakes would be made. Lord Justice Buxton said:

> *Bouygues* contended that such an outcome was plainly unjust in a case where it was agreed that a mistake had been made, and particularly in a case, such as the present, where *Dahl-Jensen* was in insolvent liquidation, and therefore the eventual adjustment of the balance by way of arbitration will in practical terms be unenforceable on *Bouygues*' part. I respectfully consider that the judge was quite right when he pointed out that the possibility of such an outcome was inherent in the exceptional and summary procedure provided by the 1996 Act and the CIC Adjudication Procedure. And in any event unfairness in a specific case cannot be determinative of the true construction or effect of the scheme in general.

Bouygues Mitigated – The Slip Rule

However, this somewhat harsh effect does not apply if the adjudicator has made a simple slip or mathematical error.

In *Bloor Construction v Bowmer & Kirkland*[3], HHJ Toulmin CMG QC ruled that a term could be implied into adjudication agreements giving an adjudicator the power to correct decisions containing accidental errors or omissions or to clarify any ambiguity. This was confirmed in a second case, *Edmund Nuttall Ltd v Sevenoaks DC,*[4] provided that the power is exercised within a reasonable time and does not cause prejudice to either party.

> … in the absence of a specific agreement by the parties to the contrary, there
>
> is to be implied into the agreement for adjudication the power of the adjudicator to correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party.

The decision in *Bloor* has been embraced by the Guidance for Adjudicators published in July 2002 by the Construction Umbrella Bodies Adjudication Task Group. Part 6 of the Guidance

[2] (1991) 28 EG 86
[3] (2000) CILL 1626
[4] 27/9/2000 - unreported

confirms that whilst once the adjudicator has delivered his decision, his jurisdiction over that dispute is ended, where there is an error on the face of the decision, the adjudicator retains a power to make corrections. The adjudicator can only correct his decision; he cannot change the substantive decision because he has had second thoughts.

The power is contractual, so the parties are at liberty either to exclude the power or to limit it as they see fit. Alternatively, the adjudicator or Adjudicator Nominating Body may set out the terms of the power in the appointment agreement. However, it is for the adjudicator to decide whether there is an error or not.

Following *Bloor* and the Umbrella Guidance, the following types of error are covered:

(i) accidental error;

(ii) omission; and

(iii) clarification and/or the removal of ambiguity.

Thus, provided that the adjudicator has made a simple mistake, that mistake can be corrected.[5]

But What if the Adjudicator has made a more Fundamental Error.

Following *Bouygues*, it would appear that there is nothing that can be done. Well, that is not necessarily the case. It all depends on the nature (or perhaps the magnitude) of the error.

In *C & B Scene Concept Design Ltd v Isobars Ltd*[6] it was held at first instance that an error in law made by the adjudicator constituted an excess of jurisdiction with the result that the decision was invalid. Recorder Moxon Browne QC agreed with Isobars that, if no election was made between payment alternatives A and B of Appendix 2 of the JCT Design & Build Contract payment provisions, then the entirety of clause 30 of the contract must fall away and the Scheme payment provisions would apply. The adjudicator had accordingly erred in law since he had based his decision not upon the Scheme but upon the provisions of clause 30.3.5 of the contract.

However, the Court of Appeal disagreed[7] with the Recorder on the effect of the adjudicator's mistake. The key question, which the Court of Appeal thought it was necessary to consider, was whether the error on the part of the adjudicator, namely the failure to appreciate that the contractual provisions had been superseded by the Scheme, went to his jurisdiction or was merely an erroneous decision of law on a matter within his jurisdiction.

Here the scope of the dispute was agreed, namely the employer's obligations to make payment or otherwise. Thus the adjudicator had to resolve as a matter of law whether certain contractual clauses applied or not, and if they did, what the effect was of the failure to serve a timeous notice. Whilst the adjudicator was, as a matter of law incorrect, that error was within the scope of the dispute agreed between the parties.

[5] Provided the adjudicator is prepared to acknowledge the slip and make the appropriate amendment.
[6] 20 June 2001 - unreported
[7] (2002) CILL 1829

The adjudicator therefore had answered the right question but in the wrong way and the claimant was entitled to enforce the decision. It is only when the adjudicator decides matters beyond the dispute referred that he has no jurisdiction. Sir Murray Stuart-Smith made it clear that he agreed with the decision in *Bouygues*:

> Errors of procedure, fact or law are not sufficient to prevent enforcement of an adjudicator's decision by summary judgment. The case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*…is a striking example of this. The Adjudicator had made an obvious and fundamental error, accepted by both sides to be such, which resulted in a balance being owed to the contractor, whereas in truth it had been overpaid. The Court of Appeal held that the Adjudicator had not exceeded his jurisdiction, he had merely given a wrong answer to the question which was referred to him.

Thus twice, the Court of Appeal had made the position clear. If you received a bad or erroneous decision that was bad luck but all you could do was to remember that adjudication only provides for an interim decision, press on and attempt to negotiate a proper settlement or if necessary litigate or arbitrate.

However, that was not the end of the matter.

HHJ Thornton QC has held that there are certain circumstances where an error on the part of the adjudicator can be such as to enable his decision to be overturned. In *Joinery Plus Ltd v Laing Ltd*[8], Joinery Plus had carried out work in relation to two projects, one involving the design and construction of the Stakis London Metropole Hotel and Conference Centre and the other known as The Old Admiralty Building, New Road, London. The first sub-contract incorporated a heavily amended version of the standard DOM/2 Conditions, whereas the second was the JCT Works Contract, 1998 Edition.

Disputes arose in relation to both sub-contracts. Joinery Plus referred a dispute in relation to The Old Admiralty Building to adjudication. The adjudicator duly awarded Joinery Plus a sum in excess of £80,000. More extensive disputes arose in relation to the Stakis sub-contract. The dispute was referred to the same adjudicator. His decision was that Laing should pay £70,424.80 (inclusive of interest and VAT).

Laing sent a cheque in payment of this sum, and Joinery Plus told Laing that it was accepting the cheque generally on account towards its overall entitlement to payment for loss and expense since the adjudicator had not decided the questions referred to him. The reason for this was that the adjudicator had referred to the wrong Sub-contract Standard Conditions but said that having revisited the decision, he was satisfied the errors were of no material relevance to the substance of his decision. The adjudicator had said he would correct the errors if either party requested him to do so. Neither party did.

Joinery Plus wanted Laing to agree to a further referral to a different adjudicator. Laing declined on the basis that such a referral would be raising the same questions as the original dispute. HHJ Thornton QC disagreed, saying that the question referred was not answered and the errors were fundamental, going to the root of the adjudicator's

[8] 27/1/2003 (unreported)

jurisdiction. The adjudicator did not decide a dispute that had arisen under the relevant construction contract nor did he decide it in accordance with the provisions of that contract.

> It follows that the adjudicator's errors went to the heart of his jurisdiction which was to decide the referred dispute under the actual construction contract between the parties. The errors were fundamental, not capable of being corrected under his implied power to correct accidental slips and were not merely errors of law within his jurisdiction. Unlike the *C & B Scene Concept Design* case, where the correct contract provisions were misconstrued by the adjudicator, the adjudicator construed and applied the wrong conditions and, in conjunction with that error, either failed to consider and apply the correct contractual documentation at all or considered the wrong documentation.

The *Joinery Plus* case is probably an extreme example of the court deciding that a mistake made by the adjudicator was so fundamental that it could be argued that it went to the heart of that adjudicator's jurisdiction. In reality, given that the same adjudicator was making a second decision in a dispute between the same two parties, it is likely that this is an example of one party taking advantage of a simple slip by the adjudicator when it came to drafting that decision and so it is not so far away from the slips made in *Bouygues* or the types of slip made in *Bloor*.

WHAT IF THE ADJUDICATOR DOES NOT ISSUE HIS DECISION IN TIME?

Would issuing a decision late be enough to make a decision bad or be enough for a party who considers it has "lost" that adjudication to successfully challenge the decision? According to a recent Scottish case, issuing a decision a few days late would not have that draconian effect.

In Scotland, *St Andrews Bay Development Ltd v HBG Management Ltd and Another* [9], St Andrews and HBG entered into a Standard Scottish Building Contract with Contractors Design (May 1999) (similar to the English JCT equivalent) in respect of the building of a leisure complex at St Andrews. In January 2003, HBG referred a dispute to adjudication.

The adjudicator, who was named as second respondent, was required to make a decision by 5 March 2003. On 5 March, a secretary employed by the adjudicator's firm informed HBG's solicitors that the adjudicator had reached a decision but did not intend to release it until her fee had been paid. By a fax sent the following day, HBG indicated its intention to pay the whole of the fee in order to secure the release of the decision. The decision was then released on 7 March 2003 and the reasons for that decision communicated to the parties on 10 March 2003. At no time did HBG seek the extension of time required to produce a decision beyond 5 March 2003. The decision was therefore late.

The provisions of the Standard Form of Contract stated that if an adjudicator failed to produce a decision within the time provided then the referring party could instruct another adjudicator and the original adjudicator must resign. St Andrews claimed that the adjudicator had no power to reach her decision after 5 March 2003 and that therefore, the

[9] 4 April 2003 - unreported

decision was not valid. Lord Wheatley said that the adjudicator had not reached her decision within the time limits provided for either by the Scheme or by the Standard Contract. Paragraph 39A of the Standard Form of Contract (which is similar to paragraph 41A of the same contract in England) required the adjudicator to reach a decision and forthwith send that decision in writing to the parties. While the Scheme is silent on the question of communication of the decision, there is a contemporaneous duty to communicate the decision to the interested parties once it has been reached. Otherwise the purpose of the legislation would be meaningless. The judge said this obligation must include a contemporaneous duty to communicate that decision to the parties.

A decision cannot be said to be made until it has been intimated to the parties. Further, in the circumstances of this case, the adjudicator was not entitled to delay communication or intimation of the decision until the fees were paid.[10] There was nothing in the Scheme or contract to allow this. So far, the judge appeared to be in favour of the approach of the "losing" party.

However, the judge also held that the failure of the adjudicator to produce the decision within the time limits whilst serious was not of sufficient significance to render the decision a nullity. It was a technical matter, not such a fundamental error or impropriety so as to render the entire decision invalid.

SO IF YOU CANNOT CHALLENGE THE DECISION ITSELF, CAN YOU GET ROUND THAT DECISION IN ANOTHER WAY?[11]

Unsurprisingly, a number of attempts have been made to set-off against sums awarded by adjudicators. There have been a number of decisions which have suggested that it might just be possible to do this.

The First Court of Appeal Decision

One case involved one of our fellow speakers HHJ Kirkham. In *Parsons Plastics (Research & Development) Ltd v Purac Ltd*[12], Parsons had been successful in an ad hoc adjudication carried out in accordance with the terms of the sub-contract and not pursuant to the HGCRA.

Six days after the adjudicator's decision was given and before paying any money pursuant to that decision, Purac served a withholding notice pursuant to that sub- contract. Purac claimed that having taken over the sub-contract works pursuant to clause 20(c), they were entitled to deduct from monies otherwise due to Parsons the reasonable cost of completing the works. Purac had paid £303,000 plus VAT to a second sub-contractor to complete the work. That was a larger sum than the sum awarded by the adjudicator.

The Court of Appeal[13], agreeing with the judge, held that under the terms of this particular contract it was indeed open to Purac to set off against the adjudicator's decision any other

[10] Under some of the adjudication rules, for example TeCSA, this is not in any event possible
[11] It might also be possible to suggest that the decision was contrary to the principles of natural justice. See for example the decision of *Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207. However, it is not intended to discuss this further here.
[12] 13 August 2001 - unreported
[13] (2002) CILL 1868

claim they had against Parsons, as long as that claim had not been determined by the adjudicator.

The relevant clause of this particular sub-contract stated that:

> 31. Nothing contained in this Deed whether expressly or by incorporation or by implication shall in any way restrict [Purac's] equitable or common law rights of set off. Without prejudice to the generality of the foregoing, [Purac] shall have the right to set off against any sum due to [Parsons] whether hereunder or otherwise a fair and reasonable sum in respect of or on account of any claim or claims that have been made or which are to be made against [Purac] by the Purchaser the subject matter of which touches or concerns the Sub-Contract Works.

Accordingly Lord Justice Pill said:

> It is open to the respondents to set-off against the adjudicator's decision any other claim they have against the appellants which had not been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this sub-contract, can be made subject to set-off and counterclaim.

Remember that this was not a contract to which the HGCRA had applied and therefore the court's decision only applied to the specific wording of this particular sub-contract.

The Attitude of the TCC to HGCRA Adjudications

In cases which did involve the HGCRA, an apparent difference of opinion emerged within the judges of the TCC.

The first case to consider the relevant principles governing set-off and withholding from an adjudicator's decision was the decision of HHJ Hicks QC in *VHE Construction PLC v RBSTB Trust Co Limited*[14], who said:

> I conclude that enforcement proceedings such as these are proceedings to enforce a contractual obligation, namely the obligation to comply with the decision. The decision does not have the status of a judgment…
>
> There is, however, a question whether the obligation to "comply with" a decision which requires the payment of a sum of money has any greater effect than to make that sum a simple debt, for example by excluding certain defences which could be raised in answer to an action on such a debt…

HHJ Hicks QC, having considered whether the contractual payment provisions that had been relied on by the paying party gave the adjudicator's decision the status of a simple debt or went as far as to exclude defences such as set-off, concluded:

> It would make a nonsense of the overall purpose of…of the Act…if payments required to comply with adjudication decisions were more vulnerable to

[14] (2000) CILL 1592

> attack in this way than those simply falling due under the ordinary contractual machinery…therefore, I find these compelling reasons for concluding that in…at least on the facts of this case, "comply" means "comply, without recourse to defences or cross-claims not raised in the adjudication".

In another case, *Solland Interiors v Daraydan International*[15], a different judge, HHJ Seymour QC, followed *VHE* and said that where there were two separate contracts you could not set off a claim for liquidated damages under a related contract, which exceeded the total amount awarded in an adjudication under a separate contract. The fact that there were apparently other disputes between the parties did not constitute any reason not to enter judgment for the sums awarded by the adjudicator.

The parties had entered into a contract which said that the decision of an adjudicator was binding pending final determination by the court. There was no provision in that particular contract to set off or deduct against that award. HHJ Seymour QC said:

> The parties plainly intended that any decision of an adjudicator should be "binding". It seems to me that inherent in the concept of a decision being "binding" is, first, that the parties should accept the decision for the period for which the Conditions provided, and, second, that the parties should give effect to it. Giving effect to a decision that A should pay £X to B means that A pays £X to B, and not that A pays some different sum or no sum at all. Any other construction of clause 22(5) of the Conditions would mean that in the Building Contract adjudication was simply for fun and could not be for profit.

However, in the case of *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd*[16], HHJ LLoyd QC held that rights of set-off were not excluded under the HGCRA. The contract required compliance with an adjudicator's decision without prejudice to other rights under the contract.

> … Therefore other rights under the contract which were not the subject of the decision remain available to the relevant party. If therefore by the time an adjudicator makes a decision requiring payment by a party, the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles a party not to pay then the amount required to be paid by the decision does not have to be paid.

In a further decision, *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd*[17], HHJ LLoyd QC had to consider a situation where the paying party had paid up following an adjudicator's decision everything save for an amount in respect of liquidated damages which reflected the adjudicator's view about the extension of time that was sought by the claimant. The defendant alleged that it had given an effective notice of withholding in respect of these damages in accordance with the terms of the contract. HHJ LLoyd QC said:

[15] (2002) 83 Con LR 109
[16] (2001) 75 Con LR 71
[17] (2002) CILL 1811

> … in my view the defendant has realistic prospects of success in maintaining that it gave an effective notice, particularly having regard to the fact that underlying all this was the fact that all along it had made it very clear that it wanted to recover liquidated damages. It had served its notices …it would be manifestly unjust also to deprive the defendant of an opportunity of maintaining that it was not obliged to pay the full amount of the adjudicator's decision.
>
> … However, even if I am wrong on this part, and even if the letter of 23 March 2001 did not satisfy the requirements of cl.24.2.1 so that the adjudicator's decision became payable in full …the counterclaim is a viable counterclaim. No defence to it has been shown and there is in any event, given the adjudicator's view on the extension of time there is in these proceedings no realistic prospect available to the claimant for resisting payment on that counterclaim so that, in practical terms, subject to questions of costs, the result will be the same.

The situation came to a head following two decisions late last year in the TCC, *Bovis Lend Lease Ltd v Triangle Developments Ltd*[18], and *Levolux AT Ltd v Ferson Contractors Ltd.*[19]

In *Bovis*, HHJ Thornton QC had to consider whether a party could withhold against a sum directed to be paid by an adjudicator following three adjudications between the parties. The judge concluded by setting out a number of factors that must be in place before such a withholding can be made:

- The decision of an adjudicator that money must be paid gives rise to a separate contractual obligation. The paying party must comply with that decision within the stipulated period. Usually the paying party cannot withhold, make a deduction, set-off or cross-claim against that sum.

- To withhold against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given and being ruled upon and made part of the subject matter of that decision.

- However, if there are other contractual terms which clearly have the effect of superseding, or providing for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail.

- Equally, where a paying party is given an entitlement to deduct from or cross-claim 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.

The contract here included a clause which said that:

> In the event of the determination…and so long as that employment has not been reinstated then…the provisions of this contract which require any further payment or release of retention to Bovis shall not apply.

[18] (2003) CILL 1939
[19] 26/6/02 - unreported

Triangle had determined Bovis' contract for failing to proceed regularly and diligently, and the judge found that it was entitled to rely on both the contract and the adjudicator's third decision (that the determination was valid) to withhold payment of the sum directed to be paid under the adjudicator's first decision. Bovis' contention (namely that the determination of its employment was invalid) was not sufficient, in the absence of either an adjudicator's decision to that effect or, alternatively, any sufficient evidence to sustain that contention, to enable them to counter this.

It should be stressed that HHJ Thornton QC did not see that there was any contradiction in the way the judges of the TCC had been approaching this question. For example, of HHJ Lloyd QC's decision in *McIean v Swansea,* he said:

> … David McLean was a case where the court was giving effect to and complying with a further decision of the adjudicator as to extensions of time and their corollary, the extent of delayed completion by the receiving party and its entitlement to liquidated damages for delay. It was for that reason that effect was not given to the separate decision in favour of the paying party that a sum of money was due to it.

The Court of Appeal Takes Charge – The Levolux Decision

Earlier HHJ Wilcox had come to a slightly different conclusion in *Levolux v Ferson*[20], and it was with this case that the situation was clarified by the Court of Appeal.

Here, Levolux referred a dispute to adjudication in respect of a failure to pay application number 2. Ferson relied upon a notice of withholding payment, but Levolux contended that the notice was not a valid notice within section 111 of the Act. The adjudicator held that the withholding notice did not comply with the requirements for section 111 of the HGCRA.

When the matter came before the court, Ferson's primary case was that it had determined the sub-contract. In these circumstances, Ferson relied on clause 29.8 of the sub-contract:

> If the Contractor shall determine the Sub-Contract for any reason mentioned in Clause 29.6,"(including wrongful suspension of work) "the following provisions shall apply:-
> (1) All sums of money that may then be due or accruing due from the Contractor to the Sub-Contractor will cease to be due or to accrue due;

Alternatively, Ferson argued that it could rely upon the amended clause and set-off and/or counterclaim against the decision of the Adjudicator. The amendment to the GC/Works sub-contract stated, at clause 38A.11, that "*neither party shall be precluded from raising any right of set off, counterclaim or abatement in connection with the enforcement of an Adjudicator's decision*". Levolux had suspended the works as a result of non-payment. Ferson then issued determination notices for failing to proceed regularly and diligently. The dispute referred to adjudication was in respect of the valuation and withholding, and did not include an issue in respect of determination.

HHJ Wilcox held that the amount owing pursuant to the decision should be paid. This was on the basis that the parties had accepted, by reference to clause 38A.7 of the contracts that a decision would be binding pending litigation or arbitration. Notwithstanding that the

[20] (2003) CILL 1956

amended clause 38A.11 in respect of a right to withhold and/or set off against an adjudicator's decision was in conflict with section 111 of the HGCRA requiring an effective notice, HHJ Wilcox held that the necessary implication of the adjudicator's award was that Levolux had been entitled to suspend the works and accordingly that the purported determination based upon wrongful suspension had no contractual effect. Clause 29.8 did not apply to monies due under an adjudicator's award provided always that the adjudicator had not exceeded his jurisdiction. There was no suggestion in this case that the adjudicator had not acted within his jurisdiction.

Ferson appealed. Lord Justice Mantell succinctly summarised the point at issue in the fourth paragraph of his judgment:

> … A central issue in the appeal is whether, pending final resolution by arbitration or litigation, an adjudicator's decision should be enforced in derogation of contractual rights with which it may conflict.

Ferson, of course, relied on the third limb of HHJ Thornton QC's conclusions in the *Bovis v Triangle* case:

> … 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.

However, Lord Justice Mantell, disagreed:

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

Lord Justice Longmore agreed:

> … I have no doubt that Parliament's intention was to avoid just the kind of arguments to which we have listened in the present case…
>
> The parties have thus agreed not merely that the adjudication is to be binding but also that they will comply with the adjudication notwithstanding the arbitration clause. For good measure, they have agreed they will submit to applications for summary judgment. If Ferson had a genuine point, there would then be a dispute which would have to be referred to arbitration but the parties have expressly agreed that course is not open to them once an adjudication has occurred. The clause thus prevents the party who has lost the adjudication from applying for a stay and, for good measure, requires him to submit to applications for summary

> judgment. The point of that must be not that the court should hear argument, at the stage of the application for summary judgment, about matters which (apart from the adjudication provision) should be referred to arbitration, but rather that summary judgment should be given without further ado. That is what HH Judge Wilcox correctly did.

The language used is reminiscent of the simple straightforward approach of Mr Justice Dyson in *Macob* and the Court of Appeal in *Bouygues.* Thus the situation is clear, you cannot get round an adjudicator's decision by adopting any set-offs or counterclaims.[21] Where there is any (potential) conflict between the rights of the contract and an adjudicator's decision, it is the adjudicator's decision which will prevail. That was the intention of Parliament. Of course, if the adjudicator had been given the jurisdiction to consider whether the determination of *Levolux* had been valid, the situation may well have been different.

If you want to challenge that decision, you can, but only because an adjudicator's decision is only binding on a temporary basis.

SO WHAT CAN YOU DO?

Rely on Your Own Adjudication and Not the Courts

If you want to raise a set-off or counterclaim and it cannot be part of an adjudication commenced by another party, consider whether you can launch your own adjudication. If successful you will have a decision you can use to reduce any exposure. However, you should act quickly as the case of *Sir Robert McAlpine v Pring & St Hill Lt,*[22] (unreported) demonstrates.

Here, HHJ Moseley QC had to consider whether to enforce an adjudicator's decision where the defendant said that it had a set-off against the Claimant which exceeded the sum awarded in the adjudication and that in the time between the hearing and the giving of the judgment, a period of some 10 days, the defendant had set in motion an adjudication with a view to resolving the question of that set-off.

In reaching his decision, HHJ Moseley QC first had to consider the question of set-off. He, in a decision that would have found favour with the Court of Appeal in *Levolux* [23]*,* held that there was a provision in the contract for a final date for payment: the adjudication was in accordance with the contract and the adjudicator ordered that payment be made within seven days. That was, in the judge's view, the final date for payment.

The judge then considered whether to grant a stay of execution for the four to six weeks it would take to reach a decision in the second adjudication. He decided not to:

> Mr Evans's final fallback position was then that I ought to grant a stay until the adjudication decision on the final payment is forthcoming. That adjudication is expected between four and six weeks hence. In my view, I ought not to grant a stay…the claimant is entitled to judgment. As a general principle, when the person is entitled to have a sum of money paid

[21] A similar situation prevails in Scotland. See the decision of Lord Young in *A v B,* 17 December 2002.
[22] Unreported – 2 October 2001
[23] Incidentally, both of these cases involved the construction of a *brise-soleil*

> to him under a judgment, that sum of money should be paid and no stay ought to be imposed. I decline to grant the stay…

The Insolvency Route

Following the decisions in *Herschel Engineering Ltd v Breen Properties Ltd*[24] the courts might order a stay of execution where there are doubts about the solvency of the receiving party. In the first *Herschel* decision (a case where Herschel obtained an adjudicator's decision despite there being proceedings on foot in the Slough County Court), Mr Justice Dyson said:

> To keep the claimant out of this money for several months would be contrary to the plain intent of the 1996 Act. I should add that there is no evidence that, if the defendant is successful in defending the County Court proceedings, the claimant will be unable to repay the sum awarded by the adjudicator. Had the position been otherwise, and there was a real doubt as to the claimant's ability to repay if it loses in the County Court, I would probably have granted a stay of execution pending the final determination of the County Court proceedings.

In the second *Herschel* decision, HHJ LLoyd QC agreed, saying:

> It is for the defendant to establish the proposition that, if there was a judgment which did not uphold the adjudicator's decision, then the amount due under that judgment would not then be honoured by the claimant.
>
> In addition I cannot draw an inference that a company, which was considered by the defendant to be worth the business granted to it by it within a few months of its formation last year, has somehow changed its nature in the course of the last year to become a company which is, at it were, teetering on the verge of insolvency either now and in the future, and will thus be unable to repay the money. On the evidence before me there has been no apparent change in the company. It still is an unknown entity in financial terms. That was the company with which the defendant contracted; that was the company which the defendant entrusted with the work. In my view that situation has not changed one iota between June 1999 and July 2000 except that the company itself has now become entitled to money due under the contract and the defendant does not wish to pay that money. That tells us nothing about the ability of the claimant to repay the money or its inability to do so.
>
> In my view, on an application for a stay where a party has entered into a contract with company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position it is in? It has, as it were, contracted for the result…It is very easy (and prudent and relatively inexpensive) to carry out a search

[24] (2000) BLR 272 and 28 July 2000 unreported

> or to obtain credit references against a company whose financial status and standing is unknown. Not to do so inevitably places a person at a significant disadvantage.
>
> It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration in its finances since the date of contract).

The *Herschel* principle has been followed in a number of instances. [25] Most recently the principle came before Her Honour Judge Kirkham in the case of *Baldwin Industrial Services Ltd v Barr Ltd*[26], who, given that there was a potential counterclaim and the strong possibility that the claimant (who was in administrative receivership) would be unable to repay any monies which were found to have been wrongly paid over, exercised her discretion in favour of granting a stay:

> "In undertaking the balancing exercise that is necessary in deciding whether a stay should be granted and, if so, on what terms, I first consider the question of *Baldwins*' financial difficulties and the doubts raised as to *Barr's* position. Given *Baldwins*' current financial position, there is a risk that what would, in other circumstances, be a temporary decision would become binding by reason of *Baldwins*' financial misfortune. It would work injustice to Barr if it could not recover money if it turned out that the adjudicator had been in error. On the other hand, in circumstances where the Receivers have cast some doubt on *Barr's* financial position, it would work injustice to *Baldwins* if a stay were granted without any requirement on *Barr* to secure the money. I bear in mind also that the grant of a stay risks defeating one of the purposes of HGCRA.
>
> I have also considered *Barr's* arguments on the merits. It is difficult to reach conclusions on the basis of the limited evidence available to me…I also bear in mind that, in the adjudication, *Barr* chose to concentrate on the jurisdiction point and presented little material and argument on the substantive issues. One wonders why they did not do so. Although Mr Hargreaves has raised some arguable points on the merits, if *Barr* were relying only on the matters they raise in connection with the merits of *Baldwins*' claim, I should not have found special circumstances existed. Further, as *Barr* have not hitherto taken any steps to commence proceedings to deal with such matters, one might have been rather sceptical about the strength of *Barr's* case. However, as a consequence of *Barr's* stated intention to commence proceedings, made through Mr Hargreaves at the hearing, some weight must be given to these matters.
>
> In all the circumstances I conclude that *Baldwins'* financial position and the consequent potential injustice to *Barr*, together with *Barr's* stated intention to begin proceedings within a month, constitute special circumstances so that *Barr* is entitled to a stay, on terms. *Baldwins* have offered to accept that payment be made into an escrow account. *Barr* are

[25] For example *Rainford House v Cadogan*.
[26] 6 December 2002 - unreported

> willing to pay the money into court and have offered to undertake to commence proceedings within a month, failing which *Barr* would consent to the money being paid out of court. That is an appropriate suggestion.

The key points to come out of this decision are that if you seek a stay on the grounds of the other party's insolvency you must be able to provide compelling evidence of the weak financial position of that party as at the time of the hearing. You would also be advised to provide compelling evidence of the merits of your proposed claim or counterclaim.

Finally, you must be prepared to pay the monies at the centre of the dispute into court. In *Baldwin,* Barr were required to pay the adjudicator's award into court and commence proceedings within one month's failing which the money was to be paid out to Baldwin and the stay of execution did not apply to the costs and fees of the adjudication.

This need to be in a position to advance your claim also comes out of the cases heard by the Companies Court. In *Guardi Shoes Limited v Datum Contracts Ltd*[27], the failure by Guardi to serve withholding notices and the fact that it waited until receiving a winding up petition before preparing draft particulars of claim were held against it by Mr Justice Ferris when he refused Guardi's application to restrain the petition.

Arbitrate or Litigate

It may feel like a last resort, but sometimes the mere threat of proceedings might be enough to make the other side see sense. A Notice to Refer can be quickly drafted or you could threaten to jump straight to litigation since there is no need to go through the Pre-Action Protocol if the dispute has already been subject to an adjudication.[28]

Alternatively the threat to litigate should be enough to promote mediation. By CPR 1(2)(e), the court must encourage the parties to use an alternative dispute resolution procedure if the court considers that it is appropriate. And following decisions such as *Dunnett v Railtrack* [29] and *Leicester Circuits Ltd v Coates Brothers plc*[30] it is unlikely that a court will consider it to be inappropriate.

Complain

Whilst complaining to the body that appointed the adjudicator who produced the decision you are unhappy with cannot change the decision in question, it might make you feel a little better. More seriously, it might also improve the pool of adjudicators for the future, making it much less likely that you would be the subject of a rogue decision in the future. All the ANBs are taking steps to ensure that their pools of adjudicators are of a suitable standard and will, if appropriate, investigate a genuine complaint.

[27] (2002) CILL 1934
[28] See Rule1.2
[29] (2002) CILL 1861
[30] 5/3/2003 (unreported)

CONCLUSION

Following *Bouygues* the attitude of the Court of Appeal seemed clear. *Levolux* has provided confirmation. Adjudication is the creation of Parliament. Parliament has created something which is new and different and which provides for swift summary justice. The Court of Appeal has recognised that on occasion this may lead to an injustice. However, that has not stopped the Court of Appeal from enforcing apparently unjust decisions in the past and it is unlikely to stop the Court of Appeal from doing so in the future. Thus it is becoming increasingly more difficult to find ways round an adjudicator's decision, even if you consider that it is a bad one.

12 May 2003

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