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ADJUDICATION:
KEY RECENT DEVELOPMENTS AND DECISIONS

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Introduction

1 It is now over eight years since the introduction of adjudication and there have been over 30,000 decisions confirming that in the vast majority of cases adjudication is now the construction industry's preferred forum for the resolution of disputes.

2 It is, however, worth reflecting upon the view of many as to the original intent of the HGCRA by reference to Lord Ackner's contribution to the debate at the report stage in the House of Lords where he states as follows:

> What I have always understood to be required by the adjudication process was a quick enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of "pay now argue later" which was a sensible way of dealing expeditiously and relatively inexpensively with disputes that might hold up the conclusion of important contracts.

3 Over the years increasingly the courts have embraced with some enthusiasm the intent of pay now argue later through enforcement and as this paper discusses, more than ever this remains the position today with the Court of Appeal backing the approach adopted by the Technology and Construction Court to enforcement.

4 In recent years there have been some rumblings of dissent amongst certain members of the judiciary who are concerned as to the suitability of adjudication for all types of dispute such as professional negligence and complex final account disputes involving significant sums. To date these concerns have very much fallen on deaf ears and increasingly the scope of adjudication continues to embrace all manner of disputes that arise in the industry.

5 Accordingly, today we have a situation where the industry itself chooses to refer highly complex disputes involving millions of pounds to adjudication at a time when the courts have made it clear that enforcement will only be declined in exceptional cases.

6 The combination of these two factors ensures that the long-term future of adjudication seems assured.

Ever increasing scope

7 It is convenient to consider the ever increasing scope of the type of disputes being referred to adjudication by reference to four categories as follows:

- Professional negligence
- All-encompassing final account disputes described by one judge as "kitchen sink adjudications"
- Construction contracts in respect of PFI projects
- Disputes which have to be referred to adjudication as a precondition to other dispute processes.

Professional negligence

8 It has been established for some time that a claim for professional negligence can be referred to adjudication. However, the suitability of adjudication for professional negligence disputes was considered by His Honour Judge Wilcox in *London & Amsterdam Properties Limited v Waterman Partnership Limited* (CILL March 2004 2071).

9 *London & Amsterdam* contended that *Waterman* were professionally negligent in the performance of their duties as civil engineers and referred a claim to adjudication in the sum of £1,324,969. *London & Amsterdam* made allegations relating to the release of steelwork design information which they claimed caused significant critical delay to the development of a shopping centre project. This was a complex dispute.

10 HH Judge Wilcox declined to enforce on the basis of an evidential ambush resulting in procedural unfairness and commented as follows:

> This scheme does not envisage that there should be a provisional resolution of a dispute by an adjudicator at all costs. That would be far greater an injustice than that which the HGCRA was enacted to remedy.

11 The judge then went on to question the suitability of cases of this nature for adjudication. Whilst acknowledging that it was permissible under the HGCRA to refer disputes of this nature to adjudication, he suggested that a review of the HGCRA in this regard should take place.

12 This decision was handed down some three years ago and, notwithstanding the judge's comments, there has been no clamour from the industry for the type of review as suggested by HH Judge Wilcox.

Kitchen sink adjudications

13 In the absence of a negotiated settlement or some form of structured negotiated settlement, it is the norm for parties to refer final account disputes to adjudication.

These have been described by His Honour Judge Coulson in *William Verry Limited v Furlong Homes Limited* (CILL April 2005 2205) as "kitchen sink adjudications" and will inevitably involve issues relating to measured works, variations, valuations, extensions of time, loss and expense, defects and retention.

14 Inevitably, by their nature, disputes of this type could involve significant sums of money and a number of complex issues, in particular in relation to extensions of time, with a significant amount of material for the adjudicator to consider. This was the position that faced the adjudicator in *CIB Properties v Birse Construction Limited* [2005] BLR 173.

15 *CIB Properties* claimed over £14 million and 49 files were filed with the Referral Notice, including 16 witness statements, and a further 58 files were served during the course of the adjudication. CIB were awarded over £2 million by the adjudicator and Birse resisted enforcement claiming both that there was no dispute and that the size and complexity of the dispute meant that it could not be resolved fairly through adjudication.

16 The judge enforced the decision, deciding that the test is not whether the dispute is too complicated, but whether an adjudicator is able to reach a fair decision within the time limits allowed by the parties. Here, to reach a fair decision, more than 42 days were needed and the adjudicator sought and obtained the agreement of the parties to extensions of time. This enabled him to reach a fair conclusion, having given both parties proper opportunities to put their case.

17 The case of *William Verry Limited v Furlong Homes Limited* (CILL April 2005 2205) involved the consideration of a very significant claim for an extension of time and all other ancillary final account issues. One of the issues raised by the defendant on enforcement was that the judge did not have enough time to consider the matter properly in 28 days.

18 In this regard, HHJ Coulson said that no one could expect an adjudicator, operating on a tight timetable and obliged to reach a decision on every possible dispute that could arise under a building contract, to deal properly with each point with the same care and detail as if the point was being decided in litigation or arbitration and he confirmed the decision whilst sounding a health warning:

> A referring party should think very carefully before using the adjudication process to try and obtain some sort of perceived tactical advantage in final account negotiations and, in so doing, squeezing a wide ranging final account dispute into a procedure for which it is fundamentally unsuited.

19 Clearly, when a referring party refers a large and complex dispute to adjudication careful consideration needs to be given to the balance between achieving an expeditious decision whilst at the same time ensuring that the timescales are such as to enable the adjudicator to reach a fair decision. If the adjudicator is not allowed sufficient time then he may resign or give a decision to the effect that he cannot reach a decision. The most likely cause is that he will proceed to make his decision but the risk of a breach of natural justice challenge on enforcement arises. None of these options are particularly attractive for a referring party.

20 Responding parties themselves may perceive some tactical advantage in refusing to agree to any extension of the period for the giving of the adjudicator's decision after the 42-day period in the hope of derailing the process, or alternatively taking an issue on enforcement. This is a high risk strategy and almost certainly it is better to try and obtain as much time as possible in order to defend the claim robustly.

Construction contracts in respect of PFI projects

21 The Construction Contracts (England and Wales) Exclusion Order 1998 (SI 1998 NO 648) confirms that concession agreements forming part of a PFI project are excluded from the ambit of the HGCRA 1996. However, a question has always arisen as to the position of the construction contract between the contractor and the project company. There is no obvious reason why contracts of this nature should be excluded from the ambit of the HGCRA notwithstanding the bespoke payment and dispute resolution procedures in contracts of this nature that mirror those in the concession agreement.

22 Construction contracts under PFI projects contain provisions for equivalent project relief and parallel claims. Broadly speaking, provisions of this nature provide that the vast majority of the contractor's claims for additional payment will have to follow the equivalent project relief and parallel claims procedure which, broadly speaking, provide as follows:

- The contractor's entitlement to additional payment will be dependent upon what is either paid by the employer to the project company or, determined in some way that should be paid by the employer to the project company.

- The contractor will not take any formal step in pursuing its entitlement under the building contract against the project company unless and until the matter has been determined under the project agreement.

The impact of the HGCRA 1996 on provisions of this nature was recently considered by Mr Justice Jackson in *Midland Expressway Limited v CAMBBA* (CILL March 2006 2313).

23 By a concession agreement the Secretary of State for Transport granted Midland Expressway Limited ("MEL") the right to design, construct and operate the Birmingham northern relief road. MEL engaged a joint venture consisting of a number of contractors known as CAMBBA for the design and construction of the toll road. The Secretary of State issued a significant variation relating to the detailed road layouts and CAMBBA claimed over £13 million as a result of the change. MEL accepted that they were entitled to extra payment for the change, but the quantum of the change was disputed and accordingly CAMBBA commenced adjudication proceedings. The construction contract contained provisions for equivalent project relief making CAMBBA's entitlement to payment dependent upon sums paid to MEL by the employer and confirming that CAMBBA could take no steps to enforce any right pending the determination of any payment under the project agreement.

24 MEL sought declarations and injunctions against CAMBBA to the effect that it was not entitled to proceed to adjudication maintaining that the express provisions of the

contract debarred CAMBBA from pursuing any claim in advance of the determination of the matter under the project agreement.

25 Mr Justice Jackson appears to have had little hesitation in finding that the provisions of the concession agreement were contrary to section 108 of the HGCRA in purporting to prevent CAMBBA from adjudicating at any time and accordingly the Scheme applied. Further, it was held that the provisions in question offended the "pay when paid" provisions of the Act at section 113. It is worth noting the Judge's reiteration of the duty of the Court as follows:

> It is the duty of this Court to uphold and support the adjudication system and to give effect to the intention of Parliament as expressed in the 1996 Act.

26 This decision should have important repercussions for the drafting of PFI project documentation although it is not yet apparent what solution, if any, has been found to this matter. In practice, given the financial structures of the project company and the fact that often the contractor is a shareholder in the project company, it remains to be seen how frequently contractors will adjudicate against the project company in advance of all attempts to pass any claims through the project company to the employer by way of the provisions for equivalent project relief and parallel claims.

Adjudication as a pre-condition to other dispute processes

27 This is worthy of mention because the NEC Form of Contract and a number of bespoke contracts provide that adjudication is a pre-condition to either litigation or arbitration. NEC 3 provides as follows:

> The party does not refer any dispute under or in connection with this contract to the Tribunal unless it has first been decided by the Adjudicator in accordance with this contract.

28 The procurement of Section 2 of the Channel Tunnel Rail Link was based upon NEC 2 and it is understood that much of the work for the Olympics is to be procured using NEC 3. This has resulted in a number of complex and substantial disputes being referred to adjudication and unless parties agree to waive this requirement, it is inevitable that parties will have no option but to continue to refer major disputes to adjudication in order to comply with this contractual pre-condition.

29 For all of the above reasons, it is inevitable that the number of significant and complex monetary disputes that are referred to adjudication will not abate in the foreseeable future, and if anything will increase. This is notwithstanding the concerns of certain members of the judiciary as to the suitability of adjudication for disputes of this nature. This conveniently raises the question of what approach is the court likely to take to the enforcement of adjudicators' decisions arising out of such adjudications?

Enforcement

30 Common attacks for the purposes of enforcement proceedings particularly in respect of major disputes are likely to be the absence of a dispute or some breach of a natural justice. These have been the lines of attack in *London & Amsterdam Properties Limited v Waterman Partnership Limited*, *CIB Properties v Birse Construction Limited, William Verry Limited v Furlong Homes Limited* and, as we will see, in *Carillion Construction Limited v Devonport Royal Dockyard.*

No dispute

31 In theory, this is a fine legal argument and, in practice, it is very difficult to argue this ground successfully. There have been a number of cases considering this question, however few have succeeded on this argument. In October 2004, Mr Justice Jackson gave an influential judgment on the question of the meaning of a dispute in the context of an engineer's decision under an ICE form of contract in *Amec v Secretary of State for Transport*. The decision was appealed and that part of Mr Justice Jackson's judgment relating to the definition of a dispute was upheld by the Court of Appeal in March 2005 (CILL June 2005 2228). In essence, Mr Justice Jackson set out seven principles in relation to the existence of a dispute, the most important of which were:

- The mere fact that one party notifies the other party of a claim does not automatically give rise to a dispute. A dispute does not arise until it emerges that the claim is admitted.

- The circumstances from which it emerges that a dispute exists are Protean – i.e. able to adapt, variable or versatile – there may be an express rejection of a claim, there may not. There may be discussions between the parties from which it can be inferred that the claim is not admitted. There may be prevarication or silence.

- The period of time for which a respondent can remain silent before a dispute is to be inferred depends heavily on the facts of the case and the contractual structure.

- A deadline for responding to a claim does not have the automatic effect of curtailing what would otherwise be a reasonable period for response although the deadline may be a relevant factor when a court comes to consider a reasonable time to respond.

- If a claim is so nebulous or ill-defined that a respondent cannot sensibly respond to it then neither silence nor an express non-admission is likely to give rise to a dispute.

32 The majority of adjudication disputes relate to payment and valuation. In construction contracts it is difficult to get to a point where one party decides to refer the matter to adjudication without these issues having first been discussed. Given

the guidance that the circumstances from which a dispute can emerge are variable, it is very much open to the courts to interpret negotiations or courses of dealing prior to adjudication as giving rise to a dispute. Accordingly, one can rarely challenge a decision on this basis.

33 A recent example of the robust approach that the courts will now take in relation to this type of challenge is demonstrated by His Honour Judge Wilcox in *All In One Building & Refurbishments v Makers UK Limited* (CILL April 2006 2321). Prior to the adjudication, the claimant did no more than assert its claim for loss of overheads and profits against the defendant and then particularised the claim in the adjudication itself. On this basis, the defendant attempted to argue that there could be no dispute in relation to this element of the claim when the adjudication was commenced. HHJ Wilcox rejected this argument, stating as follows:

> It is evident that the proper approach is to adopt a rigorous and common sense approach, bearing in mind that these issues arise in a comparatively modest construction dispute and there is no warrant for being legalistic and overly technical in considering what labels are used when identifying whether or not a dispute has arisen.

34 Notwithstanding the Judge's reference to a modest construction dispute suggesting that a different approach might be adopted if the sums at stake were greater, in larger more complex disputes it is likely that it would be even more difficult to argue that there is no dispute.

Natural Justice

35 The common law rules of natural justice are two-fold:

- firstly, every party has the right to a fair hearing – in practice this means proper notice and an effective opportunity to make representations before a decision is made;
- secondly, every party has the right to an unbiased tribunal.

36 Therefore natural justice encompasses allegations of impartiality and bias as well as procedural unfairness and a myriad of other issues of conduct which an Adjudicator might fall foul of.

37 In April 2005, Mr Justice Jackson gave judgment in the case of *Carillion Construction Limited v Devonport Royal Dockyard* (CILL 2005 2253). Devonport were engaged by the Ministry of Defence to carry out substantial refurbishment works to a number of docks at the Devonport Royal Dockyard in Plymouth. Devonport in turn engaged Carillion as a subcontractor.

38 Substantial delays occurred during the course of the works as a result of design matters for which Carillion was not responsible, and substantial delays and cost increases arose generally on the project as a whole. Disputes arose between *Devonport* and Carillion as to Carillion's entitlement to payment and in particular the operation of the target cost provisions. Issues also arose as to defects in Carillion's works.

39 On 4 January 2005, Carillion served a notice of adjudication on Devonport claiming approximately £12 million plus interest. Devonport maintained that in fact Carillion had been significantly overpaid and that remedial works to the value of approximately £20 million were necessary and that they should also be taken into account.

40 Having considered the issues before him, the adjudicator awarded Carillion approximately £10.6m including interest. Devonport refused to pay Carillion and Carillion referred the matter to court for enforcement. Devonport argued that the Adjudicator's decision was made on an unfair basis in breach of the rules of natural justice. In particular, Devonport contended:

- the Adjudicator had not taken into account certain submissions that had been made on the target cost issues;
- in relation to the defects claim, the Adjudicator had not considered Devonport's expanded defects claim, simply the original defects claim;
- the Adjudicator had not given the parties the opportunity to comment on the 20% deduction he made on the original defects claim; and
- he had given no or no adequate reasons for his decision.

41 Mr Justice Jackson held that the Adjudicator's decision was not in breach of the rules of natural justice and, after considering the relevant cases on natural justice, restated four basic principles as follows:

> The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);
>
> The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;
>
> Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;
>
> Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

42 The Judge then set out five propositions which bear upon the consideration of natural justice in the enforcement of adjudicators' decisions. Of note are the following:

> If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision.
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> It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an

> exceptional case such as *Balfour Beatty v The London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the court will decline to enforce his decision.
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> If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice.

43 This case was appealed and in November 2005, the Court of Appeal heard an application for permission to appeal (CILL February 2006 2297). On the natural justice issues, the Court of Appeal refused permission to appeal. The judgment was delivered by Lord Justice Chadwick who indicated the Court of Appeal's broad agreement to the propositions set out by Mr Justice Jackson in his judgment and who went on to say:

> The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator.
>
> It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or subcontractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly…
>
> In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator…

44 Since the Court of Appeal decision in *Devonport* there has been a decline in the number of successful attempts to resist enforcement on the grounds of some breach of natural justice. For example, in *Kier Regional Limited v City & General Holborn Limited* (CILL June 2006 2353), Kier commenced adjudication proceedings in respect of its final account claiming a sum in excess of £1 million.

45 In defence of this claim, City & General provided two experts' reports during the course of the adjudication that had never been provided before.

46 The Adjudicator disregarded these reports on the basis that he was required to decide the amount due on the basis of the documentation before the contract administrator at the time he rejected Kier's claim. City & General argued that therefore the process leading to his decision was manifestly unfair but Mr Justice Jackson decided that the Adjudicator's conduct could not invalidate his decision and at worst he had made an error of law causing him to disregard two pieces of relevant evidence which of itself could not invalidate the decision.

47 Interestingly, in M Rhode Construction v Nicholas Markham-David (CILL August 2006 2364), Mr Justice Jackson did decline to enforce the Adjudicator's decision but this was because the Referring Party had taken a deliberate decision to deprive the Responding Party of an opportunity to make representations in the adjudication. Accordingly, this was …

> one of those rare and exceptional cases in which the Court will decline to enforce an Adjudicator's decision by reason of breach of natural justice.

Conclusion

48 What this does demonstrate, is that to successfully resist enforcement on the grounds of an absence of a dispute or some infringement of the rules of natural justice is now a high test. A further illustration of the courts' current determination to support the adjudication regime and discourage parties from refusing to abide by an adjudicator's decision is the recent decision of His Honour Judge Coulson in *Grey & Sons Builders Limited v Essential Box Company Limited* (CILL November 2006 2396).

49 In this case, the defendant to enforcement proceedings complied with the Adjudicator's decision only a matter of days before the enforcement hearing. An issue arose between the parties in relation to costs which was heard by His Honour Judge Coulson who in awarding indemnity costs against the defendant stated as follows:

> Defendants who avoid paying up in accordance with an Adjudicator's decision until the last moment or beyond are … seeking to frustrate the adjudication provisions within the HGCRA … as a matter of principle indemnity costs are appropriate.

50 It is interesting to note that His Honour Judge Coulson who ordered indemnity costs is the same judge who expressed concerns as to the suitability of adjudication for wide-ranging final account disputes. Whilst there may be expressions of unease amongst some of the judiciary as to the suitability of adjudication for substantial disputes, in practice the message is that any party trying to resist enforcement of adjudicators' decisions in any type of dispute is likely to get short shrift from the courts.

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