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Recent Developments in Adjudication

Introduction

1. The year 2008–2009 saw a flurry of cases concerning the enforcement of adjudicators' decisions. Although adjudicators' decisions can be variable, some important themes have emerged from the enforcement cases that came before the court over the past year. The purpose of this paper is to consider the key themes from the recent case law. The clear trend that emerges is the extent to which it is becoming increasingly difficult, albeit not impossible, to challenge adjudicators' decisions.

Background

2. The Technology and Construction Court ("TCC") continues to adopt a robust approach to the enforcement of adjudicators' decisions. The principle remains that adjudicators' decisions will be upheld unless the adjudicator had no jurisdiction or there was a serious breach of natural justice. This strict approach to enforcement stems from the earliest cases on the enforcement of adjudicators' decisions.[1] As adjudication does not involve the final determination of the parties' rights (unless the parties agree), a decision will be enforced even where that decision results from errors of procedure, fact and/or law. To allow otherwise would be to "drive a coach and horses" through the provisions of the Housing Grants, Construction and Regeneration Act 1996.[2] The courts continue to critically examine alleged errors by adjudicators of procedure, fact and/or law before accepting that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.[3]

3. The recent case of *Able Construction (UK) Limited v Forest Property Developments Limited*[4] serves as a useful reminder that the courts are wholly unsympathetic to parties who appear to be trying to avoid their obligations. In that case, the TCC enforced an adjudicator's decision after *Forest Property* failed to comply with a settlement agreement made following the adjudicator's decision. The court also awarded Able Construction indemnity costs because *Forest Property* had no defence to the claim and because *Able Construction* had incurred extensive costs in recovering sums that *Forest Property* had previously agreed to pay. This case acts as a clear warning to parties who have no real defence to a claim and who are simply delaying payment of monies due.

Jurisdictional challenges are becoming more difficult

4. Cases over the last year make clear that jurisdictional challenges are becoming more difficult as adjudication jurisprudence becomes clearer. This can be illustrated by reference to *PT Building Services Limited v Rockbuild Limited*[5] which highlights the difficulties faced by those contemplating jurisdictional challenges.

5. *PT Building* (subcontractor) commenced an adjudication against *Rockbuild* (contractor). The adjudicator subsequently ordered a payment to *PT Building* which *Rockbuild* refused to pay. *PT Building* then commenced a second adjudication, regarding the same dispute, to seek to cure *Rockbuild's* jurisdiction arguments. *Rockbuild* refused to allow the second adjudication to proceed, arguing that the first adjudicator had ruled on

1. Macob Civil Engineering Limited v Morrison Construction Limited [1999] EWHC 254 (TCC) and Bouygues v Dahl-Jensen UK Limited [2000] EWCA Civ. 507
2. Dyson J in Macob v Morrison stated that the intention of the Act was to "introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement".
3. See Carillion Construction Limited v Devonport Royal Dockyard [2005] EWHC 778 (TCC), a decision subsequently approved by the Court of Appeal [2005] EWCA Civ. 1358
4. [2009] EWHC 159 (TCC)
5. [2008] EWHC 3434 (TCC)

the dispute referred to in the second adjudication.

6. Previously, a responding party who did not accept the jurisdiction of an adjudicator could set out the terms of its objection and then, after having fully reserved its position, participate in the adjudication. This meant that if the referring party was successful in both its jurisdictional and substantive case and then sought to enforce the decision, the responding party, having reserved its position, could proceed to challenge the validity of the adjudicator's decision on the grounds of lack of jurisdiction. This tactic, which is not uncommon, would not now appear to be available as the TCC has ruled that a party contemplating a challenge to an adjudicator's decision must decide whether to agree with such a challenge or alternatively to accept an adjudicator's decision.

7. In his judgment, Ramsey J held that a respondent could not "blow hot and cold" and "reprobate" an adjudicator's decision. By arguing that the first adjudicator had decided the same dispute, *Rockbuild* had elected to treat the first adjudicator's decision as valid. *Rockbuild* could not therefore maintain its jurisdiction arguments in enforcement proceedings. This case is important as it makes clear that it is not open to a party to argue that a decision is both valid and invalid. Responding parties in adjudication must therefore think carefully about any circumstances where they might have to elect to treat an adjudicator's decision as valid or invalid.

8. Other recent cases reiterate the importance of a party reserving its right to challenge an adjudicator's decision and for that reservation of rights to be repeated. Once a responding party has raised a jurisdiction objection, it is important that all future correspondence and further submissions are made without prejudice to that objection. The courts have shown a willingness in the past year to broadly construe a reservation of rights. In *Dalkia Energy and Technical Services Limited v Bell Group UK Limited*[6] *Bell* argued in enforcement proceedings that *Dalkia* had indicated an intention to be bound by the adjudicator's decision because *Dalkia* had used the word "ruling" in one of its letters. Unsurprisingly, the court did not agree that *Dalkia* had waived its right to raise an argument on jurisdiction and dismissed *Bell's* arguments. In the enforcement proceedings the court indicated that it was interested in the broader picture as to whether or not a party had actually reserved its position on jurisdiction and was not as concerned as to what particular form of words may have been used. This case nonetheless serves to highlight that a party must be clear in the language that it uses when reserving its position on jurisdiction.

The purposive construction to deficiencies in notices of adjudication

9. There have been other examples in the past year where the courts have adopted a similar approach to that in *Dalkia v Bell* by showing a willingness to consider a broader perspective. Indeed, one recent trend is that the courts have shown a willingness to adopt a purposive approach in relation to jurisdictional challenges. This approach has served to make jurisdictional challenges more difficult.

10. This trend can be seen by reference to the greater leeway that the courts have recently adopted in relation to deficiencies in notices of adjudication and/or referral notices. In *OFC Building Services Limited v Interior Dimensions Contracts Limited*[7] the TCC enforced an adjudicator's decision despite potential confusion about the exact dispute referred to adjudication and the limit of the adjudicator's jurisdiction. In this case,

6. [2009] EWHC 73 (TCC)
7. [2009] EWHC 248 (TCC)

OFC Building Services had claimed a different figure in respect of its claim in both the notice of adjudication and the referral notice. Also, the notice of adjudication and referral notice referred to a failure to serve a valid withholding notice in relation to the "final account" whereas the adjudicator's decision referred to an "interim account" (albeit related to a draft final account under preparation). Despite these errors, the court was prepared to determine the nature of the dispute referred to adjudication by reference to both the notice of adjudication and the referral notice in the parties' earlier correspondence.

11. There have been other recent examples where the courts have shown a willingness to adopt a purposive construction and/or grant greater leeway in relation to notices of adjudication and/or referral notices. For example, in *VGC Construction Limited v Jackson Civil Engineering Limited*[8] Akenhead J held that a subcontractor's claim was not so nebulous or ill defined that it warranted being struck out. In *Mrs Sandra Williams (trading as Sinclair Construction) v Abdul Noor (trading as India Kitchen)*,[9] the court enforced an adjudicator's decision and rejected the defendant's argument that the referring party had been incorrectly named in the adjudication proceedings.

12. The willingness of the courts to allow parties greater leeway in the manner referred to above makes challenging adjudicators' decisions more difficult. There will no doubt be more cases in the future where the courts show greater leeway to deficiencies in adjudication pleadings.

The severability of adjudicators' decisions

13. Challenging adjudicators' decisions is also becoming more difficult as a consequence of the new concept of severability of adjudicators' decisions. Until recently, it was considered settled that an adjudicator's decision must stand or fall in its entirety. In practice, this meant that if an adjudicator was in breach of natural justice or exceeded his jurisdiction, then it would be impossible to sever the enforceable from the unenforceable parts of the decision.

14. Until the past year, there were no reported cases in which an adjudicator's decision had been severed and enforced only in part. However, in *Cantillon Limited v Urvasco Limited*[10] Akenhead J indicated that an adjudicator's decision could indeed be severed in cases where it dealt with more than one dispute. This meant that the decision could effectively be enforced in relation to one dispute, but not the other.

15. In this case, *Urvasco* engaged *Cantillon* to carry out demolition and piling works. *Cantillon* suffered delays and a number of disputes arose over *Cantillon's* entitlement to extensions of time. In adjudication proceedings, *Cantillon* claimed, *inter alia*, two extensions of time. *Urvasco* argued that the losses claimed could not be recoverable because there was no material piling works during one of the periods claimed and that any prolongation costs were incurred during the later period. The adjudicator awarded *Cantillon* its prolongation costs. *Urvasco* refused to pay the award and so *Cantillon* sought to enforce the adjudicator's decision. In the subsequent court proceedings, *Urvasco* argued that the adjudicator had exceeded his jurisdiction, had failed to comply with the rules of natural justice and had also failed to allow *Urvasco* a reasonable opportunity in which to make its submissions.

16. In his judgment, Akenhead J reviewed the case law on breaches of natural justice by adjudicators and held that any breach of natural justice must be material. However, the most interesting parts of the judgment concern

8. [2008] EWHC 282 (TCC)
9. [2007] EWHC 3467 (TCC)
10. [2008] EWHC 282 (TCC)

Akenhead's obiter comments as to whether parts of an adjudicator's decision could be enforced and other parts not enforced in those cases where an adjudicator's want of jurisdiction or breach of natural justice related only to one part of the decision. Akenhead J held that in cases where an adjudicator's decision addressed more than one dispute, a successful challenge on the grounds of jurisdiction or natural justice in respect of one part of the decision will not undermine the validity and enforceability of the other part of the decision. The exception to this principle is in relation to those decisions that are simply not severable in practice and/or where a breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted.

17. Issues concerning the severability of an adjudicator's decision came before the courts again in the recent case of *Bovis Lend Lease Limited v The Trustees of the London Clinic*.[11] That case is important as it extended the principle of severability first set out in *Cantillon v Urvasco*. It is also important for issues relating to alleged breaches of natural justice and which will be considered further below.

18. In his judgment in *Bovis Lend Lease v London Clinic*, Akenhead J indicated that the concept of severability could have wider implications than he first envisaged. Akenhead J made three important observations in his judgment regarding severability.

    (i) Akenhead J commented that the court would not have severed the adjudicator's decision in this case on the grounds that the clinic should have been given additional time to respond to the claim because such a natural justice argument would probably go to the root of the whole adjudication and not just parts of it;

    (ii) Akenhead J stated that if the clinic had succeeded in demonstrating that its loss and expense claim had not crystallised (which it failed to do), the court would have severed the extension of time claim from the loss and expense claim; and

    (iii) Akenhead J said that if the decision had been severed and only the extension of time element enforced, then the court would not have granted leave to enforce the costs element of the adjudicator's decision because that element of the decision was not split between the two disputes.

19. The *Bovis Lend Lease v London Clinic* case is the first decision post *Cantillon v Urvasco* where the court considered the concept of severability in the context of a no loss argument. This judgment broadens the scope of the *Cantillon v Urvasco* decision by extending the concept of severability to cases relating to no dispute arguments. The concept of severability will therefore be of relevance to more cases because no dispute arguments are more likely to succeed than natural justice arguments.

20. The decisions in *Cantillon v Urvasco* and *Bovis Lend Lease v London Clinic* question the established law on adjudication enforcement and develop a limited but potentially useful doctrine of severability. This concept will allow one part of an adjudicator's decision untainted by a breach of natural justice to be severed from the other part. This will mean that the courts will be able to salvage an enforceable decision (even if only in part) from the ruins of a successful challenge on the grounds of jurisdiction and/or breach of natural justice.

21. In order to limit the effect of these decisions, a referring party should define the dispute in the notice of adjudication as wide as possible so as

11. [2009] EWHC 64 (TCC)

to limit arguments about the number of disputes being referred. Adjudicators dealing with more than one dispute should consider giving a decision that separates and allocates costs against each issue. This should then ensure that if the adjudicator's decision is successfully challenged in any enforcement proceedings then the whole decision will not fall.

Narrowing the grounds on inability to pay

22. Over the past year, the courts have also narrowed the ability of a party to challenge an adjudicator's decision on the grounds of insolvency-related issues and/or inability to pay. It is well established that an adjudicator's decision will not be enforced in the event that a claimant is in liquidation and unable to repay sums upon the final determination of the dispute. The same principle also applies to cases where a claimant is in administration or administrative receivership rather than liquidation. In cases where the claimant is neither in liquidation nor administration, very compelling evidence is required to demonstrate a significant risk of inability to repay monies before a stay will be ordered.

23. Although these principles continue to remain valid, following the decision in *Mead General Building Limited v Dartmoor Properties Limited*[12] the courts have confirmed that a party is unable to challenge an adjudicator's decision on the grounds that a claimant is subject to a company voluntary arrangement ("CVA"). This is a procedure for a company in financial difficulty to reach a binding compromise of its debts with its creditors.

24. The facts of that case were that *Mead* was engaged by *Dartmoor* to carry out a development in Devon. A dispute arose between the parties which was referred to adjudication. Following the referral *Mead* entered into a CVA. Subsequently, the adjudicator ordered *Dartmoor* to pay *Mead* the sum of £332,000 plus interest and a contribution to his fee. As *Dartmoor* failed to pay any part of that sum, *Mead* applied to the court to enforce the adjudicator's decision. At the hearing, the court dismissed some of *Dartmoor's* arguments against enforcement and addressed in detail the effect of *Mead's* CVA on the enforcement proceedings. The court noted there was no prior authority dealing with the position where a claimant was subject to a CVA.

25. Coulson J rejected the application for a stay of execution in enforcement proceedings and enforced the adjudicator's decision. He held that where a claimant was subject to a CVA, the CVA was a relevant factor in the application but would not of itself automatically lead the court to infer that the claimant would be unable to repay any sums paid out. In these circumstances, the claimant's current trading position would be taken into account. Other factors to be considered include whether the financial difficulties that led to the CVA were caused solely or significantly by the defendant's failure to pay the sums awarded. In this case, the court accepted *Mead's* evidence that the financial difficulties were indeed caused by *Dartmoor*. The court placed weight on *Mead's* current trading position and indicated that relevant factors included whether the company was trading at all, whether the company had ongoing and/or future work lined up, whether the company was taking steps to comply with the conditions of the CVA and/or whether the CVA supervisor considered that the company could trade out of its difficulty. The court was also interested in whether the financial difficulties that led to the CVA were caused solely or significantly by the defendant's failure to pay the sums awarded by the adjudicator.

26. The decision in *Mead v Dartmoor* is consistent with other recent cases in which the courts have been reluctant to stay adjudicators' decisions for

12. [2009] EWHC 200 (TCC)

reasons relating to the alleged inability of a party to repay monies upon the final determination of a dispute. In *Gipping Construction Limited v Eaves Limited*[13] it was held that an inability to pay is insufficient to prevent enforcement of an adjudicator's decision, especially in cases where there was no actual evidence of inability to pay. In *Air Design (Kent) Limited v Deerglen (Jersey) Limited*[14] the court held that in cases where a defendant had not proved that a claimant was insolvent, no stay of execution would be granted.

27. A stay of execution was also refused in *Avoncroft Construction Limited v Sharba Homes (CN) Limited*.[15] In that case the contractor's parent company had agreed to guarantee the liabilities of its subsidiary and so a stay of execution was not granted in respect of an adjudicator's award obtained by the subsidiary company

28. All these cases serve to indicate the challenges faced by those contemplating a stay of execution on grounds relating to the alleged inability of a successful recipient of an adjudicator's award to repay monies upon the final determination of a dispute. Indeed, as a consequence of the case law over the past year challenges on this basis are becoming increasingly difficult.

Narrowing of challenges for breaches of natural justice

29. Some of the most interesting recent developments concerning challenges to adjudicators' decisions have been in the area relating to alleged breaches of natural justice. Developments in this field over the past year have been significant because they have both narrowed the grounds on which challenges for breaches of natural justice can be brought and also potentially opened a new front on which adjudicators' decisions might be open to a successful new challenge.

30. Natural justice requires that every party has the right to a fair hearing and has the right to be heard by an impartial tribunal. Breaches of natural justice may include bias, failure to act impartially and/or procedural irregularity. An adjudicator is required to act impartially[16] and is under a duty to comply with the rules of natural justice.[17] Challenging an adjudicator's decision on the grounds of a breach of natural justice is becoming ever more difficult but it is by no means impossible.

31. There have been a number of recent cases relating to alleged breaches of natural justice. During the past year, the courts have held that no breach of natural justice arose where an adjudicator failed to undertake a site visit[18] or where a party had telephoned the RIBA direct to ascertain the availability of an adjudicator to determine a dispute.[19] It has also been held that no breach of natural justice arose on account of an adjudicator's conduct of an adjudication[20] or in respect of the adjudicator's award.[21]

32. The case of *Bovis Lend Lease v London Clinic* mentioned above indicates the difficulty in challenging an adjudicator's decision on the grounds that a party has had insufficient time to respond to a claim. In that case, the clinic challenged the enforcement of an adjudicator's decision on the grounds of a breach of natural justice because the clinic allegedly had insufficient time to deal with the claim. Akenhead J held that the adjudicator had not breached the rules of natural justice. It was signal that during the adjudication the clinic had not complained that it had insufficient time to prepare its response or rejoinder. Also, the clinic had only asked for two additional days to serve its response and which extension was agreed and granted in full. Although the court considered that there had been no ambush, it said that ambush is not a precise term

13. [2008] EWHC 3134 (TCC)
14. [2008] EWHC 3047 (TCC)
15. [2008] EWHC 933 (TCC)
16. Section 108(2)(e) of the Housing Grants Construction and Regeneration Act 1996 and paragraph 12(a) of the Scheme for Construction Contracts (England & Wales) Regulations 1998
17. Amec Capital Projects Limited v White Friar City Estates Limited [2004] EWHC 393 (TCC)
18. Gipping Construction Limited v Eaves Limited [2008] EWHC 3134 (TCC)
19. Makers UK Limited v The Mayor and Burgesses of the London Borough of Camden [2008] EWHC 1836 (TCC)
20. Edenbooth Limited v CRE8 Developments Limited [2008] EWHC 570 (TCC)
21. Cantillon Limited v Urvasco Limited [2008] EWHC 282 (TCC)

and the key factor was whether or not sufficient time was requested, given and taken by the clinic to respond. The court concluded in this case that the clinic had indeed been given sufficient time and that there had been no breach of natural justice.

Challenging a decision on the grounds of a failure to consider evidence

33. One of the most important developments in the past year has been in relation to those cases where jurisdictional challenges on the grounds of a breach of natural justice have succeeded on account of an adjudicator's failure to consider all the evidence and/or address all the issues. This appears to be a significant new development in adjudication jurisprudence and would appear to have opened a new front on which adjudicators' decisions might be challenged.

34. This principle can best be illustrated by reference to the recent case of *Quartzelec Limited v Honeywell Control Systems Limited*[22] which concerned a responding party's right to raise new defences during the course of an adjudication. *Quartzelec* was engaged by *Honeywell* to design, supply and install communication systems on a construction project in Liverpool. A dispute arose over the interim valuation of *Quartzelec's* works and which *Quartzelec* subsequently referred to adjudication under the Scheme. In its response, *Honeywell* argued that the amount of the interim valuation should be reduced to account for certain items that had been omitted from the scope of works before *Quartzelec* had submitted its interim valuation. This defence (the omission defence) was a new argument, which *Honeywell* had not previously raised, even in its correspondence. *Quartzelec* argued that the omission defence was not part of the dispute submitted to the adjudicator, meaning that the adjudicator had no jurisdiction to consider it. As part of his decision, the adjudicator accepted *Quartzelec's* submission and ignored the omission defence, finding in favour of *Quartzelec*. The adjudicator ordered that *Quartzelec* pay the interim valuation and decided that *Honeywell* should bear 85% of the adjudicator's fees and 80% of *Quartzelec's* costs. *Honeywell* refused to comply with the adjudicator's decision and so *Quartzelec* commenced enforcement proceedings in the TCC.

35. In his judgment, Davies J refused to enforce the adjudicator's decision on the grounds that, *inter alia*, the adjudicator should have considered the omission defence. The court accepted that if the adjudicator had considered and then rejected the omission defence on its merits, then the decision would be enforceable. However, the court was unable to find any such rejection in the adjudicator's decision.

36. A similar issue arose in *Thermal Energy Construction Limited v AE & E Lentjes UK Limited*.[23] In that case, the adjudicator made the mistake of failing to address in his decision a key part of the Lentjes defence, namely whether or not *Lentjes* had a set-off or counterclaim that exceeded the amount claimed by *Thermal Energy*. Despite the length of the adjudicator's decision, the court denied enforcement because it could not identify any part of the decision that dealt with the defence. This case shows that an adjudicator must not ignore a submission but must in fact expressly deal with all the issues and arguments before him. This means addressing all the claims made by a referring party and all the defences put forward by the responding party. If an adjudicator overlooks an issue in his decision then he risks having that award challenged on the basis that he has failed to consider all the issues before him.

22. [2008] EWHC 3315 (TCC)
23. [2009] EWHC 408 (TCC)

37. The recent case of *Rupert Cordle (Town and Country) Limited v Vanessa Nicholson*[24] serves to confirm the recent trend of adjudicators' decisions not being enforced where all issues and/or defences have not been expressly addressed by the adjudicator. In his judgment handed down on 6 April 2009, Teare J followed the decisions of *Quartzelec v Honeywell* and *Thermal Energy v AE&E Lentjes* and declined to enforce the adjudicator's decision on account of a failure by the adjudicator to address all the issues and/or defences in his decision.

Conclusion

38. The key theme that emerges from the case law over the past year is that adjudicators' decisions will generally be enforced and that successful challenges are becoming ever more difficult. That is not to say that every decision will always be enforced. The approach that the courts adopt only continues to apply to those cases that are valid, namely those decisions which the adjudicator was authorised to reach or where the decision was not undermined by a material failure to comply with the basic concepts of fairness.

39. Recent case law has served to restrict the number of potential challenges to adjudicators' decisions that would have been open to parties even a year ago. In practice this means that a losing party in an adjudication is far more limited in their ability to challenge adjudicators' decisions on the grounds of jurisdiction, inability to pay and/or insolvency-related issues. Challenges have also become more difficult on account of the courts' willingness to allow parties greater leeway in alleged deficiencies in their adjudication pleadings. The emergence of the new concept of severability has meant that adjudicators' decisions that would otherwise have been unenforceable in their entirety can now be enforced if only in part.

40. However, as one door closes another opens and the past year has seen the seeds of a potential new trend of adjudicators' decisions not being enforced where the adjudicator has failed expressly to address all the issues and/or defences before him. The extent to which parties will be able to avail themselves of this potential new opportunity to obtain a stay of execution in respect of adjudicators' decisions that fail to address all the issues and/or defences will be a development that we will all no doubt watch with interest in the adjudication case law over the next year.

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24. As yet unreported