

## CONSTRUCTION ADJUDICATION – SOME UNRESOLVED ISSUES

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### Introduction

There is no doubt now that adjudication is important in the construction industry. Contrary to some of the predictions, it is becoming widely used.

Probably everyone here is familiar with the basics:

- (1) HGCRA 1996 Pt II applies to “construction contracts” as defined,
- (2) every such contract must provide for adjudication in conformity with the Act,
- (3) if the contract makes no or inadequate provision for adjudication, the statutory Scheme applies,
- (4) unless otherwise agreed, the adjudicator’s decision is binding until the dispute is finally resolved by arbitration, litigation or agreement.

In summary, it provides a statutory “quick fix”.

In the courts more than a dozen cases have been decided: see the list of cases (below).

I’m going to cover briefly some of the unresolved issues (other than questions of jurisdiction, which are the subject of another talk).

### HUMAN RIGHTS ACT?

*Is adjudication subject to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms?*

The Act probably comes into force in England and Wales on 2nd Oct 2000 (the necessary commencement order has not been published yet – is the Government still nervous about whether it will be ready by then?).

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms gives everyone the right to a fair hearing for the determination of his or her civil rights and obligations. There are various ways in which adjudication could be unfair. Consider *Bouygues* case (on the list of cases). Adjudicator made a mistake in his figures, which meant that his award was in favour of one party instead of the other. Dyson J enforced the decision. A brief summary of his reasoning is: “Court will enforce adjudicator’s award even if obvious error in the adjudicator’s reasoning. This may cause injustice. Hard luck..” Dyson J made some frank comments about the risk of injustice:

“It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.”

This dictum recognises an example of unfairness: where one party is required to pay, after a rough and ready procedure in which serious errors are made, then the recipient becomes insolvent.

Other examples might be:

- (1) appointment of an adjudicator who is not independent (named by the employer in every contract),
- (2) ambush (which I shall come on to).

*Why the Human Rights Act appears not to help:*

The adjudication process is of an interim character only, and does not finally determine the parties’ rights. Adjudication is not a substitute for, and does not take away, the ordinary right to a fair hearing in subsequent litigation or arbitration. Therefore, on this argument, it cannot contravene Article 6.

*How it could be argued that the Human Rights Act must be taken into account:*

Adopt a broad purposive approach: the requirements of the Convention ought to apply to adjudication, since there are circumstances in which an adjudication may prejudice a party’s ability to take advantage of his ordinary right to a fair hearing in subsequent litigation or arbitration - as Dyson J has recognised.

When a court is asked to enforce an adjudicator's award, the court, as a public authority, must give effect to the requirements of the Act.

*But:*

Overall, is adjudication conducive to justice? Probably yes. Need to look at the whole picture. Worse injustice is probably done without adjudication being available, when subcontractors are driven to the wall by contractors who use their financial muscle to refuse payment and ordinary legal proceedings are too slow to save the subcontractor from going under.

There is much more to be said that cannot be said here. My guess is that adjudication will not be held to be contrary to the requirements of Article 6, but there is complete uncertainty. We shall have to wait and see.

### **AMBUSH**

There are two kinds of ambush:

- (1) The claimant spends months preparing material to place before the adjudicator, prior to giving notice of adjudication. There may be many files of letters, photographs, plans, invoices, claims schedules, witness statements, calculations and the like. It may be impossible for the respondent, subjected to an ambush of this kind, to answer the material in the short time available. This can arise not only by a deliberate ambush, but simply from the size of the dispute.
- (2) Co-ordinated attack by numerous claimants, who serve their notices of adjudication on the same or consecutive days.

Both have happened.

The claimant is under no obligation to agree that there be any extension of time. The adjudicator must therefore reach a decision within 28 days of referral. This puts both respondent and adjudicator in difficulties.

What solutions are available?

- (1) The adjudicator should exercise the power that he has to limit the quantity of material that a party is allowed to put forward. He may have the power under express rules. If not express, it is likely to be implied as a necessity arising from the short timetable and the summary nature of adjudication. The adjudicator should require the prolix party to re-formulate the claim with a brevity, and an economy of supporting material, that enables it to be sensibly considered, and a decision to be reached, within the time allowed.
- (2) The adjudicator in reaching a decision ought to make due allowance for the fact that the respondent has had insufficient opportunity to answer the case put forward.

These two procedures will deal with most cases.

(3) Extreme cases: Sometimes a dispute may appear to be impossible to adjudicate within the time available, or within any extended time likely to be agreed, not because of any over-elaboration by the claiming party, but simply because of the innate difficulty and complexity of the issues involved. It has been suggested that the adjudicator's only option in this situation is to resign, but this is an unduly negative view. In these circumstances the adjudicator's decision might have to be directed less at the full resolution of the dispute than at how the matter should lie until it can be fully resolved by a more suitable process. Here the position of the adjudicator may be compared with the position of a court faced with an application for an interim injunction pending a subsequent trial. An interim decision has to be made at a time when the full rights or wrongs are not known. In this situation the court seeks the solution which is most likely to provide a just result whichever party wins in the end, bearing in mind the ability to award damages at the trial to the party whose rights turn out to have been infringed. The adjudicator should take account of this consideration, but is not under the same constraints as the court. He ought to take into account his view, on the material before him, of which party is more likely to prove ultimately to be in the right. In a sense this is no different from his task in any adjudication, since every adjudication is an abbreviated procedure which produces an interim decision.

- (4) If it is held that adjudication must comply with Article 6, by virtue of the Human Rights Act, it would be possible to argue that an ambush is an unfair procedure.

## **PAYMENT TO STAKEHOLDER?**

### *Mandatory stakeholder clauses:*

One of the purposes of the right to adjudication is to regulate fairly the cash flow for work done. There is a stark conflict of interest between the recipient, who has incurred the expense of carrying out work, and the paying party, who may be worried about having to make a payment before it has finally been decided whether the payment is properly due. Concern about the solvency of recipients has led to the drafting of contracts which require that any cash award ordered by the adjudicator has to be paid to a stakeholder. The money is held by the stakeholder until the dispute has been finally determined by agreement, arbitration or litigation. The question arises whether such a contract is compliant with the requirements of HGCRA 1996.

My view is that a mandatory stakeholder clause is inconsistent with s 108(1), which provides for the right to refer a dispute for adjudication. If the dispute is over the payment of a particular sum of money to the claimant, yet the adjudicator has no power to order that the money be paid to the claimant, there is no effective right of adjudication.

One of the principal purposes of the adjudication process is to enable the adjudicator to decide which party must shoulder the risk of being wrongly out of pocket until the final resolution of the matter in dispute. A mandatory stakeholder clause nullifies that purpose.

Since a contract with a mandatory stakeholder clause does not comply with the Act, the statutory Scheme would apply instead.

### *Optional stakeholder clauses:*

An optional stakeholder clause is one where the adjudicator has a discretionary power to order payment to a stakeholder where he considers it appropriate to do so.

Optional clauses are not subject to the same objection as mandatory clauses, and are perfectly valid.

### *Does an adjudicator acting under the Government Scheme have power to order payment to a stakeholder?*

In *Drake and Scull Engineering Ltd v McLaughlin and Harvey Plc* (1992) 60 BLR 102, HHJ Bowsher QC granted an injunction requiring compliance with an adjudicator's decision that a sum of money be paid to a stakeholder pending final resolution of the dispute. But that was an adjudication under the DOM/1 form of subcontract, where there was an express power for the adjudicator to order payment to a stakeholder.

What about under the Scheme, or other rules where no express power? The point is a difficult one. It was touched on, but left open, in *Allied London and Scottish Properties plc v Riverbrae Construction Limited* [1999] BLR 346.

I think the answer is probably yes, in limited circumstances. The adjudicator has to decide whether money is due. But he is also deciding what is to be done pending final determination. Particular circumstances might make a stakeholder order the most appropriate order. This point is uncertain at present.

## **COSTS OF THE PARTIES**

Adjudication rules vary on the question of party costs. Some contain a power to award costs and some do not. Most do not. The best known example is the JCT provisions: these provide for no costs as between the parties, except for opening up and testing.

Under the TECBAR rules the parties by agreement can give the adjudicator power to deal with party costs, but unless they do so there is no such power.

### *What is the position on party costs under the Government Scheme?*

Paragraph 25 of the Scheme deals with the adjudicator's fees, but not with party costs.

*John Cothliff v Allenbuild (North West) Ltd* 1999 CILL 1530. The Judge decided in *Cothliff* that the adjudicator had power to award party costs. He gave three reasons, all of which were wrong (in my view):

(1) Express power in scheme "to issue directions relating to the conduct of the adjudication" - paragraph 13(h).

BUT directions in relation to conduct of the adjudication are a different thing from awarding costs.  
(2) Express power in scheme to direct that a party be permitted to be represented by more than one person. – paragraph 16(2).

BUT so what – that is a different thing from awarding *costs* of the representation.

(3) He was “inclined” to the view that there was an implied power to award costs, on grounds of business efficacy.

BUT the Scheme is efficacious without any such power. Indeed, the presence of such a power is likely to make the Scheme less efficacious.

There is a rather obvious contrast between the presence of express provisions in the Scheme concerning the adjudicator’s own costs, and the absence of any power to order party costs. Even with the poor standard of drafting of the Scheme, the omission must surely have been deliberate. Consider also the policy aspect. Adjudication is supposed to be a quick, cheap decision. Awarding costs will tend to turn it into something else.

[*Subsequent note: see now Northern Developments (Cumbria) Ltd v J & J Nichol [TCC Website] 24 January 2000, where HHJ Bowers QC held that the Scheme did not give a power to award party costs.*]

### **ENFORCEMENT OF ADJUDICATOR’S AWARD BY INJUNCTION?**

General principles:

Adjudication gives contractual rights. It is part of the contract. Where the Scheme applies, it takes effect as terms of the contract implied by statute. By contract, a party is obliged to comply with adjudicators’ decisions.

Contractual rights are enforceable by injunction where a claim for damages would not be an adequate remedy.

For a subcontractor starved of cashflow, a right to sue in the courts is clearly not an adequate remedy – if it were, the Act would not have been passed. Therefore in principle, injunction should be an available remedy, even where the decision is an order for the payment of money.

The great advantages of an injunction are: (1) speed and (2) if a penal notice is attached, there is the potential of proceedings for contempt of Court if the other party does not comply.

In *Macob Dyson J* agreed with the general principle that a mandatory injunction could be granted to enforce an adjudicator’s decision. But he considered it was inappropriate where the decision was merely an order to pay money. He said it was “difficult to see why the sanction for failure to pay in accordance with an adjudicator’s decision should be more draconian than for failure to honour a money judgment entered by the Court.”

However, he did not close the door entirely.

He expressly said he was not casting any doubt on *Drake*, where the adjudicator’s order was for payment to a stakeholder, and an injunction was granted to enforce it.

Even where the payment of money is required to be direct to the other party, it is not difficult to imagine a case where an injunction might be appropriate:

Suppose one party is taking advantage of the other’s financial weakness – driving it into insolvency. The adjudicator sees what is happening, and makes a peremptory order, because it is vital for the money to be paid over without delay. Such an order should be enforceable by injunction.

The door is open. We shall have to see what develops.

### **EFFECT OF SUSPENSION OF WORK**

I finish with a problem to which I have only the most tentative answer.

Subject to certain conditions, HGCRA 1996 section 112 gives right to suspend performance of the contract where money due is not paid.

Where there is a dispute over whether a sum is due, the exercise of the right of suspension is laden with risk, because it may be decided subsequently that non-payment was justified. The suspending party would then be liable in damages for wrongful non-performance.

The question arises whether the exercise of the right of suspension is less risky where it *follows an adjudicator's decision that the sum should be paid*.

If the adjudicator's decision is confirmed in subsequent litigation or arbitration there is no difficulty; in those circumstances the suspension was clearly justified.

The awkward situation is that where the suspension of performance is justified by the adjudicator's decision but not by the ultimate decision.

Suppose a sub-contractor exercises the right to suspend work because a sum ordered by the adjudicator to be paid is not paid, but in the subsequent arbitration or litigation it is held that the adjudicator was wrong and the sum was not properly due from the main contractor.

Does that mean that the suspension of work was wrongful after all, and the sub-contractor must pay damages for the wrongful suspension? Or can the sub-contractor contend that it was not wrongful, because it was justified by the decision of the adjudicator?

Unfortunately the Act does not address this question, and the answer is not clear.

I can give only a tentative answer:

The answer may be that the parties contracted to accept the adjudicator's decision and comply with it temporarily until final determination of the dispute; therefore the main contractor was in breach of contract, by failing to comply on an interim basis with the adjudicator's decision, and cannot complain of the suspension.

It can be argued that the suspension was contractually justified, not by reason of the non-payment in and of itself (for it has been held that the sum was not due), but by reason of the main contractor's breach of the obligation to comply temporarily with the adjudicator's incorrect decision.

This difficult question is bound to arise sooner or later.

## **LIST OF CASES**

### **EARLY CASES**

*Macob Civil Engineering Ltd v Morrison Construction Ltd*, (1999) 64 Con LR 1, Dyson J.  
Normal method of enforcement is by summary judgment, on grounds that, however the dispute may in future be resolved, there is no defence at the time judgment is sought. (12.2.99)

*Outwing Construction Ltd v H Randall & Son Ltd* (1999) 64 Con LR 59, HHJ Humphrey Lloyd QC.  
Court willing to abridge procedures to ensure speedy enforcement, provided no unjust prejudice to the other party. (15.3.99)

### **CASES TO BE NOTED IN EMDEN'S CONSTRUCTION LAW Issue 61 - April 2000**

*Rentokil Allsa Environmental Ltd v Eastend Civil Engineering Ltd* 1999 CILL 1506 (Sc).  
Court will not permit legal procedures to be used so as to freeze or delay the making of the payment ordered by an adjudicator's decision. (31.3.99) [only **Sheriff Court**]

*Straume (UK) Ltd v Bradlor Developments Ltd* 1999 CILL 1520, Judge Behrens QC.  
An adjudication is sufficiently similar to arbitration or other quasi-legal proceedings that it falls under the statutory prohibition on starting legal or other proceedings against an insolvent company without permission of the court. (7.4.99)

*A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* 1999 CILL 1518, HHJ Wilcox.

Right to adjudicate survives the termination of the contract. (23.6.99)

Allied London and Scottish Properties plc v Riverbrae Construction Ltd [1999] BLR 346.  
Adjudicator must reach his decision in accordance with the law applicable in relation to the contract.  
(12.7.99)

Project Consultancy Group v Trustees of the Gray Trust (1999) 65 Con LR 146, Dyson J.  
The question for the Court on an application for summary judgment is whether the defendant has a real prospect of showing that the challenge to jurisdiction is correct. If the Court concludes that there is such a prospect, then the application for summary judgment must fail. (16.7.99)

John Cothliff v Allenbuild (North West) Ltd 1999 CILL 1530, Judge Marshall Evans QC.  
Scheme adjudicator has power to award costs as between the parties. [**Wrong**] (29.7.99)

Palmers Limited v ABB Power Construction Limited [1999] BLR 426, HHJ Thornton QC.  
Where there is doubt concerning a party's right to proceed with an adjudication, the question can be submitted to the court for decision. In a suitable case the court will be able to make a speedy determination of the question of jurisdiction.  
The erection of a boiler in a steel framework was held to be a "construction operation" within s 105(1), and a contract to provide scaffolding for the purpose of that operation was held to be a "construction contract". (6.8.99)

Bouygues UK Ltd v Dahl-Jensen UK Ltd 1999 CILL 1566, Dyson J.  
Court will enforce even if obvious error in the adjudicator's reasoning. This may cause injustice. Hard luck. [pronounced "Bweeg"] (17.11.99)

Lathom Construction Ltd v Cross, 1999 CILL 1568, HHJ Mackay.  
Adjudicator had made a decision concerning the effect of a compromise agreement. Summary judgment was refused because the defendants had a reasonable prospect of showing that the decision was outside his jurisdiction, since the compromise agreement was not itself a construction contract.

Homer Burgess Ltd v Chirex (Annan) Ltd, Ltd [www.scotcourts.gov.uk] Ct of Session, 10 and 18 November 1999, Lord Macfadyen  
Pipework was part of pharmaceutical plant, therefore no jurisdiction. (Contrast Palmers Ltd). Doubts expressed about the correctness of the narrow view in Macob of what constitutes acting outside jurisdiction.

Sherwood & Casson Ltd v Mackenzie, TCC, 30 November 1999, unrep, HHJ Thornton QC.  
Scheme adjudicator had decided that a dispute concerning the final account was not substantially the same as an earlier dispute concerning an interim account, notwithstanding that most of the figures in dispute were the same in both accounts. The contract provided for remeasurement and revaluation at final account stage. The court held that the adjudicator had been correct in assuming jurisdiction and in declining to resign under the provisions of para 9(2).

Fastrack Contractors Ltd v Morrison Construction Ltd, TCC, 4 January 2000, unrep, HHJ Thornton QC  
On what is a "dispute".

VHE Construction plc v RBSTB Trust Co Ltd [TCC Website] 13 January 2000, HHJ Hicks QC  
No set off unless requirements for withholding-notice fulfilled.

**Case subsequent to the meeting:**

Northern Developments (Cumbria) Ltd v J & J Nichol [TCC Website] 24 January 2000, HHJ Bowsher QC  
Claim for damages for repudiation of the contract is an adjudicable claim "under" the contract. But no jurisdiction because not included in withholding-notice. No jurisdiction to award costs under the Scheme unless parties agree.

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