Ten things we have learnt about adjudication since the introduction of LDEDCA

Introduction

1 The Local Democracy, Economic Development and Construction Act 2009 ("LDEDCA") came into force in England and Wales on 1 October 2011. This made a number of changes to the Housing Grants Act and the legislation surrounding payment and adjudication. A new Scheme for construction contracts was also introduced on the same day to support the new Act. When we decided to talk about adjudication at our annual Construction Update, one obvious topic for consideration was what has changed since the introduction of the new Act.

Issue 1 – What was all the fuss about?

2 The answer to this question is that very little has changed. The anecdotal evidence is that not everyone understands the new payment regime and that there have been adjudications where adjudicators have had to grapple with deciding what the terms of a contract were, when there was nothing in writing. In the courts, there may have been a couple of cases involving enforcements with contracts let after 1 October 2011. But the issues raised were nothing new.

3 Of course, it could be that there are a raft of challenging cases just around the corner, and remember that we had to wait ten months for the first case – *Macob v Morrison* – to appear under the original Housing Grants Act. So it is probably business as usual. It is also likely that the reality is that the changes introduced by LDEDCA were not as wide ranging as was thought.[1]

4 This does mean that the question mark over Tolent clauses remains. Although, that said, in the case of *Sprunt v London Borough of Camden*[2] Mr Justice Akenhead made an obiter comment which strongly suggested that the approach of Mr Justice Edwards-Stuart in the *Yuanda* case (which was pre-LDEDCA) that the Tolent-type clause in question did offend against the principles of the Housing Grants Act and was unenforceable is likely to be followed.[3]

5 So a better title for this talk would probably be "10 things we have learnt about adjudication over the past 12 months".

Issue 2 – Does every type of construction contract carry a right to adjudicate?

6 Remember that the Housing Grants Act applies to construction contracts unless they relate to an excluded operation as per those listed in section 105. When you think about excluded operations, it is usually power plants and the like that come to mind. More specifically, the cases typically were about whether everyday construction activities were an integral part of that power plant. For example, there is the old case of *Homer Burgess Ltd v Chirex (Annan) Ltd*.[4] Here the evidence was that the provision of insulation was an integral part of the construction of pipework and boilers which were required so that power could be generated. Without insulation, the pipework and boilers would not function, nor could the plant be operated safely and efficiently. Therefore the insulation works were excluded. There were other cases in a similar vein.

1. And it is also true that there was a widespread attempt across the industry to ensure that everyone knew what the changes were all about.
2. [2011] EWHC 3191 (TCC)
3. Mr Justice Akenhead noted that his colleague had *" ... confirmed ... that the intention of Parliament 'in enacting HGCRA was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of the adjudicator to be enforced, pending the final determination of disputes by arbitration, litigation or agreement'. He found at Paragraph 43 that 'it would be in express conflict with the requirement that the parties were to comply with the decisions of adjudicators'. This does not directly apply to the current case but it is at least an illustration that one needs to consider the purpose of the Act when construing it."*
4. (2000) BLR 124

7 In June 2012, the case of *Clark Electrical Ltd v JMD Developments (UK) Ltd*[5] came along. Here JMD engaged Clark to carry out electrical works on a new distillery in North Yorkshire. Disputes arose and Clark served a Notice of Adjudication seeking payment of some £177k. On 19 March 2012, consultants acting on behalf of JMD wrote to the adjudicator informing him that the electrical works were not "construction operations" and therefore were excluded under section 105(2) of HGCRA. If this was correct then the dispute could not be referred to adjudication. The electrical works themselves were clearly within the definition of "construction operations" in section 105(1) of the HGCRA. The interesting point was that section 105(2)(c)(ii) excludes construction operations with regard to the:

"assembly, installation or demolition of plant or machinery, or erection or demolition of steel work for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is –

(ii)the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink."

8 Remember too that supply contracts are not covered by the Housing Grants legislation. In Scotland, an employer, Pro-Duct (Fife), asked Specialist Insulation ("Specialist") to provide a quote for the supply of ductwork. Specialist provided a quote, stating that the quote was subject to its standard terms and conditions which could only be altered by its written agreement. Those terms did not include any reference to adjudication. There was a dispute about whether and on what terms the contract was formed – but at the end of the day the contract was for the supply of ductwork. Section 105 (2) (d) of the Housing Grants Act notes that the manufacture or delivery to site of various items is not covered by the Housing Grants Act, unless the contract also provides for their installation.

Issue 3: The same dispute

9 Paragraph 9.2 of the Scheme provides that an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that earlier adjudication. An adjudicator should therefore resign if the dispute referred to him is "the same or substantially the same" as one previously decided by an adjudicator. This is an issue that can arise when there are serial adjudications on the same project.

10 In *Quietfield Ltd v Vascroft Construction Ltd,*[6] in the first adjudication the contractor made a claim for an extension of time based on two letters. In the third adjudication, the contractor sought to rely on that material, along with significant other material (running to 400 pages), to defend a claim for liquidated damages. The adjudicator refused to accept the material, saying that the contractor's extension of time claim had been dealt with in the first adjudication. Both Mr Justice Jackson and the Court of Appeal disagreed. May LJ said that:

"Since Vascroft's Appendix C in the third adjudication identified a number of causes of delay which did not feature in the two letters and was substantially different from the claims for extension of time which were advanced, considered and rejected in the first adjudication, the adjudicator was wrong in the third adjudication not to consider Appendix C."

5. [2012] EWHC 2627 (TCC)
6. [2006] EWCA Civ 1737

"More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided."

11 In November 2011, the case of *Carillion Construction Ltd v Smith*[7] came before Mr Justice Akenhead. Carillion commenced Part 8 proceedings seeking a declaration that an adjudicator had no jurisdiction as the adjudication referred to him by Smith was substantially the same as a previous adjudication between the parties. The parties had disagreed about the causes of the delay, entitlement to extensions of time and the valuation of the subcontract. There were two adjudications between Smith's firm, UPS, and Carillion. UPS then went into voluntary liquidation and Smith served a Notice of Adjudication in the third adjudication. Smith argued that the adjudication was materially different from the second adjudication. After comparing the two claim submissions, the Judge found that the dispute referred by Smith in the third adjudication was the same or substantially the same as that referred in the second adjudication: they were both claims for delay and disruption based on loss and expense, said to be caused by Carillion's breaches of contract and default, and the financial heads of claim were the same. The Judge gave the following guidance:

"In my judgment, the following factors, amongst others, can be deployed in considering whether the same or substantially the same dispute has been referred to or resolved in an earlier adjudication:

(a) One needs to consider what is and was the ambit and scope of the disputed claim which is being and was referred to adjudication. That of course will vary from dispute to dispute. One has however to take a reasonably broad brush approach in determining what the referred claims were. The reason for this is to avoid repeat references to adjudication of what is essentially the same dispute.

(b) The fact that different or additional evidence, be it witness, expert or documentary, over and above what was relied upon in the earlier adjudication, is deployed in the later claim to be referred to a second or later adjudication, will not usually alter what the essential dispute is or has been. The reason is that evidence alone does not generally alter what is the essential dispute between the parties. One needs to differentiate between the essential dispute and the evidence required to support or undermine one party's or the other's case or defence.

(c) The fact that different or additional arguments to support or enhance a claiming party's position are deployed in the later adjudication will not usually of itself mean that it is a different dispute to that which was referred earlier. Again, the reason is that different or even better arguments that are deployed in a later adjudication do not usually create an essentially different dispute.

(4) The fact that the quantum is different or is claimed on a different quantification basis in the later reference to adjudication from that claimed in the earlier adjudication is not necessarily a pointer to the referred disputes being in substance different. If for example in Adjudication A the referring party claims for the value of 100 m^3 of supplying and installing concrete, £20,000, at a rate of £200 per cubic metre, a claim for the same concrete work on a time plus materials basis in Adjudication B is essentially the same claim, albeit put on a different basis. There is nothing to stop the referring party in the

7. [2011] EWHC 2910 (TCC)

subsequent arbitration or litigation claiming on each alternate basis but the claim is a claim for payment for the supply and installation of concrete.

(5) One should be particularly cautious about being over-awed in the exercise of comparison of two sets of documents purporting to set out the disputed claims for two adjudications by the amount or bulk of the detail, evidence, analysis, submissions or annexures attached to either.

(6) It is legitimate to look at the expressed motivation by the party in the later adjudication for bringing it and the given reasons for the basis of formulation of the later adjudication claim.

(7) One must bear in mind that Notices of Adjudication and Referral Notices are not required to be in any specific form; they may be more or less detailed and they may or may not be drafted by people with legal expertise. They do not need to be interpreted as if they were contracts, pleadings or statutes.

(8) One strong pointer as to whether disputes are substantially the same is whether essentially the same causes of action are relied upon in the earlier and later Notices of Adjudication and Referral Notices. One must bear in mind that one dispute (like one Claim in Court proceedings) may encompass more than one cause of action."

[My emphasis]

12 It is interesting to speculate whether this represents a slight change in approach. The facts of *Quietfield* are quite extreme, and Mr Justice Akenhead's helpful checklist rather suggests that close attention will be paid to a party who dresses up a claim in order to try and have a second go. What matters is the actual substance of the dispute that is being referred, not the actual form.

Issue 4: When can I adjudicate?

At any time?

13 You can still adjudicate at any time within reason.[8] In *NAP Anglia Ltd v Sun-Land Development Co Ltd,*[9] NAP started court proceedings in autumn 2008 which had proceeded rather slowly. In June 2011 NAP referred the dispute to adjudication. The judgment in the county court was at least four months away. The adjudicator's decision was enforced.

But you can only adjudicate if there is a dispute

14 In *Working Environments Ltd v Greencoat Construction Ltd,*[10] Greencoat engaged WE to carry out the mechanical services installation as part of substantial fitting-out works at existing office accommodation. Under the subcontract, provision was made for WE to apply for payment on the second to last Friday of each month and for Greencoat to issue a payment certificate within one week thereafter. WE submitted Application No. 10 for payment for a net sum of £488k. The final date for payment was to be 45 days after receipt of an invoice by WE. This included breakdowns as to how that figure was reached. Greencoat certified that a net sum

8. See *Herschel v Breen* [2000] EWHC TCC 178
9. [2011] EWHC 2846 (TCC)
10. [2012] EWHC 1039 (TCC)

of only £16.6k was due, again providing breakdowns against various heads of work done, variations and withheld items.

15 Under the subcontract, payment was due by 14 January 2012. On 8 December 2011, WE's consultants confirmed that they did not accept Greencoat's assessment. They started adjudication proceedings 6 days later.

16 Greencoat said that the adjudicator effectively had no jurisdiction on the basis that no dispute or no material dispute had crystallised because the date for payment had not yet accrued, and because relief for payment was sought which the adjudicator could not award because the obligation to pay had not arisen.

17 The adjudicator replied, saying *"I also doubt that the fact that payment is not yet due is a good point"*. The Judge agreed, saying that it was clear that there was a dispute as to whether £488k or some other sum was due. The Judge noted that it would be illogical to say that there cannot be a dispute about an interim valuation of work unless, until and after the valuation falls due for payment. The fact is that here there was a dispute about the interim valuation and that dispute was referable to adjudication. Any dispute would cover the items put forward for withholding, since effectively Greencoat was arguing that the items and quantum then claimed could and should be deducted, whilst WE was arguing that they could and should not be deducted.

The dispute must have crystallised

18 In *Beck Interiors Ltd v UK Flooring Contractors Ltd,*[11] Beck entered into a subcontract with UK Flooring Contractors Limited ("UKFCL") for the installation of specified floor coverings for renovation work at a shop. On 15 March 2012, Beck issued a Schedule of Costs Incurred claiming £30,826.15 (subsequently increased to £31,148.97). On 5 April 2012 (one day prior to Good Friday long weekend) Beck issued to UKFCL a further letter claiming entitlement to LADs.

19 On 10 April 2012 (the first working day after 5 April 2012) Beck issued its Notice of Adjudication, comprising both the Schedule of Costs and LAD claims. The adjudicator found in favour of Beck, awarding sums in respect of both claims.

20 However, unsurprisingly perhaps, because of the Easter holiday, Beck had given UKFCL only one working day to consider the claim. There were no special reasons (i.e. limitation) and the court decided that the adjudicator therefore had no jurisdiction to consider the LAD claim.

Item 5: Appointing the adjudicator

Can I select the adjudicator of my choice?

21 There is, of course, nothing to stop you trying to agree the identity of the adjudicator with the "other side". This is an entirely sensible approach, which should have the benefit of ensuring the choice of an adjudicator who is suitably qualified to deal with the dispute.

11. [2012] EWHC 1808 (TCC)

22 However, it is still a step too far to say that you can select the adjudicator of your choice. That said, it seems that there is some scope for selecting your adjudicator or choice, or for "forum shopping". In *Lanes Group Plc v Galliford Try Infrastructure Ltd t/a Galliford Try Rail*,[12] Galliford commenced adjudication and applied to the ICE to appoint an adjudicator. Mr Klein was appointed. However, Galliford's solicitors failed to take the next step, namely sending referral documents. As Lord Justice Jackson characterised the position, the solicitors, honestly but mistakenly believing that Mr Klein was disqualified on grounds of bias, served a fresh notice of adjudication.

23 They then applied to the ICE to appoint a new adjudicator. The ICE responded by appointing Mr Atkinson. Lanes' solicitors protested that he did not have jurisdiction, on the grounds that Mr Klein rather than Mr Atkinson was the only adjudicator appointed to resolve the dispute. Mr Atkinson ultimately awarded Galliford £1.2million.

24 Did Mr Atkinson have jurisdiction as adjudicator? Lanes argued that s.108 of the HGCRA and clause 18B of the subcontract conditions permitted a party to refer a dispute to adjudication on one occasion only. If the party seeking adjudication did not follow through the reference, then that was the end of the matter. The right to adjudication of the dispute notified in the notice was lost forever. Therefore Galliford, having allowed the adjudication before Mr Klein to lapse, could not commence a new adjudication in respect of the same subject matter.

25 Lord Justice Jackson was initially attracted to this, noting that permitting a claimant to allow an adjudication to lapse because it disapproves of the appointed adjudicator and then to start a fresh adjudication before a different adjudicator was not appealing. However, there are occasions when an adjudication is not pursued further after the preliminary steps have been taken. There was no authority to suggest that this meant that the claimant would lose its right to adjudicate that dispute for ever. Further, the Blue Form subcontract, the ICE Adjudication Procedure and the Scheme recognised that there was a right to restart an adjudication in a number of circumstances.

26 It was therefore not right that a claimant's entitlement to adjudicate the dispute would be irretrievably lost. Lord Justice Jackson said that:

> *"Forum shopping is never attractive. My first view of this case was that Galliford could not be permitted simply to drop the first adjudication and then adjudicate before a different adjudicator whom it preferred. Mr. Marrin's submissions have persuaded me, however, that Galliford's conduct was permissible under the contract and the second adjudicator did indeed have jurisdiction."*

Who can act as a nominating body?

27 However, again perhaps unsurprisingly, you cannot act as your own nominating body. In the case of *Sprunt Ltd v London Borough of Camden*,[13] the parties had entered into a Framework Agreement under which Sprunt agreed to provide building consultancy services in its capacity as an architect. Clause 25 of the contract indicated that:

12. [2011] EWCA Civ 1617
13. [2011] EWHC 3191 (TCC)

> *"25.4 The Council shall be the specified nominating body for the purposes of paragraphs 2(1)(b) and 6(1)(b) of Part 1."*

28 Sprunt had approached the RICS. Camden argued that it was the nominating body. Mr Justice Akenhead noted that the concession that clause 25.11 was contrary to s.108(3) of the Housing Grants Act, meant that all the adjudication provisions of the Scheme applied:

> *"if there is in the contract adjudication provisions at least one material non-compliance, they all go".*

29 The Judge then went on to make a further, in his words, "stronger point", namely that:

> *"it is inherently unsound and contrary to the policy of the HGCRA for the contract to specify that one side should nominate the adjudicator. Section 108(2)(e) imposes a statutory requirement that the contract should impose a duty on the adjudicator to act impartially. Impartiality in an adjudicator, or indeed an arbitrator or judge, is judged in two ways, the first being by reference to actual partiality or bias and the other by reference to ostensible or apparent partiality or bias."*

30 The Judge stressed that he was not suggesting any actual bias on the part of Camden, but he did note that it would be difficult to dispel the real possibility that Camden had appointed what it thought was a "horse for the course" and someone who was or might be sympathetic to Camden. The fact that Camden was a party to the construction contract in question meant that it lacked the necessary quality of independence in the nomination of an adjudicator. Here, adjudication was different from arbitration as there is only a limited time in which a party to adjudication can determine if an adjudicator nominated by the other party is or might be considered potentially, actually or ostensibly partial or biased. The Judge concluded:

> *"Essentially, what Camden would have is not a judge in its own cause but the right to nominate a judge in its own cause and that strikes against the policy of the act of having actually and ostensibly impartial adjudicators."*

Issue 6: What can adjudicators do and not do in reaching their decisions?

Use of an adjudicator's own knowledge?

31 Well, an adjudicator can make use of his own knowledge, up to a point. This is always a slightly tricky area for the adjudicator and the parties. Under paragraph 13 of the Scheme, the adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute. Where possible, the parties should always try to secure the appointment of a construction professional who understands the issues under dispute. Therefore you are looking for the adjudicator to make use of his own knowledge and experience. However, as I say, that is only up to a point.

32 In *Carillion Utility Services Ltd v SP Power Systems Ltd*,[14] a dispute arose out of contracts made under a framework agreement whereby Carillion carried out certain excavation, installation and reinstatement works for SP. Carillion were awarded

14. [2011] CSOH 139

£2.7 million by an adjudicator in respect of claims for payment for the provision of lamping and guarding of cable excavations during periods when it was waiting for SP personnel to carry out and complete cable jointing operations.

33 SP said that the adjudicator had failed to comply with the rules of natural justice in the method which he adopted to quantify Carillion's claim. In short, he did not adopt the method of quantification which Carillion had put forward and which SP had criticised, but used his own experience of what would constitute reasonable commercial rates for the additional equipment used at the time the contract was formed. Further, he did not give the parties an opportunity to consider and comment on his proposed methodology and the material on which it was based. In so doing he acted in breach of natural justice in a material respect. The adjudicator concluded:

> *"that additional payment is due but the adoption of a multiplier which is simply the application of a number derived by dividing the actual plan perimeter of the excavated area by the theoretical plan perimeter of the standard excavation as stated in the Contract is not appropriate. ... I have decided therefore to evaluate the applicable charge for excavations that are larger than that specified in the Contract on the basis of my experience of what would constitute reasonable commercial rates for the additional equipment employed at the time the Contract was formed ..."*

34 SP further said that this meant that the adjudicator had decided the case on undisclosed factual material and on a basis which neither party had advanced. Lord Hodge referred to the comments of Lord Drummond Young in the case of *Costain Ltd v Strathclyde Builders Ltd*,[15] who listed nine principles of natural justice including:

> *"6. An adjudicator is normally given power to use his own knowledge and experience in deciding the question in dispute ... If the adjudicator merely applies his own knowledge in assessing the contentions, factual and legal, made by the parties, I do not think that there is any requirement to obtain further comment. If, however, the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of law or fact which have not been canvassed by the parties, it will normally be appropriate to make those propositions known to the parties and call for their comments."*

35 In the Judge's view, an adjudicator should disclose to the parties information that he has obtained from his own experience or from sources other than the parties' submissions, if that information is material to the decision which he intended to make. Whether the information is of sufficient potential importance to the decision is a question of degree which must be assessed on the facts of each case.

36 Here, the adjudicator did not go off on a frolic of his own. The adjudicator's task was to fix a reasonable price for the lamping and guarding of the larger excavations. He had before him Carillion's claim which he considered to be overstated but which disclosed the size of the excavations in respect of which it claimed payment. Having concluded that the perimeter multiplier overstated Carillion's claim, he was entitled to look at the sizes for which Carillion claimed and form the view from that material that on average the equipment that was needed amounted to what

15. [2003] ScotCS 352

he stated. In doing so, he applied his knowledge and experience to assess both Carillion's claim and SP's comments on that claim. Here the adjudicator derived his reasoning from the parties' submissions rather than adopting a wholly extraneous methodology.

37 However, the Judge was concerned about the way in which the adjudicator had applied the commercial rates which, from his experience, he saw as reasonable and about which there appears to have been no evidence. There was no doubt that this was a material part of his decision. It could not be regarded as being in any way peripheral or insignificant. The Judge noted that this was an addition to a daily charge and that even a minor adjustment could have a large impact. A change of some 30% would have altered the markup that he allowed by over £100,000. Therefore parties were entitled to know of this input into the adjudicator's reasoning and to have a chance to comment on it.

38 This was a breach of natural justice as the parties were entitled to have notice of the commercial rate that he proposed and the way in which the adjudicator proposed to apply it in reaching his conclusion.

Adopt their own methodology?

39 There is, however, a fine line between what the adjudicator can and cannot do. In the case of *Hyder Consulting v Carillion*,[16] there was no breach of natural justice when the adjudicator seemed to adopt a particular methodology which the parties had not commented upon. Here, a dispute arose about the calculation and payment of Hyder's fees. Carillion said that the adjudicator had acted in breach of the rules of natural justice by failing to notify and seek submissions upon the methodology used by him for calculating the Target Cost value.

40 The question here is, to what extent should an adjudicator invite comment? In the case of *Primus Build v Pompey Centre*,[17] Mr Justice Coulson had said that:

> *"an Adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision".*

41 Mr Justice Edwards-Stuart disagreed with Carillion. The failure to invite comment on the methodology used to value the Target Cost did not amount to a breach of the rules of natural justice, even though the calculation departed from that methodology advanced by both parties, because:

(i) The calculation of the Target Cost was always an issue in the adjudication and each party had made more than one submission about the relevant terms in relation to the calculation of Target Cost; and

(ii) The adjudicator did not use any information that Carillion had not had an opportunity to consider and comment upon.

42 Where Mr Justice Edwards-Stuart agreed with Lord Hodge was in his comment that:

16. [2011] EWHC 1810 (TCC)
17. [2009] EWHC 1487 (TCC)

"unless the rules of engagement are fundamentally disregarded by the Adjudicator such that the outcome is materially affected, the Court will not usually intervene".

43 This is the key consideration. In *Herbosh-Kiere Marine Contractors Ltd v Dover Harbour Board*,[18] the adjudicator adopted a method for calculating the daily rate for plant and personnel that the contractor was entitled to that neither party had argued for. Mr Justice Akenhead looked at the dispute referred. He said that:

"the scope of disputes can be 'as broad as it is long'. Disputes may be very wide and cover myriad issues ... disputes may be very narrow and involve one or more limited and discreet issues."

44 However, here the scope of the dispute did not include the method for calculating the daily rate which the adjudicator adopted. A key reason why the adjudicator's initiative was a breach of the rules of natural justice was because it made a material difference (of around £350k) to the amount awarded to the contractor.

45 The point to remember is that the adjudicator was free to have used his own methodology, but only provided that he gave the parties themselves the opportunity to comment.

Obtaining legal advice?

46 The same point arises out of the case of *Highlands and Islands Airports Ltd v Shetland Islands Council*.[19] This case arose out of the construction of an extension to runways at Sumburgh Airport. After the adjudicator's decision had been issued, SIC's solicitors discovered by chance that before reaching his decision the adjudicator had taken advice from senior counsel in relation to the proper construction of clause 41.3 of the NEC Professional Services Contract. The adjudicator did not tell either of the parties that he had taken advice, nor did he tell the parties the terms of that advice, nor did he give the parties any opportunity to address him on the construction of clause 41.3. The adjudicator ordered SIC to pay some £2 million. SIC refused to pay, saying that there had been a breach of natural justice.

47 The court heard evidence from the adjudicator, who had telephoned one counsel who declared a conflict of interest. The advice then received from a second counsel had been in the course of a short telephone call in which the adjudicator had asked whether senior counsel agreed with the view he had formed of what clause 41.3 of the contract meant. The call lasted no more than 2 or 3 minutes and no fee was charged. Lord Menzies said that the rules of natural justice were designed to prevent the possibility of injustice. Here, the Judge considered that the confirmation sought by the adjudicator was indeed advice. It was given informally, it did not take long to impart, and no fee was paid for it, but nonetheless it was legal advice. It was legal advice which was sufficiently important to the adjudicator that when one counsel declined to speak to him because of a conflict of interest, he went on to telephone another to obtain advice on the point. It was also "*the foundation for any award in favour of HIAL for Future Remedial Works Costs*".

18. [2012] EWHC 84 (TCC)
19. [2012] CSOH 12

Changes his mind?

48 What if, during a series of adjudications, the adjudicator changes his mind during say adjudication 2 about an issue he has already decided as part of adjudication 1? A number of issues arise. Should he keep quiet? Is he under an obligation to tell the parties? And assuming he does tell the parties, is everyone still bound by the original decision, even though the adjudicator now considers it to be wrong?

49 The central question before Mr Justice Edwards-Stuart in the case of *Vertase F.L.I. Ltd v Squibb Group Ltd*[20] was, what had the adjudicator decided in Adjudication No. 1 and was the adjudicator in Adjudication No, 2 being asked to decide the same issue again? In Adjudication No. 1 the adjudicator decided that Vertase should pay Squibb £167k and he granted Squibb an extension of time to 9 March 2012. In Adjudication No. 2 the adjudicator ordered Squibb to pay Vertase the sum of £184k. Squibb paid or agreed to pay the sum less £105,000 awarded in respect of liquidated damages.

50 In Adjudication No. 1 Squibb claimed a full extension of time and, in addition, sought payment of consequential loss and damage in excess of £550k. In its Response to the Referral Notice, Vertase contended that Squibb was entitled to an extension of time until 5 February 2012 but was entitled to nothing in respect of loss and expense. In addition, it claimed £180,000 in respect of liquidated damages. Squibb took two points in response to Vertase's claim for liquidated damages. First, it asserted that Vertase "must have actually incurred the liquidated damages, which it has failed to prove". Second, that Vertase had failed to provide an appropriate notice of its intention to withhold or deduct liquidated damages.

51 In Adjudication No. 1, the adjudicator found that Vertase did not have a right to claim liquidated damages under the subcontract unless they could demonstrate an equivalent loss under the main contract, and that Vertase had no entitlement to take liquidated damages from any amount that I might decide is due to be paid to Squibb.

52 There was a dispute about what the adjudicator actually decided. The Judge preferred the view that the adjudicator's conclusion that Vertase was not entitled to liquidated damages was based on two grounds: first, the absence of a withholding notice and, second, the failure to demonstrate any equivalent loss under the main contract.

53 In Adjudication No. 2, under the heading "What reason, if any, would absolve Squibb from liability for liquidated damages as asserted by Vertase?", the adjudicator said this:

> *"Vertase assert that they have a right under the sub-contract to be paid liquidated damages whether or not a similar loss has been suffered under the main contract. Liquidated damages are intended to represent a true estimate of the risk of loss to the Employer (or main Contractor) in the event that the Contractor (or Sub-Contractor) defaults on his obligations under the contract. In this case, no loss has been demonstrated by Vertase, but I am persuaded by Vertase's arguments on the legal position sufficiently to change the view that I took in my Decision in the first adjudication.*

20. [2012] EWHC 3194 (TCC)

I find that Squibb have not established that the liquidated damages provision in the contract is unenforceable on the ground that Vertase have not demonstrated a loss under the main contract or from any other reason." [Emphasis added]

54 The key words can be found in the penultimate paragraph where the adjudicator says that he has changed his view. The first question for the court was whether that was what the adjudicator had actually done. The second was whether or not the adjudicator was entitled to change his mind.

55 There was no doubt that Vertase had managed to persuade the adjudicator in Adjudication No. 2 to alter a conclusion that he had reached in Adjudication No. 1. That conclusion formed part of his reasoning that led to his rejection of Vertase's claim for liquidated damages.

56 The point made by Squibb was that the adjudicator concluded in Adjudication No. 1 that Vertase had no entitlement to liquidated damages and that that should have been the end of the matter. The dispute about Vertase's entitlement to liquidated damages was essentially the same in each referral. The adjudicator was not entitled, in Adjudication No. 2, to reconsider the point about the need for Vertase to demonstrate a loss, given the content of his Decision in Adjudication No. 1.

57 The Judge agreed. The initial finding was final and binding on the parties until finally determined by litigation or arbitration; it was not open to the adjudicator to change it. To put it another way, since the parties were bound by his decision in Adjudication No. 1 that the absence of any loss in respect of delay precluded Vertase from claiming liquidated damages, that conclusion, until finally determined by litigation or arbitration, remained one with which the parties were bound to comply. It mattered not whether it was right or wrong.

58 This view was supported by the authorities. Once a dispute has been determined by adjudication, there cannot be another adjudication about that same dispute. In *Redwing Construction Ltd v Wishart*,[21] Mr Justice Akenhead had said that:

"(d) any decision which can be described as deciding the dispute, as referred or as expanded effectively within the adjudication process, is binding and cannot be raised or adjudicated upon again in any later adjudication".

Issue 7: Severance

59 The principle behind severance is whether parts of an adjudicator's decision may be enforced and others not. In the 2008 case of *Cantillon v Urvasco*,[22] Mr Justice Akenhead gave the following guidance:

"65. On the severability issue, I conclude, albeit obiter in the result, as follows:

(a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.

21. [2011] EWHC 19 (TCC)
22. [2008] EWHC 282 (TCC)

(b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.

(c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

(d) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

(e) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.

(f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court."

60 What has been interesting in 2012 is that the courts have, on at least three occasions, been happy to sever an adjudicator's decision.

61 In the case of *Working Environments Ltd v Greencoat Construction Ltd*,[23] there were however two items totalling approximately £25k which were not part of, or within the confines of, the dispute as they had not been mentioned before they emerged 22 days into the adjudication process. The Judge was of the view that he was able to sever that part of the decision where the adjudicator did not have jurisdiction and reduce the total sum due accordingly. To act in this way was entirely consistent with the principles set out in the *Cantillon v Urvasco* decision.

62 In the case of *Beck Interiors Ltd v UK Flooring Contractors Ltd*,[24] only part of the claim had been raised in the correspondence at Easter. That part of the claim related to liquidated damages. As the dispute had not crystallised, the adjudicator did not have jurisdiction. However, as the liquidated damages' claim was, in the words of the Judge, "tagged on", it could be severed.

Severance cuts both ways

63 Then in *Lidl UK GmbH v R G Carter Colchester Ltd*,[25] it was the employer, who had been successful in the adjudication, who was seeking to sever the decision. The employer accepted that the adjudicator had decided one question that was not referred to him but said that this could be severed from the rest of the decision. However, the contractor tried to argue that only one dispute had been put to the adjudicator and his decision was therefore not severable. The court agreed with R G Carter, but only up to a point. Mr Justice Edwards-Stuart said that:

23. [2012] EWHC 1039 (TCC)
24. [2012] EWHC 1808 (TCC)
25. [2012] EWHC 3138 (TCC)

> *"At first sight it may appear that the decision in Greencoat conflicts with the general principle that a decision cannot be severed where only one dispute or difference has been referred. The rationale underlying this principle is, I think, that where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot safely be severed from the whole. However, where, in the case of the referral of a single dispute additional questions are brought in and adjudicated upon, whether by oversight or error, there should be no reason in principle why any decision on those additional questions should not be severed provided that the reasoning giving rise to it does not form an integral part of the decision as a whole. However, failing this, the entire decision will be unenforceable."*

64 Has there been any general widening of the severability principle? Possibly, although the courts have on each occasion acted within the established *Cantillon* principles. In the *Working Environment* and *Beck* cases, the court severed that part of the adjudicator's decision which had not crystallised at the time of referral to adjudication. In *Lidl* the reason for the severance was that the adjudicator had exceeded his jurisdiction by considering an issue which had not been referred to him. This was even though only one question had been referred to the adjudicator. The ability to sever came via certain "additional" questions that were raised.

65 In the *Highlands and Islands Airports Ltd v Shetland Islands Council* case, the Employer tried to save part of the sums awarded to it through the doctrine of severance. They did not succeed. By far the greater part of the sum awarded by the adjudicator related to the informal advice issue. The dispute which was the subject of that decision was a single issue dispute, and in the circumstances the determination as to Future Remedial Works Costs could not be severed from the rest of the decision.

Issue 8: Can the adjudicator award interest?

66 In *Partner Projects Ltd v Corinthian Nominees Ltd*,[26] Mr Justice Edwards-Stuart agreed that following the decision in *Carillion v Devonport Royal Dockyard* an adjudicator has no free-standing or inherent power to award interest in the absence of a contractual provision granting such power. If there is no provision for interest in either the contract or the adjudication procedure, a claiming party may be able to maintain a claim under the Late Payment of Commercial Debts (Interest) Act 1998 or for financing charges, provided such a claim is actually made.

67 The contract here was based on the JCT Standard Form of Building Contract, Private Without Quantities, 1998. Clause 30.1.1.1 does not confer a power to award interest on sums which have not been certified. However, the Judge considered that the adjudicator was able to award sums greater than those certified by the architect because the contract gave him the power to open up and review certificates. Importantly, by including the claim for interest in the notice and referral, the contractor had given the adjudicator jurisdiction to deal with its claim for interest.

68 In the view of the Judge, what the adjudicator had done was to open up, review and revise the architect's certificates and to substitute for the sums actually certified

26. [2011] EWHC 2989 (TCC)

the sum that he considered should have been certified. Once this had been done, the adjudicator must be entitled to award interest on the sums due under the corrected certificates.

69 This was not an excess of jurisdiction. This was particularly the case where the Adjudication Notice specifically invited the adjudicator to decide whether, pursuant to clause 30.1.1.1, PPL was entitled to interest. Accordingly, the question of PPL's entitlement to interest was squarely covered by the adjudicator's terms of reference. If the adjudicator had concluded that PPL was entitled to interest when, on a true construction of the contract, it was not entitled to such interest, then that would have been an error of law in determining a question that was referred to him. It would not have been a case of answering the wrong question; rather he would have answered the right question in the wrong way.

Issue 9: Set-off against an adjudicator's decision

70 Generally, the paying party cannot avoid paying up by relying on the principles of set-off. There are exceptions:

(i) If there is a clear contractual right to set-off; or

(ii) The nature of the adjudicator's decision is such (for example, it gives declaratory relief) that the contractual machinery (including the issue of a withholding notice) can still be operated.

71 In *R and C Electrical Engineers Ltd v Shaylor Construction Ltd*,[27] R&C were engaged by Shaylor under a sub-subcontract ("the Subcontract") to carry out mechanical and electrical works at a hospital in Walsall. The Subcontract contained a "pay when certified" provision (clause 21.8(b)). The main contractor was Ashley House PLC. Under the main contract between Ashley House and Shaylor ("the Main Contract"), the issue of a final certificate was a precondition to R&C's right to payment. By November 2011, a dispute had arisen between the parties regarding R&C's financial and other entitlements under the Subcontract. On 15 November 2011, R&C referred the dispute to adjudication.

72 The adjudicator determined that the final Subcontract sum was £1,495,034, of which £196,963 (plus VAT) remained outstanding and due to R&C. However, in view of the "pay when certified" provisions of clause 21.8, this sum was not yet payable.

73 R&C made a Part 8 application seeking a declaration for immediate payment of the £196,963 (plus VAT) despite the fact that the adjudicator had directed that it was not to be paid forthwith.

74 The Judge rejected R&C's application and held that the issue of whether R&C were entitled to immediate payment of the final contract sum as determined by the adjudicator did not arise. The adjudicator had not determined whether Shaylor had a valid claim for delay in a time at large situation as Shaylor's delay claim was not advanced on this basis. Therefore Shaylor was not seeking to exercise a right of set-off or counterclaim in the enforcement proceedings. Rather it was seeking to exercise its contractual right that in the Judge's view had been expressly preserved

27. [2012] EWHC 1254 (TCC)

by the adjudicator's decision itself. This case reaffirms the principle that in limited circumstances a party may set off against an adjudicator's decision, that is, as the final date for payment had not arrived Shaylor would be in a position to issue a withholding notice against those sums. The Judge did, however, make clear that this did not affect the adjudicator's decision which was binding on the parties until the dispute was finally resolved by litigation or arbitration.

75 The first adjudication between Squibb and Vertase had also led to an enforcement hearing.[28] The adjudicator decided that the subcontract allowed Squibb to claim an extension of time and additional loss and expense, that Squibb was entitled to an extension of time of six weeks to 9 March 2012 and that Vertase had not served a withholding notice in respect of any cross-claim for LADs. Therefore, Squibb was not required to pay Vertase any amount in respect of LADs and Vertase had no entitlement to take LADs from any amount that the adjudicator decided was due to Squibb. Vertase refused to pay the award and served a withholding notice in the amount of approximately £276,600.

76 Mr Justice Coulson enforced the first decision in full. The general rule is that the right to make such set-off is generally excluded because anything else would be contrary to the HGCRA. On proper construction of the Subcontract, there was no contractual right to set-off and reading the adjudicator's decision as a whole it was clear that he had not given some form of declaratory relief; instead he was deciding a one-off claim in a one-off way. The adjudicator had indicated that the sum of £167,500 should be paid immediately without deduction and there was nothing in the Subcontract that allowed any other deductions.

77 The Judge did note that there was nothing to stop Vertase from claiming the items in a separate adjudication. However, this should not prevent the payment of the sums awarded to Squibb in Adjudication No. 1.

78 The same principles apply to equitable set-off. In *Beck Interiors Ltd v Classic Decorative Finishing Ltd*,[29] CDF were engaged by Beck to carry out internal and external decoration works. Disputes arose and an adjudicator held that Beck was entitled to the sum of £36k plus VAT. CDF refused to pay, arguing that the sum was not due as Beck owed CDF the sum of €60k relating to a project in Dublin. Beck issued enforcement proceedings. CDF said that they were entitled to set-off against the adjudicator's decision sums they claimed were due under a separate contract in Dublin. In the absence of a contractual right to set-off, did CDF have any equitable set-off rights? Mr Justice Coulson said the following:

(i) The general principle is that it is rare for the court to permit the unsuccessful party in an adjudication to set-off against the sum awarded by the adjudicator some other separate claim. That would defeat the purpose of the Housing Grants Act;

(ii) There are two possible exceptions; firstly where there were express set-off provisions in the contract, and secondly where the adjudicator did not order immediate payment, instead giving a declaration as to the proper operation of the contract.

28. *Squibb Group Ltd v Vertase F.L.I. Ltd* [2012] EWHC 1958 (TCC)
29. [2012] EWHC 1956 (TCC)

79 Neither of those exceptions applied here. There was no express contractual set-off provision in the subcontract and the adjudicator had told CDF to pay Beck "without further ado". There remained the question as to whether CDF had any right of equitable set-off. Reference was made to the case of *Federal Commerce & Navigation Ltd v Molena Alpha Inc*[30] where Lord Denning said that:

> *"It is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. It is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."*

80 CDF's cross-claim concerned a contract in Dublin and did not arise out of the same transaction that lay behind the adjudicator's decision. They were different contracts, entirely different projects, in two separate countries (and therefore two separate jurisdictions) and in two separate currencies. CDF did not therefore have any entitlement to equitable set-off

Issue 10: Do I have to pay the adjudicator?

81 The general answer to this question is yes. In most circumstances, both parties to an adjudication are jointly and severally liable to pay the adjudicator's fees. There have been a number of decisions which support that general proposition. However, a Court of Appeal case from July 2012 has raised a rather large question mark over this issue.

82 In *PC Harrington Contractors Ltd v Systech International Ltd*,[31] Mr Justice Akenhead had decided that an adjudicator appointed pursuant to the Scheme was entitled to be paid when his decision had been ruled to be unenforceable because of a failure to comply with the rules of natural justice. The Judge noted that, as required by the Scheme, the adjudicator had carried out a number of activities, including producing a decision. Further, there were policy reasons in favour of the adjudicator. The Judge said:

> *"One should therefore be somewhat slower to infer that what parties and adjudicators intended in their unexceptionably worded contracts was something which excluded payment in circumstances in which the adjudicator has done his or her honest best in performing his or her role as an adjudicator, even if ultimately the decision is unenforceable. The position might well be different if there was to be any suggestion of dishonesty, fraud or bad faith."*

83 Harrington appealed, arguing that the adjudicator had failed to perform the service which he had contracted to perform. The Court of Appeal, led by the Master of the Rolls, Lord Dyson, agreed. The Court of Appeal did agree that the Scheme imposes an obligation on the adjudicator to produce a decision within a short period. It also agreed that the adjudicator was obliged to perform some ancillary functions and entitled to perform others. He could not simply produce a decision out of a hat. However, the question was not whether the adjudicator was obliged or entitled to take these steps. Rather, it was whether he was entitled to be paid for those steps, if they led to an unenforceable decision. Here, the adjudicator's terms

30. [1978] 1 QB 927
31. [2011] EWHC 2722 (TCC) and [2012] EWCA Civ 1371

of engagement had to be read together with the Scheme. The Scheme carefully defines the circumstances in which the adjudicator is entitled to be paid. For example, the purpose of paragraph 25 of the Scheme is to make it clear that an adjudicator cannot charge an unreasonably high fee. Paragraph 11(2) notes that if the adjudicator's appointment is revoked due to his default or misconduct, he is not entitled to any fees. Lord Dyson noted:

"I return to the question: what was the bargained-for performance? In my view, it was an enforceable decision. There is nothing in the contract to indicate that the parties agreed that they would pay for an unenforceable decision or that they would pay for the services performed by the adjudicator which were preparatory to the making of an unenforceable decision. The purpose of the appointment was to produce an enforceable decision which, for the time being, would resolve the dispute."

84 A decision that was unenforceable was of no value. The parties would have to start again in order to achieve the enforceable decision which the adjudicator had contracted to produce. If the adjudicator's appointment was revoked due to his default or misconduct, he is not entitled to any fees:

"the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a 'default' or 'misconduct' on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner."

85 The Court of Appeal considered the difference between arbitrators and adjudicators. First, an arbitral award is binding, subject to the supervisory jurisdiction of the court under sections 66-68 of the Arbitration Act 1996. Second, when ancillary functions are carried out by an arbitrator, they are binding and therefore the arbitrator gives value in performing them. Third, an arbitrator has inherent jurisdiction to make a binding decision on the scope of his own jurisdiction. The Court of Appeal then considered the policy question:

"I accept that the statutory provisions for adjudication reflect a Parliamentary intention to provide a scheme for a rough and ready temporary resolution of construction disputes. That is why the courts will enforce decisions, even where they can be shown to be wrong on the facts or in law. An erroneous decision is nevertheless an enforceable decision within the meaning of the 1996 Act and the Scheme. But a decision which is unenforceable because the adjudicator had no jurisdiction to make it or because it was made in breach of the rules of natural justice is quite another matter."

86 Such a decision does not further the statutory policy of encouraging the parties to a construction contract to refer their disputes for temporary resolution. It has the opposite effect. It causes the parties to incur cost and suffer delay. The Court of Appeal stressed that what mattered was what the contractual arrangements between the parties actually said. Here, the adjudicator had not produced an (enforceable) decision which determined the matters in dispute. This was what his contract had required of him before his entitlement to fees arose.

87 Finally, the Court of Appeal noted that if their decision did give rise to concerns on the part of adjudicators then the solution was:

"in the market-place: to incorporate into their Terms of Engagement (if the parties to the adjudication are prepared to agree) a provision covering payment of their fees and expenses in the event of a decision not being delivered or proving to be unenforceable".

88 It remains to be seen whether this is something which the various adjudicator nominating bodies or parties in general will consider to be acceptable. It will be interesting to see whether further cases are brought as a result of this decision, with parties seeking repayment of adjudicators' fees where their decisions have been held to be unenforceable.

89 Further, a number of questions remain. The *Harrington* case was a breach of natural justice (the adjudicator failing to consider one part of the defence). It would appear from the judgment that the basic principle would apply where a decision is held to be unenforceable due to lack of jurisdiction: again it would be unenforceable. That said, many jurisdiction decisions are made by adjudicators at the outset of an adjudication. By carrying on and reserving its position, will a party be deemed to have taken the risk of paying the adjudicator's fees even if the ultimate decision is unenforceable on the very same jurisdiction grounds? The *Harrington* case was an adjudication under the Scheme. Other contracts have different rules. Another potential area of uncertainty is how an adjudicator's entitlement will be assessed if the court severs the decision.

Conclusions

90 It appears that the number of adjudications may be on the increase. The number of adjudications at TeCSA, one of the more minor adjudication providers, has gone up from 61 in 2010 to 78 (so far) in 2012. After a lull during 2010/2011, it also appears that the number of reported enforcement decisions at the TCC may be on the increase as well. That, of course, may in part be the result of parties looking for more time to pay in these difficult economic times.

91 So, in time, there will be cases that deal with the amendments introduced by LDEDCA. However, the clear message of support for adjudication from the TCC (and the Court of Appeal) remains firmly in place. In the vast majority of the cases referred to above, the adjudicator's decision was enforced (or at least enforced in part, when it was severed) and the attempts to avoid or get round that decision rejected.

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November 2012