

Adjudication Seminar 6

Note: Candidates are expected to have available: The Housing Grants, Construction and Regeneration Act 1996 (as Amended 2009) ["the Act"] and

The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended (England) Regulations 2011), or as amended (Wales) Regulations 2011, or as amended (Scotland) Regulations 2011) ["the Scheme"]

1. Conflict of Interest

You are appointed as Adjudicator/Arbitrator by a nominating body [ANB]. The Defenders' representative is identified by the ANB and you have no conflict. Shortly afterwards you receive an email from different representatives for Defenders who claim that you have a conflict with them from the past. They demand that you resign forthwith.

Q: What do you as Adjudicator, or Arbitrator, do?

A: There is a famous but possibly apocryphal answer to this. A famous arbitrator was sitting in the arbitral hearing when surprisingly his son came marching in to represent one of the Parties. The arbitrator looked up and said:
"One of us has to go, and it is not going to be me!"
His son turned on his heel and marched out again.

The Adjudicator/Arbitrator in question replied that it was the new representatives Who should resign in such circumstances.

The current RICS Guide for Dispute Resolvers effective from February 2021 defines 'Dispute Resolver' as '*A surveyor appointed either privately or by RICS, to resolve a dispute, whether as arbitrator, independent expert, mediator, adjudicator or in any other capacity. Emphasis added.*

Under this question, the new representatives were RICS surveyors. The ethical standards of other bodies are largely similar.

There was discussion of ways to avoid conflicts arising including a married couple whose respective firms have agreed that they do not accept appointments as dispute

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resolvers where the other's firm might be involved. Accordingly there is no possibility of the appearance of bias and therefore no possible conflict of interest.

It was noted that the duty to disclose any potential conflict was a continuing duty throughout the referred dispute. A leading case on this was **Halliburton Co. v Chubb Bermuda Insurance Ltd. 27th November 2020 UKSC 48 ["Chubb"]**. Once involved in the arbitral proceedings the Arbitrator did not disclose a further appointment in circumstances where a conflict could occur. The Court upheld the Court of Appeal whereby disclosure should have occurred but did not, thereby raising the prospect of the 'appearance of bias'. Proceedings of this kind including adjudications are private and confidential as between the Parties and such confidentiality is of considerable importance in many other arenas too.

However, Para 85 in Chubb gives approval to the concept of privacy and confidentiality but the obligation is not absolute, its boundaries are unclear.

"the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order or leave of the court [presumably on the grounds of the first, third or fourth exceptions here]; third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating [or adjudicating] party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.

Further, the state of progress of the proceedings at the time of the need for disclosure became apparent can be critical to the decision on whether the Arbitrator/Adjudicator should resign. If doing so would waste considerable time and/or costs from what has gone before, the less likely it is that resignation should occur. It seems very likely that the reputation of the Arbitrator, as here, also played a part in allowing him to continue.

2. Part 7 and Part 8 Proceedings

This was included in the questions for Adjudication Seminar 5 but was not discussed. Enforcement of an Adjudicator's Decision by one Party was resisted by the other Party in Part 8 Proceedings on the grounds of the former's failure to comply with certain conditions precedent. Part 8 is intended to permit the court to finally resolve matters when no relevant facts are required in order for the court to do so.

Q: What approach would the court adopt?

A: **See Sleaford Building Services Ltd. v Isoplus Piping Systems Ltd. 28th April 2023 EWHC 969(TCC):**

One Party wanted to enforce an Adjudicator's Decision using the Part 7 enforcement process and at the same time the other wanted a Part 8 review. The judge enforced under the former and refused to deal with the Part 8 until the facts were established for it.

Since then we have had other Part 8 cases of which the following are a few.

ISG Retail Ltd. v FK Construction Ltd. 18th April 2024 EWHC 878 (TCC):

An estoppel point was too fact sensitive to be dealt with under Part 8. However there seems to be no bar to a single point from an Adjudicator's Decision being the subject of Part 8 if no facts are disputed.

TClarke Contracting Ltd. v Bell Build Ltd. 29th April 2024 EWHC 992 (TCC):

Classic attempt to use Part 8 to overturn an Adjudicator's Decision which failed because almost none of the Part 8 criteria were satisfied. You cannot use Part 8 as a way to appeal such a Decision.

3. Set off/withholding in relation to an Adjudicator's Decision to account for other adjudications between the same Parties

This was Included in the questions for Adjudication Seminar 5 but was not discussed.

Q: Is it possible to set off competing Adjudicators' Decisions between the same Parties in order to arrive at a net payable sum?

A:

FK Construction Ltd. v ISG Retail Ltd. 5th May 2023 EWHC 1042 (TCC) before Mrs. Justice Joanna Smith DBE. [The "Smith Judgment"]

ISG argued that the sum claimed by FK should be set off against other decisions affecting the same Parties. ISG failed in this argument and did not advance anything material otherwise.

In particular, evidence of a Part 8 claim does not delay enforcement of an Adjudicator's Decision.

Consequently, the Decision by an Adjudicator named Wood was enforced and paid on the basis of the lack of a payless notice.

There are three exceptions:

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First, where there is a specified contractual right to set off which does not offend the statutory requirement under the Act for immediate enforcement of an Adjudicator's Decision in which case the contractual provision will be unenforceable;

Second, where it follows from an Adjudicator's Decision that the Adjudicator is permitting a set off to be made against the sum otherwise decided to be payable

Third, in an appropriate case, Mr. Justice Akenhead combined two Decisions, both of which were valid and enforceable at the time, in *HS Works v Enterprise Managed Services* 8th April 2009 EWHC 729.

ISG Retail Ltd. v FK Construction 2nd August 2023 EWHC 2012 (TCC) before Adrian Williamson KC including the unreported case between the same Parties on 14th June 2023 and the same judge. [The "Williamson Judgments"]

However, in the unreported case dated 14th June 2023 between the same Parties (the Sawyer Proceedings) it was shown that the payee application for payment had itself been out of time and 'not in accordance with the contract' or S110B of the Act. Ergo, Wood had also been wrong for the same reason with the result that the Smith Judgment had resulted in an overpayment by ISG.

Applications for payment must also be on time in order to be in accordance with the Scheme or the contract.

Therefore, following Paras 23 to 24 of *Aspect Contracts (Asbestos) Ltd. v Higgins Construction Plc* [2015] 1 WLR 2961 UKSC, as set out at Para 15. If a final determination by a court or arbitration corrects a previously enforced Adjudicator's Decision by which more than found to be finally due was awarded then the Decision ceases, retrospectively, to bind. Consequently, repayment and interest thereon are then due if overpayment has occurred.

4. Insolvency

This was Included in the questions for Adjudication Seminar 5 but not discussed. You are an adjudicator between an Employer and Contractor following a previous adjudication where the adjudicator decided that the Employer's termination was invalid and constituted a repudiation. The Contractor is now claiming damages in your adjudication. The Employer's Director writes to you to say that following the previous Decision the funder has decided to no longer support the Company and there are a number of pending winding up petitions from the Employer's professionals and legal team. The Contractor has also obtained an injunction preventing the Employer from disposing of the property. The Director asks you to stay the adjudication pending the outcome of the winding up petition and an application to lift the injunction and has advised that they now have no legal representation.

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Q: What do you do?

A: Ask the contractor if they wish you to continue. If they do, then proceed.

5. **The Referral claimed a sum on the alleged basis of a failure to pay by a final date for payment absent a valid payer payment or payless notice, alternatively on the basis of a true value assessment.**

Q: Was this a single dispute?

A: **Bellway Homes Ltd v Surgo Construction Ltd. 27th November 2023 EWHC 10 (TCC), 196 BLR April 2024.**

This judgment continues the sensible and pragmatic approach in terms of considering a single dispute, expressed in different ways on the one hand; and multiple disputes, independent of one another, all referred to adjudication in a single reference on the other.

The Adjudicator had dismissed the 'smash and grab' claim and considered the alternative claim for a 'true value'. He was entitled to do so and his Decision was enforced.

Not to be confused with the same Parties in the judgment on **12th Feb 2024 EWHC 269 (TCC) 244 BLR 244** which states, interestingly:

Under Clauses 4.8 and 4.9 of the JCT Intermediate Form with Contractor Design 2016, a payer can recover overpayments at any time and not just at the final account stage.

See Paras 83 to 90. The bespoke changes in Clause 4.9A did not alter this conclusion.

In **Workspace Management Ltd. v YJL London Ltd. 28th July 2009 EWHC 2017 (TCC)** an Adjudicator who had found a negative sum to be due on a claim but did not award it was criticised by the Court for not doing so. Similarly in **Grove Developments Ltd. v S&T (UK) Ltd. 27th February 2018 EWHC (TCC)** an Adjudicator has inherent power to order a negative certificate, as **upheld on appeal 7th November 2018 EWCA Civ 2448.**

More recently to similar effect, see **Croda Europe Ltd. v Optimus Services Ltd. 19th February 2021 EWHC 332(TCC).**

6. **Errors in the Adjudicator's Decision**

Q: How substantial in money terms does an adjudicator's error have to be to warrant a revision by the court on enforcement.

A: **Van Elle Ltd. v Keynvor Morlift Ltd. 8th December 2023 EWHC 3137 (TCC), 40 BLR February 2024.** £15,833.00 out of a total of £335,142.00 was insufficiently serious to warrant disturbing the Decision.

In **McLaughlin & Harvey Ltd. v LJJ Ltd. 5th May 2024 EWHC 1032 (TCC)** the Adjudicator invited the Parties to suggest any slips in the Decision pursuant to the HGCRA whereupon they made further submissions that went way beyond the definition of a slip. The Adjudicator revised his Decision on that basis and it was held that he could not do so. His original Decision was enforced because there was no slip as defined as such. Otherwise an Adjudicator may not revise an already published Decision.

It might be thought unwise for an Adjudicator to invite suggestions from the Parties for a slip in his/her Decision.

7. Loss and expense under the JCT 2016 suite of contracts

Q1 Is the contractual notification process here a condition precedent to the constructor recovering such loss etc.?

A: **FES Ltd. v HFD Construction Group Ltd. 27th February 2024 CSOH 20:** Compliance with **Scottish** JCT Clause 4.21 was a condition precedent for the contractor to be able to pursue loss & expense claims. This might apply to English JCT as well.

Q2 Therefore no recovery by the constructor?

A: Not necessarily, the standard forms preserve the constructor's common law rights for damages which the amended contract in 'FES' purported to exclude but there might be contractual provisions permitting common law claims as appears to be the case in England.

Indeed, in the Scots case the common law clause was only crossed out with the result that common law remedies were still available. You have to have an effective 'entire agreement' in order to exclude common law remedies.

8. Adjudicator's directions

The directions include: *It is confusing to the Adjudicator and bad practice for subsequent pleadings to the Referral to fail to address each paragraph in the preceding pleading. Subsequent pleadings must make clear which parts of the pleaded predecessor are admitted, not admitted, or denied, whilst dealing with all the matters in contention.*

Q What happens when these directions are not followed?

A: **Chaos! How do you discern what is disputed and what is not.**

Further, in a recent dispute the Adjudicator received an extensive non-standard set of contract documents with the Referral and a second set with the Defence. He asked both Parties whether he should check the two versions against each other 'line by line'. The Shamefaced Defenders said the two versions were identical but they had included it again 'for completeness'.

9. Confidentiality clause

A main contractor's ["the MC"] novel subcontract terms included a confidentiality clause intended to prevent discourse etc. between individual subcontractors about their individual experiences as regards delays, loss & expense, termination, and common law remedies, arising from the same project and the responsibility of the MC.

During an adjudication raised by subcontractor A against the MC, A sent a detailed letter of claim which was supported by the facts. A later admitted that the letter was a copy of that of subcontractor B who had endured identical circumstances.

The adjudicator was satisfied that A's letter was valid and awarded A a substantial sum.

Q1. Was he correct?

A: **Please note: This question is not really concerned with *IBM UK Ltd v LzLabs GmbH 28th February 2024 EWHC 423(TCC)* which is primarily concerned with 'trade secrets', except to focus upon Para 45 which states:Confidentiality is a relative and not an absolute concept; in each case, the issue must be considered in context and is fact-sensitive.**

See also our previous note regarding **Halliburton v Chubb** under 1.

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MC asserted that the Decision was invalid and A failed to pay the adjudicator's fee in the first instance but the Decision provided that ultimately MC should reimburse A in full. Sometime later MC paid the fee in full.

Q2. What do you think happened between A and MC in the intervening period between the Decision and payment of the fee?

A: This seems to be happening quite a lot. The Referrer is sometimes naïve and represents themselves or is poorly represented. They are persuaded not to enforce the Decision on false invalidity grounds and to accept a lesser sum than is awarded. The Defender realises that the Adjudicator will sue for his/her fee and then pays the Adjudicator in order to avoid publication of the Decision, payment of a greater overall sum, and further financial embarrassment with other subcontractors.

10. A little domestic difficulty

Not discussed

11. True Value?

This problem concerns two adjudications between a Sub-Contractor and a Main Contractor, both concerning the same interim application for payment.

The first adjudication was a 'smash and grab' commenced by the Sub-Contractor. The Contractor did not issue a Payment Notice but did issue a Pay Less Notice specifying a notified sum of -£72,911.96 (minus i.e. due to the Contractor) and the basis on which that negative sum had been calculated.

The Sub-Contract Conditions state:

If any payer's notice or any written notice to pay less issued by the Contractor results in a balance due to the Contractor then the Sub-Contractor shall repay to the Contractor the amount of any overpayment within 20 Business Days following the Contractor having given written notice of the overpayment.

The Sub-Contractor argued in the first adjudication that revised payment terms had been agreed and that the Contractor's Pay Less Notice had, as a result, been issued late, two days after the final date for payment. The Contractor acknowledged that there had been discussions regarding revised payment terms but denied that there had been any concluded agreement to vary the payment terms.

The adjudicator found no evidence of an agreement to vary the payment terms, decided that the Contractor's Pay Less Notice was valid and in time, and, consequently, that no sum was due to the Sub-Contractor.

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The Sub-Contractor then commenced a second 'true value' adjudication.

The Contractor raised a jurisdictional challenge, arguing that in accordance with the judgement in **Henry Construction Projects Ltd v Alu-Fix (UK) Ltd 23rd May 2023 EWHC 2020(TCC)**, and the principles previously established in **Bexheat, Davenport, AM Construction** and **Grove**, the Sub-Contractor was not entitled to commence a true value adjudication until it had paid the Contractor the outstanding notified sum of £72,911.96.

Q Is this a valid jurisdictional challenge?

A: In **AM Construction Ltd. v. The Darul Amaan Trust 17th June 2022 EWHC 1478 (TCC)** there was no valid Adjudicator's Decision but a Notified Sum in favour of the payee did feature. The judge found that there was a Notified Sum but no payer payment or payless notice with the result that there could be no True Value Adjudication instigated until the Employer had paid the said Notified Sum.

In the instant dispute there was an Adjudicator's Decision for a nil value which became the Notified Sum leaving no bar to the 'true value' adjudication.