

construction update

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Welcome to this month's construction update which reviews recent cases of interest involving adjudication. This year, the construction industry has already generated considerable case law addressing common adjudication enforcement issues. Get it wrong and you might spend a lot of money on a decision you will be unable to enforce.

1. Reserve your position!

Frequently parties raise challenges to an adjudicator's decision. When challenges to an adjudicator's jurisdiction are made, caution should be exercised in ensuring the right to challenge is preserved.

The case of *GPS Marine Contractors Limited v Ringway Infrastructure Services Limited (2010)* provides a useful summary of the court's approach at enforcement. Ramsey J stated that a party can object to the jurisdiction of an adjudicator generally or on specific grounds. However, if a party participates in the adjudication and fails to raise any jurisdictional objections, that party will lose its right to resist enforcement of the decision even if there are valid grounds for doing so. Furthermore, a party who participates in an adjudication and raises only specific objections later found by the court to have no merit will be unable to challenge the decision on fresh grounds at enforcement.

Ramsey J noted that raising only general objections was 'undesirable' and raised difficulties as the adjudicator and the other party will not be able to investigate the merits of unspecified objections and will be unable to decide

whether to proceed with the adjudication. However, participation by a party in an adjudication where a clear general jurisdictional reservation has been given will not waive that party's right to later object to the enforcement of the decision on specific jurisdictional grounds.

If you have specific jurisdictional objections - raise these in the adjudication at the earliest opportunity. Objections should be made in writing and also expressly state that you reserve your right to resist any later enforcement of the adjudicator's decision. Further, a general reservation raised when the adjudicator is appointed and maintained throughout the adjudication will protect your position should further objections later come to light.

2. The right to adjudicate "at any time" curtailed

In the same way as an injunction may be granted to restrain the pursuit of litigation, it is possible to apply the same principles to adjudication proceedings to prevent a party from acting unreasonably and in bad faith.

In the case of *Packman Lucas Limited v Mentmore Towers Limited (2010)*, the courts considered whether Packman Lucas, the defendant, had any recourse when it challenged a series of adjudication notices served by the claimant. Packman Lucas commenced adjudication proceedings against Mentmore Towers for its outstanding fees, following suspension of the works. The adjudicator made an award in Packman Lucas' favour for the outstanding sums but Mentmore refused to pay. The day before charging orders were made final, Mentmore issued court proceedings alleging overpayments to Packman Lucas. The courts granted a stay of those court



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proceedings pending compliance with the adjudicator's award. In granting the stay, Akenhead J concluded that there was: *"Unreasonable and oppressive behaviour and some elements of bad faith involved in the claimants pursuing these claims without first honouring the adjudicator's decision...."*

The claimants subsequently issued three Notices of Adjudication for the overpayments. The defendant, Packman Lucas, applied for an injunction to prevent Mentmore from taking any further steps in those adjudications. The judge concluded that the injunction to restrain the adjudication should be granted and that the adjudicator's award should be strictly enforced unless there has been some excessive jurisdictional breach of natural justice. In making his decision he further referred to the *"pay now argue later "approach" that underlies the legislative purpose"*.

Injunctions restraining adjudications are rarely granted given the right of the parties under the Construction Act to refer disputes "at any time". No doubt, the extent of the courts willingness to grant such injunctions will be tested further.

3. All things considered...?

It is not uncommon for a referring party to want to refer only a selection of issues to adjudication, possibly to limit the scope and cost of the adjudication, and also possibly for tactical reasons in order to try to avoid the defence of overpayment in respect of other matters relating to the contract. A common approach to avoiding the argument that more than one dispute has been referred to adjudication is to describe the dispute in broad terms, such as a dispute in respect of the value of an interim certificate for example.

In the recent case of *Pilon Limited v Breyer Group Plc (2010)*, it was decided that the decision of an adjudicator should not be enforced because the adjudicator refused to consider a defence to an application for payment which he thought was outside the scope of the adjudication.

Pilon argued that it was entitled to payment of an application for payment in full because no withholding notices had been served. Breyer's principle defence was that it was entitled to set off sums against monies owed to Pilon which are claimed as an early overpayment in relation to previous works arising out of the same contract. The adjudicator considered that his jurisdiction was limited to the matters referred by Pilon and were restricted to the valuation for plots 26 to 62 only. Breyer's defence of overpayment related to batches 1-25. On that basis, the adjudicator refused to deal with this

defence. The judge found that the adjudicator erred in failing to take into account Breyer's defence by reference to the overpayment on batches 1-25. If an adjudicator reaches an erroneous conclusion as to jurisdiction and as a consequence fails to answer the question referred to him, his decision may be unenforceable. The important point to note is that attempts by the referring party to seek a tactical advantage by restricting the ambit of the dispute may be relevant. As the judge noted in this case *"it would be absurd if a claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim"*.

4. Made a mistake? That's all right!

In *Rok Building Limited v Celtic Composting Systems Limited (2010)*, Celtic resisted Rok's attempts to enforce the adjudicator's decision on the grounds that the adjudicator had acted unfairly and in breach of the rules of natural justice. Essentially, the dispute related to the release of retention monies. Upon receipt of the adjudicator's decision, Celtic asked the adjudicator to correct it. There were some typographical errors which the adjudicator amended as is permitted by the "slip rule". However, Celtic also invited the adjudicator to make more substantive changes to the decision.

It was held that the adjudicator's decision in relation to when the sub-contractor achieved completion of its works, and subsequently when retention was due to be released, was not obviously wrong and was not one which on the facts no adjudicator acting fairly and reasonably could not have reached. As regards the slip rule, the judge thought that it must be the adjudicator who is, and was here, best placed to determine whether there really is an "accidental" error or omission. If the adjudicator had made an error on the scale suggested, Celtic could refer the matter to arbitration to produce a final correction on the state of account between the parties. This decision affirms the general position that, provided the adjudicator had jurisdiction to hear the dispute and there has been no breach of the rules of natural justice, the court will enforce an adjudicator's decision which is erroneous.

5. Adjudication – all or nothing?

In *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin (2010)*, the defendant refused to honour the adjudicator's decision arguing that an agreement between the parties was not a "construction contract" because the works fell partly within the definition of "construction operations" pursuant to the Construction Act and partly within Section 105(2) exception. On that basis it was argued that the adjudicator lacked jurisdiction. The court

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considered whether the adjudicator's decision could be severed to allow those parts relating to the dispute which were in the adjudicator's jurisdiction to remain in effect.

Ramsay J held that where an adjudicator's decision is made in relation to a single dispute relating to works caught by both the Construction Act and those which fall outside, generally the decision is not severable. However, if the "bad" part of the decision is easily identifiable and can be severed with relative ease, it is possible to enforce the "good" parts which remain in effect.

This case highlights the difficulties which can arise when a project involves works on the fringe of the Construction Act or where a dispute relates to a mixture of both construction and non-construction operations.

With the above in mind, caution should be exercised when deciding whether to commence adjudication proceedings. While adjudication is a swift form of dispute resolution, it is not without its limitations and drawbacks.

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