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Adjudication Update No. 2 of 2022

8 September 2022

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Today's Agenda

- ***ML Hart Builders Ltd (In Liquidation) v Swiss Cottage Properties Ltd*** [2022] EWHC 1465 (TCC)
- ***FTH Ltd v Varis Developments Ltd*** [2022] EWHC 1385 (TCC)
- ***Essential Living (Greenwich) Ltd v Elements (Europe) Ltd*** [2022] EWHC 1400 (TCC)
- ***Bexheat Ltd v Essex Services Group Ltd*** [2022] EWHC 936 (TCC)
- ***AM Construction v The Darul Amaan Trust*** [2022] EWHC 1478 (TCC)
- ***Van Oord UK Ltd v Dragados UK Ltd*** [2022] CSOH 30
- ***Liverpool City Council v Vital Infrastructure Asset Management (Viam) Ltd (In Administration)*** [2022] EWHC 1235 (TCC)
- ***The Metropolitan Borough Council of Sefton v Allenbuild Ltd*** [2022] EWHC 1443 (TCC)
- ***NJCH v Liberty Homes*** [2022] EWHC 1203 (TCC)

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ML Hart Builders Ltd (in liquidation) v Swiss Cottage Properties Ltd

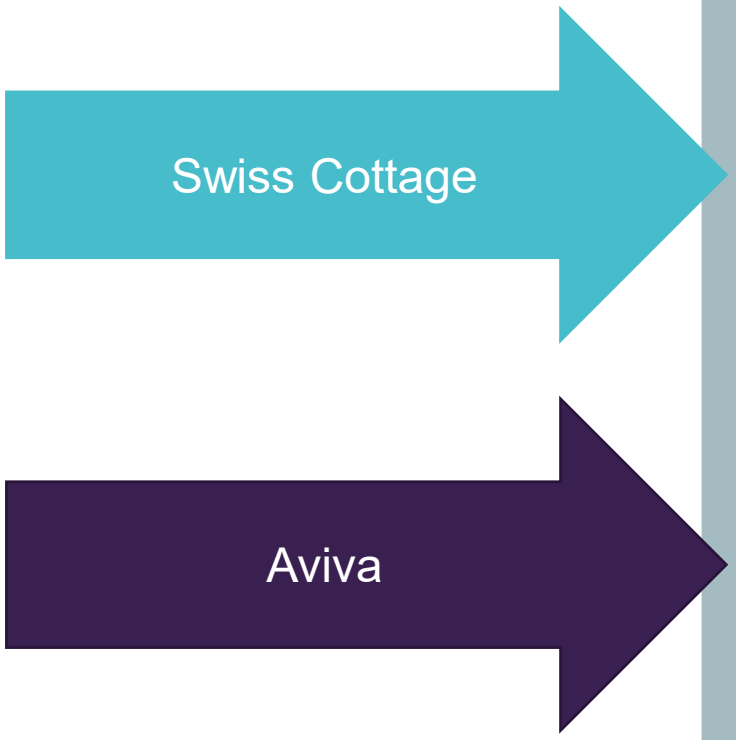
[2022] EWHC 1465 (TCC)

The Scheme for Construction Contracts (England & Wales)1998

Paragraph 9(2)

"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 adjudication"

Guarantee bond



"...satisfy and discharge [damages sustained by Swiss Cottage] as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to [ML Hart]."

Contract termination

If the Contractor's employment is terminated…following the completion of the Works and the making good of defects in them… an account of the following shall within 3 months thereafter be set out in a statement prepared by the Employer:

- *expenses properly incurred by the Employer*
- *any direct loss and/or expense*
- *amount of payment made to the Contractor*
- *the total amount which would have been payable for the Works*

Sums claimed and agreement

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Sums claimed

- Swiss Cottage's statement claimed £435,175.39 from ML Hart
- ML Hart claimed that c.200,000 was in due to it

Swiss Cottage and Aviva "Acceptance Agreement"

- Aviva agreed to pay the difference between Swiss Cottage and ML Hart

Issues for the adjudicator

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Issue 1

Whether the Acceptance Agreement, setting out sums payable under a guarantee bond, prevent assessment of the termination account under clause 8.7.4 of the Building Contract?

Issue 2

If not, what decision should be reached in respect of that assessment?

Enforcement proceedings

"Clause 8.7.4 contemplates a statement having primary efficacy as between the parties to a construction contract. An agreement between the Employer and the Surety settling liability under the Bond is not an agreement on its face having efficacy between the parties to the construction contract"

Mr Roger Ter Harr QC

Second adjudication?

- Yes, as to the merits of issue 2
- *Hitachi Zosen Inova AG v John Sisk & Son Limited [2019] EWHC 495 (TCC)*

"In my judgment the dispute referred to in the eighth adjudication was also not "substantially the same" as the dispute decided in the second. It is important to bear in mind that the comparison to be made is between what was referred in the eighth adjudication and what was decided in the second. Once it is recognised that there was no valuation decision at all in the second adjudication, it become clear that, in [this] matter…there is no overlap at all …"
(emphasis added)

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FTH Ltd v Varis Developments Ltd

[2022] EWHC 1385 (TCC)

CVAs and *Bresco v Lonsdale*

"… the general position relating to a CVA may, depending on the facts, be very different to the situation where the claimant company is in insolvent liquidation … A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cashflow."

Lord Justice Coulson, *Bresco v Lonsdale* [2019] EWCA Civ 27

Facts

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FTH had two adjudication decisions:

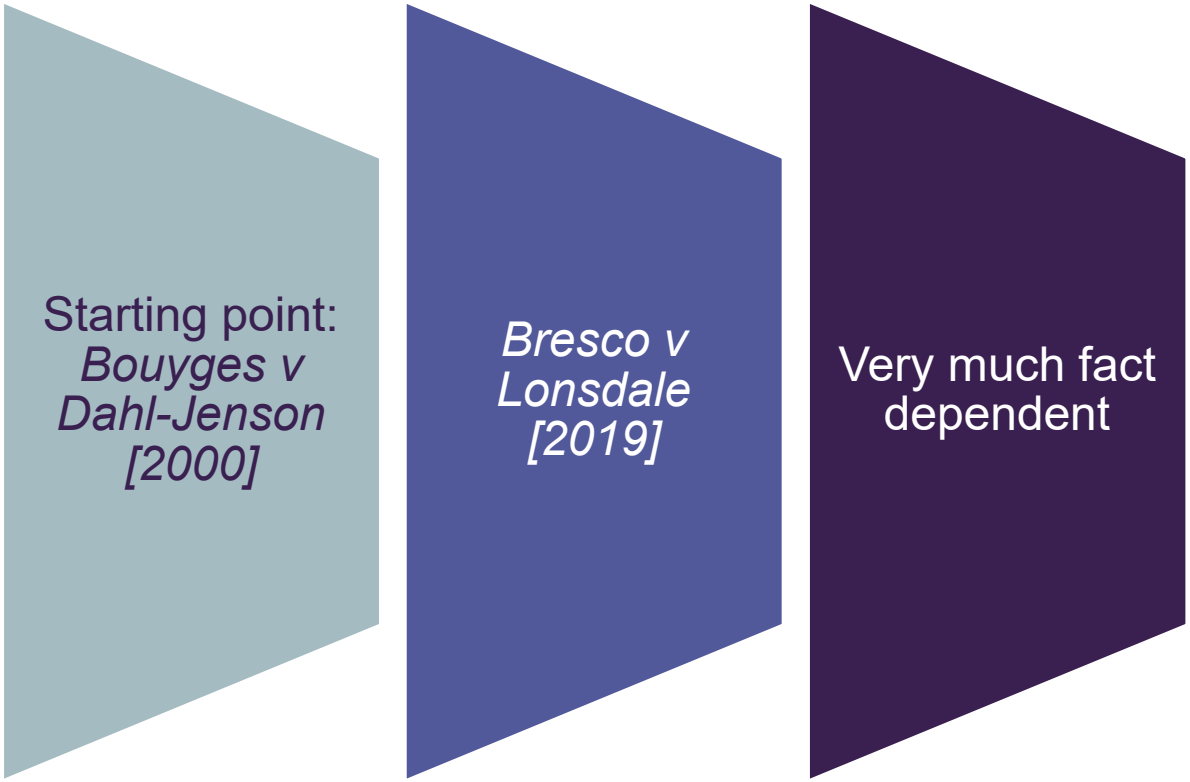
1. upholding the validity of a pay less notice

2. concluding that Varis had terminated the contract by repudiation

FTH entered into CVA which was designed to last for 12 months (with the power to be extended), and aimed to produce dividends of 56p for every £1 for un-secured creditors.

Varis had a cross claim of £1.7m

Court's judgment



"Real risk" that Varis may be deprived of adequate (or any) security in respect of its cross claim if the court enforced the Decisions

Stay of execution needed?

- No, as summary judgment refused
- Reminder: *Wimbledon v Vago [2005]* principles

- Adjudication designed to be a quick and inexpensive method of arriving at a temporary result
- Decisions are intended to be enforced and the successful party (claimant) should not be kept from its money
- The court must exercise its discretion with the above in mind
- The probable inability of the claimant to repay the judgment sum at the end of the substantive trial may constitute special circumstances rendering it appropriate to grant a stay
- If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted
- Evidence of the claimant's present financial position would not usually justify the grant of a stay, if the claimant's financial position is the same or similar to its financial position at the time that the contract was made, their financial position is due to the defendant's failure to pay sums awarded by the adjudicator

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To what extent does an adjudicator's decision on an interim application bind parties in relation to the final account?

Essential Living (Greenwich) Ltd v Elements (Europe) Ltd [2022] EWHC 1400 (TCC) (8 June 2022)

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Background

- Essential engaged Elements to design, supply, manufacture and install modular units for a mixed use development project in London.
- Contract incorporated the JCT Management Trade Contract 2011. Contract sum: approx. £25m.
- July 2019 - Adjudicator's decision valuing Elements' works up to March 2019 interim application. In decision, Adjudicator valued sums for **variations**, **rectification of defects** and **LADs for delay**.
- May 2019 - PC certified.
- October 2019 – Elements submitted documents for the purpose of calculating its final account.
- 2021 – Disputes arose over the binding nature of the 2019 adjudication decision on the final account.
- October 2021 – Essential issued Part 8 proceedings seeking various declarations.

Essential Living (Greenwich) Ltd v Elements (Europe) Ltd

Essential sought the following Part 8 declarations:

- Essential was entitled **to LADs** and clause 8.7A damages (financing costs) awarded by the Adjudicator, and was entitled to retain those sums, unless and until the Adjudication Decision is overturned, modified or altered by the Court.
- Elements was not entitled to any **EOT** beyond that already assessed and awarded in the Adjudicator's Decision unless and until it is overturned, modified or altered by the Court.
- A declaration that nothing in clause 2.27.5.1, clause 4.6 or any other provision of the Trade Contract allows the Construction Manager to review, reopen, modify or alter the **EOT, LADs**, clause 8.7A damages and **valuations** assessed and decided by the Adjudication Decision.
- Declaration that Elements is not entitled to claim any **loss and/or expense** for

  (i) extended on-site preliminaries;

  (ii) factory production disruption costs; and

  (iii) prelims thickening based on alleged delay events which were considered and rejected by the Adjudicator

  unless and until the Adjudication Decision is overturned, modified or altered by the Court.
- A declaration that Elements is not entitled to claim or pursue any deductions to the Trade Contract Sum for the cantilevered balcony works and/or preliminaries which differ from the values and/or basis already decided by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the Court

Essential Living (Greenwich) Ltd v Elements (Europe) Ltd

Judgment of O'Farrell J, summarised at paragraph 84 of Judgment:

1. The parties **are bound** by the Adjudication Decision on any dispute or difference determined therein until it is finally determined by the court or by subsequent settlement;

2. The parties cannot seek a further decision by an adjudicator on a dispute or difference **if that dispute or difference has already been the subject of the Adjudication Decision**;

3. The Adjudication Decision is **not binding** on the parties for the purpose of the Construction Manager's **final determination of the Completion Period** under clause 2.27.5, from which would flow any liability on the part of Elements **for liquidated damages and finance charges**;

4. The Adjudication Decision is **not binding** on the parties for the purpose of **determining the Final Trade Contract Sum**;

5. The Adjudication Decision **is binding** in respect of **variations** considered and assessed by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the court, or unless either party identifies a fresh basis of claim that permits such variation claim to be opened up and reviewed under the terms of the Contract;

6. It is a **matter of fact and degree**, requiring careful analysis of the evidence and argument on each disputed item, as to whether the Adjudication Decision is binding **on any other discrete issue** referred to and determined by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the court

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Payment disputes: recent cases

Recap

The *S&T* Rule:

In *S&T v Grove*, the Court of Appeal held that an employer has the right to bring a true valuation adjudication but this right is subject to the employer first complying with its obligation to pay a notified sum.

Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 939 (TCC) (19 April 2022)

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Background

- Essex Services Group Limited (**"ESG"**) was the MEP subcontractor on a project for the construction of a residential and care facility.
- ESG sub-subcontracted the plumbing aspects of its MEP works to Bexheat Limited (**"Bexheat"**).

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Bexheat Ltd v Essex Services Group Ltd

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Payment application 22 / true value adjudication

- July 2021 - Bexheat submitted interim application for payment no. 22 (**"AFP22"**) for the period up to 31 July 2021. ESG issued a Pay Less Notice in respect of AFP22.
- Bexheat commenced adjudication (the **"First Adjudication"**), seeking a determination on the true value of AFP22.
- 12 October 2021 – First Adjudication Decision – decided true value of AFP22 was £1.3m; payment of £141k due to Bexheat.
- ESG complied with that decision, making payment in full to Bexheat.

Bexheat Ltd v Essex Services Group Ltd

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Payment Application 23 / smash & grab adjudication

- 17 August 2021 (1 day prior to Bexheat commencing the First Adjudication), Bexheat issued interim application for payment no. 23 (**"AFP23")** for period up to 31 August 2021 seeking payment of £706k. ESG did not serve a valid Pay Less Notice (it was served 1 day late).

- ESG failed to make any payment to Bexheat in respect of AFP23. Therefore, on 18 October 2021 (6 days after decision in the true value First Adjudication) Bexheat commenced a smash & grab adjudication (the **"Second Adjudication"**).

- 12 November 2021 – Second Adjudication Decision – decided that ESG had failed to issue a valid Pay Less Notice - sum claimed by Bexheat in AFP23 (£706k) became the notified sum and was to be paid by ESG.

- ESG failed to pay. Bexheat commenced enforcement proceedings.

Bexheat Ltd v Essex Services Group Ltd

Decision:

1. The dispute in the First Adjudication was not the same or substantially the same as the dispute in the Second Adjudication:

(i) The First Adjudication concerned the true value of AFP22, not the true value of AFP23.

(ii) The Second Adjudication concerned whether a valid pay less notice had been served in response to AFP23.

2. ESG could not rely upon and enforce the First Adjudication true value decision against AFP23, even though it had failed to serve a valid payment or pay less notice in respect of AFP23:

(i) The AFPs covered different time periods.

(ii) ESG did not raise a true value jurisdictional challenge in the Second Adjudication, so it had failed to reserve its position (see *Bresco*).

(iii) If ESG wanted to rely on the 'true value' adjudicated on in the First Decision against any payment sought in AFP23, it should have raised it in a pay less notice. Having failed to do so, the sum claimed in AFP23 became the notified sum.

3. The clause in the parties' contract allowing an unqualified contractual right to set off against an adjudicator's decision offends against s.108 HGCRA and the Scheme which provide that an adjudicator's decision is binding and require the parties to comply with it.

Accordingly, the Second Adjudication decision was valid and enforceable.

Bexheat Ltd v Essex Services Group Ltd

Helpful reminder /summary of the applicable legal principles

O'Farrell J reviewed the various applicable legal principles and helpfully summarised the position at paragraph 76 of her Judgment:

(i) Where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with section 111 of the 1996 Act;

(ii) Section 111 of the 1996 Act creates an immediate obligation to pay the 'notified sum';

(iii) An employer is entitled to exercise its right to adjudicate pursuant to section 108 of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;

(iv) The entitlement to commence a 'true value' adjudication under section 108 is subjugated to the immediate payment obligation in section 111;

(v) Unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a 'true value' adjudication under section 108.

Is a party prevented from commencing a true value adjudication if it has failed to pay the notified sum, even if the other party has not obtained a smash & grab decision concluding that a notified sum is due and unpaid?

Until now, TCC has considered adjudication cases where there was an adjudicator's smash & grab decision which concluded that a notified sum was due and unpaid, and a party could not commence a true value adjudication until it had paid the notified sum.

However, can a party commence a true value adjudication where the other party has not obtained a smash & grab decision concluding that a notified sum is due and unpaid?

AM Construction v The Darul Amaan Trust [2022] EWHC 1478 (TCC) (17 June 2022)

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Background

- The Darul Amaan Trust ("**DAT**") is a charitable trust.
- In July 2015, DAT engaged AM Construction ("**AMC**") for the construction of a new three storey mosque.
- The Contract was a 'construction contract', it was based on the JCT form and therefore included provisions for interim payments.
- In 2021, DAT commenced a true adjudication. Adjudicator's decision issued on 19 November 2021, deciding that DAT had overpaid AMC.

AM Construction v The Darul Amaan Trust

AMC issued Part 8 proceedings.

AMC sought declarations that the Adjudicator's decision was unenforceable as the Adjudicator lacked jurisdiction following DAT's invalid service of the Notice of Adjudication.

Further, AMC argued that:

(i) It had submitted two separate 'default notices' and DAT had failed to serve a valid Pay Less Notice in respect of either.

(ii) Accordingly, there was a sum of money that had to be paid to AMC before DAT was entitled to commence the true value adjudication (applying *S&T*).

AM Construction v The Darul Amaan Trust

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Invalid service of NoA?

Settled law that:

1. Unless a Notice of Adjudication is properly served by the referring party on the responding party, there is no jurisdiction and the adjudication process is a nullity.

2. Similarly, if a referring party approaches an ANB before the Notice of Adjudication is validity served, then there is no jurisdiction and the adjudication is a nullity.

No dispute that on 4 October 2021, a process server pushed an envelope through the door of AMC's registered office, which was also the home of Mr & Mrs Anwar (the shareholders on AMC).

The question was: did the envelope contain the Notice of Adjudication? AMC's case was that it did not.

During the adjudication, the adjudicator had decided that the envelope did include the Notice of Adjudication and did not resign.

However, in the Part 8 proceedings, there was witness evidence from Mrs Anwar, DAT's solicitor and the process server (which the adjudicator had not had the benefit of).

Decision:

Mr Ter Haar QC (sitting as Deputy High Court Judge) preferred the evidence of Mrs Anwar.

Concluded that the envelope did not contain the NoA. Therefore, the NoA had not been validly served and so the Adjudicator lacked jurisdiction.

AM Construction v The Darul Amaan Trust

Unusually, AMC relied in the alternative upon two different 'default notices' for two very different sums

First Default Notice

- On 11 March 2020, AMC sent "valuation 22" by email ("**First Default Notice**") for £809k up to 9 March 2020. At trial, AMC accepted that the document did not strictly comply with the requirements of the contract as (a) it did not value the works up to the due date; (b) it did not include a deduction for the amount claimed and so (c) it did not set out the sum due. Nevertheless, AMC argued that the document was valid because it would have been clear to any reasonable recipient how much was due.
- DAT argued that the document was a not valid, because (a) it was described as a "valuation"; (b) it did not state the sum that AMC considered to be due (c) it did not value the works up to the correct date; (d) it was impossible to tell what sum AMC considered to be due to it and (e) further AMC had conceded that the First Default Notice was invalid.

Decision: Judge decided that First Default Notice was invalid.

AM Construction v The Darul Amaan Trust

Second Default Notice

In July 2020, AMC sent DAT's representative a letter which attached an updated valuation of the works up to 2 March 2020, claiming £206k.

The letter enclosed a valuation headed *"Interim Payment Notice Pursuant to Clause 4.11.2.2. of the Contract"* and which set out (a) the basis on which AMC said the sums were due; (b) the previous amounts paid; and (c) the total amount due.

DAT argued that:

1. The document was issued over 4 months after the due date (2 March 2020) and baseline final date (16 March 2020) for the payment cycle.

2. AMC never withdrew the First Default Notice (and in fact continued to rely on it in the Part 8 proceedings). The relationship between the two documents was never explained. It was not clear what sum AMC was saying DAT should pay – £809k or £206K?

AM Construction v The Darul Amaan Trust

Decision on the Second Default Notice

The Judge:

1. Accepted that the statutory machinery, reflected in the contract, permitted only one payment application and one payment notice per period. However, as he had decided that the First Default Notice was invalid, service of the Second Default Notice was permissible.

2. Rejected DAT's argument that the Second Default Notice was confusing and might not have been understood by DAT. It must have been clear that it was intended to be a formal notice under clause 4.11.2.2 and that it superseded any earlier valuation or application for payment.

It followed from this that not only was the Second Default Notice valid, but also as there had been no payment or Pay Less Notice, the sum of £206k was due from DAT to AMC.

AM Construction v The Darul Amaan Trust

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Failure to pay notified sum prevents the commencement of a true value adjudication?

- AMC argued that DAT could not commence a true value adjudication until it had paid the amount due to AMC under the provisions of the 1996 Act, which the judge held was £206k.
- The Judge referred to the legal principles summarised by O'Farrell J in *Bexheat*.
- DAT argued that AMC had misread the authorities and sought to distinguish *Bexheat* (as well as *S&T* and *M Davenport*) from the present case on basis that:
  1. There was no unsatisfied adjudication decision in AMC's favour.
  2. In other words, AMC could not prevent DAT from commencing a true value adjudication **unless it has first obtained a monetary adjudication award in its favour**.

AM Construction v The Darul Amaan Trust

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Mr Ter Haar QC did **not** accept DAT's submission. **DAT could not commence a true value adjudication until it had paid the amount he had found to be due.**

Paras 103 to 106 of Judgment:

> *"103. I do not accept that submission. Firstly, no such limitation was suggested by the Court of Appeal or the first instance judges in this Court in any of the three cases cited.*
>
> *104. Secondly, the submission is contrary to the requirement referred to in those cases and repeated by O'Farrell J. in sub-paragraphs [76(v)] and [76(vi) of Bexheat that*
>
> > *"(v) the entitlement to commence a 'true value' adjudication under section 108 is subjugated to the immediate payment obligation in section 111;*
> >
> > *(vi) unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a 'true value' adjudication under section 108."*
>
> *Thirdly, the submission runs contrary to the policy considerations underlying the above trio of cases, that where no Pay Less Notice has been served, the Employer must pay before disputing the amount outstanding.*
>
> *It follows that I accept AMC's submission that DAT cannot commence a 'true value' adjudication until it has paid the amount I have found to be due."*

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Van Oord UK Ltd v Dragados UK Ltd

[2022] CSOH 30

Principles

- Scots case considering whether the Adjudicator's award was unenforceable because the Adjudicator went off on a frolic of their own.
- Principles are well established:
  - Each party must be given a fair opportunity to put its case.
  - If the Adjudicator makes their own enquiries, or proposes to use their own knowledge or expertise to determine a significant point, the parties should be given an opportunity to give their views on the proposed course.
  - The Adjudicator should not decide a point on a factual or legal basis that has not been argued by either party.
  - An Adjudicator can reach a decision on a basis different to that adopted by either party, provided the parties are aware of the supporting material and have had an opportunity to address it.
  - Only a material breach of natural justice will vitiate an Adjudicator's decision, and an Adjudicator has significant leeway in how they reach their final findings.

Facts of this case

- Essential issue in the Adjudication was as to causation of delay:
  - The parties' experts disagree about the appropriate Baseline Programme (C says
  - And they disagree about almost everything else, including the date on which a particular delaying event began to cause critical delay (which is potentially relevant to a time bar defence)
- In his Decision, the Adjudicator:
  - Calculates delay by using a Baseline Programme that neither party said was the right one; and,
  - Relatedly, reaches a conclusion about the critical date of a delaying event which has implications for a time bar argument.
- The Adjudicator did not give any notice of his intention to reach a decision on that basis, and did not ask the parties for their views.

Arguments and findings

- Contractor says that this is fine, because all the Adjudicator has done is adopt an "intermediate position":
  - *Miller Construction (UK) Ltd v Building Design Partnership Ltd* [2014] CSOH 80
- Court says no:
  - The line is "*not always an easy one to draw*"
  - This is not a case where the Adjudicator based his decision on material not before the parties, or which the parties did not have an opportunity to address
  - But the critical factor here was that the Adjudicator's adoption of the March 2019 Baseline Programme had a knock-on effect on the time-bar issues which had already been raised.
  - That point could have been significant, the parties should have been given an opportunity to address it, and there was therefore a breach of natural justice.

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Liverpool City Council v Vital Infrastructure Asset Management (Viam) Ltd (In Administration)

[2022] EWHC 1235 (TCC)

Another frolic

- One of the issues in this Adjudication was the applicable rate for maintenance of certain temporary fencing.
- There were four rates in the BoQ: three expressed as a rate *per metre per day*, and one expressed as a rate *per metre* only
- In the Court's view, it was obvious a mistake had been made:

> *"… no-one could sensibly believe that a rate for maintenance of temporary fencing could be expressed as anything other than a rate per metre per day. Otherwise, a contractor would receive the same for maintenance of the same length of fencing for a year as for a day."*

- Difficulty was that this was not the basis on which the referring party had put its case.
- The Adjudicator wrote to the parties pointing this out, and even invited the Referring party to consider starting a fresh adjudication, to no avail.

Another frolic

- The Adjudicator tries to reach the "right" result anyway: and decides the point on a different basis, namely that the responding party had *admitted* there was an error in the BoQ
- This was not permissible:
  - There had been no such admission.
  - The part said to have made the admission had not been given an opportunity to respond to that allegation.
- "*In my judgment these were fundamental departures from the obligation to follow a fair procedure. Indeed, in proceeding in this way he departed in a significant way from the approach he had spelled out in his email of 20 May 2021. He has not, in his supplemental observations, been able to explain in any way which I regard as convincing on what basis he considered that he was entitled to reach the decision he did without allowing LCC the opportunity to address him on the point. He has not been able to suggest that these departures from natural justice have had no practical adverse effect upon LCC. Indeed, it is apparent that LCC has lost the opportunity to have the substantive arguments which it did put forward determined by him and there is no suggestion or obvious basis for my concluding that these arguments were incontrovertibly misconceived*."

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The Metropolitan Borough Council of Sefton v Allenbuild Ltd

[2022] EWHC 1443 (TCC)

Arbitration clause vs Adjudication enforcement

- Contract contains a tiered dispute resolution clause

Adjudication (CIC rules)

Arbitration

"90.2 The *Adjudicator* settles the dispute by notifying the Parties and the *Project Manager* of his decision together with his reasons within the time allowed by this contract. Unless and until there is such a settlement, the Parties and the *Project Manager* proceed as if the action, inaction or other matter disputed were not disputed. The decision is final and binding unless and until revised by the *tribunal*."

Should the enforcement proceedings be stayed?

- Successful party seeks to enforce an adjudication award in the TCC.
- Responding party asks for a stay of those proceedings pursuant to section 9 of the Arbitration Act 1996.
- They argue:
  - An adjudication enforcement action is a breach of contract claim.
  - The Arbitration clause in the contract covers breach of contract claims.
  - Therefore the adjudication enforcement action is within the scope of the arbitration clause.
  - The enforcement proceedings should be stayed, and the matter has to be referred to arbitration.

The Court's Judgment

- The fundamental issue is one of contractual construction:
  - Is the adjudication enforcement action within the scope of the arbitration clause?]
  - No problem *in principle* with parties agreeing to confer jurisdiction on an arbitrator to consider enforceability of an adjudicator's award
- *Macob v Morrison*: [1999] BLR 93
  - Treat the adjudicator's decision as a binding decision under the contract, in which case any disputes about it can be referred to arbitration for determination; or
  - Deny that it is a valid decision at all, in which case it falls outside the scope of the contract, including the arbitration clause.

The Court's Judgment

- In this case, the Court emphasises the content of the CIC rules which govern the arbitration. The decision is:

  > "*binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement*".

- The Court says that "*binding*" here means that the parties have agreed that the decision is "*provisionally enforceable*" until the *substantive* dispute is finally resolved in litigation or arbitration

- The Court emphasises that it is *not* deciding the case on policy grounds or to give effect to the "pay now, argue later" regime under the Act, rather, it is giving effect to the parties' intent

- Important distinction to be drawn between the *substantive dispute* and the enforceability of a decision *about* the substantive dispute

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NJCH v Liberty Homes

[2022] EWHC 1203 (TCC)

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Thank you!
Questions?

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