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Weather Warning:
Adjudication hot-house meets depression. Precipitation expected.

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Introduction

1. The focus of this paper is on recent adjudication enforcement decisions, to see what the latest themes are, and to take a short-selling speculative guess at what may be coming in 2009 and beyond.

Overview

2. For about 10 years now adjudication has been forum of choice for resolving disputes in the construction industry. True, that choice has sometimes been forced and its limitations and shortcomings as a process are well known. But the construction industry is, more or less, still in love with it: with robust TCC enforcement in support, it still provides relatively quick cashflow. It remains the case that very few small value disputes are making it to Court directly: most are now resolved quickly and cheaply by way of adjudication instead. Very high value disputes are also being resolved by adjudication as well. But not at all cheaply, and sometimes not very quickly.

3. Adjudication has also proved to be a land of opportunity for construction lawyers, particularly in enforcement proceedings. Over the course of the decade, one by one, the novel points have been run to ground. Is there anything left to learn or do?

4. Of course, Adjudication is not what it was a decade ago. If it was ever cheap, those days are gone. If it was ever used to resolve simple cash flow disputes during the course of the project, it is not any more. By and large the payment provisions brought in consequent upon the Act have done their work effectively. Parties tend to make sure they comply with the procedural hoops.

5. The original vision for Adjudication has suffered from 'mission creep'. Adjudication is now frequently used as a means of resolving more complex disputes often long after the project is completed or requiring resolution of a complex final account dispute many months if not years after practical completion. And these tend to be 'kitchen sink' affairs with all the festering claims that adjudication was supposed to avoid. Whatever the merits or drawbacks of using adjudication to resolve such complex disputes, it is clear that this is something the construction industry will just have to live with. At best, possibly, ways of ameliorating the difficulty may develop.

6. The recession adds a new twist to adjudication. It is perhaps too early to say what effect it will have. Recent signs are that more adjudications and adjudication enforcements are coming through the doors in Chambers, but this may not last. Many employers/contractors are experiencing acute difficulties paying contractors/sub-contractors. Clients are keen to run increasingly creative arguments in order to avoid being subjected to an adjudicator's decision or to challenge adjudicators' decisions in the Courts.

7. There are some, who upon seeing the festering kitchen sink dispute coming their way soon are keen to deliver the mortal pre-emptive tactical blow that might simply put the other side out of business. So the recession may well encourage more and more strategic adjudication (of the wrong sort of course!) and things could get nasty.

8. On the other hand strategically parties might be better off using the Court instead if it can offer a streamlined and expeditious service because of the comfort of costs protection, the ability to counterclaim – all serious concerns when one or other party might be financially wobbly.

9. As always despite the keenness of clients for their lawyers to be creative in challenging adjudicators' decisions, the approach of the Courts to adjudication enforcement remains robust[1].

Trends Emerging from Recent Enforcement Decisions

10. A number of trends have emerged from some of the more important decisions on enforcement proceedings in the TCC in 2008. First I summarise the general trends that have emerged:

    10.1 The jurisprudence on natural justice continues to be developed. It is clear that trivial or peripheral breaches of natural justice will not invalidate adjudicators' decisions. The breach must be material, significant, and such as to prejudice the defendant.

    10.2 Parties to adjudication will not be strictly limited to the precise arguments, contentions and evidence put forward before the dispute crystallised.

    10.3 In particular, a failure by the adjudicator to consider a defence raised for the first time in the adjudication proceedings is likely to amount to a material breach of natural justice.

    10.4 The Court may sever an adjudicator's decision if that decision relates to more than one dispute, and the breach of natural justice or jurisdictional challenge only goes to one of those disputes.

    10.5 A minor delay in serving a response will not be fatal: the adjudicator will have a discretion to consider that response, and he should consider whether to exercise that discretion. A failure to consider whether to exercise that discretion would invalidate his decision.

[1] In keeping with the principles outlined in the leading case of *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 where Chadwick LJ noted that it would only be in "rare circumstances" that the courts would interfere with the decision of an adjudicator.

10.6 There is a growing willingness on the part of the TCC to find that an adjudicator had jurisdiction to decide his own jurisdiction in cases where substance and jurisdiction overlap.

10.7 Parties to adjudication proceedings can make good tactical use of the Part 8 TCC procedure to seek clarification of potential jurisdictional issues and to put down a marker for future challenges to enforcement.

Natural Justice

11. One of the most important decisions of 2008 was ***Cantillon Ltd v Urvasco Ltd*** [2008] EWHC 282 (TCC). This was a case principally about natural justice, although Mr Justice Akenhead also made authoritative comments on a number of hot topics in enforcement jurisprudence. This case is one of a series of decisions which developed the application of principles of natural justice to the enforcement of adjudicators' decisions. It is settled law that trivial or peripheral breaches of natural justice will not invalidate adjudicators' decisions: the breach must be material, significant, and such as to prejudice the defendant.

12. The facts of the case were as follows. The Defendant had engaged the Claimant to carry out demolition and piling works under a JCT contract. A number of disputes arose over the Claimant's entitlement to extensions of time. In adjudication proceedings, the Claimant claimed *inter alia* an EOT during a 13 week period together with loss and expense (including prolongation costs relating to piling works). The Defendant argued that the losses claimed could not be recovered because there were no material piling works during that 13 week period, and any prolongation costs were incurred during a later period. The adjudicator awarded the Claimant prolongation costs for the later period, concluding that he was not bound by the 13 week EOT application when determining the period for which prolongation costs were recoverable.

13. The Defendant refused to pay the award, and the Claimant sought to enforce the adjudicator's decision. The Defendant contended that the adjudicator had exceeded his jurisdiction and failed to comply with the rules of natural justice by resolving an issue relating to delay during a period other than the 13 week period identified by the Claimant, and failing to give the Defendant a reasonable opportunity to make submissions and adduce evidence in relation to the costs incurred in this later period.

14. Mr Justice Akenhead reviewed the case-law on natural justice breaches by adjudicators, and concluded that any breach must be material and more than peripheral. The breach will be material if the adjudicator has failed to bring to the parties' attention a particular point which is either decisive or of considerable importance to the outcome of the dispute, and is not irrelevant or peripheral. This is a question of degree. There will be no breach if one party has argued a point and the other party has not responded. The

Judge's findings on natural justice have been routinely cited in subsequent enforcement judgments and *Urvasco* is now seen as one of the leading judgments on natural justice.

15. Mr Justice Akenhead gave judgment for the Claimant. He found that the logical consequence of the Defendant's defence on delay was a recognition that there might be different losses during a later period. It would offend reason that the Defendant could argue that the losses were incurred in a later period, but avoid the liability for those later losses. The adjudicator was not limited to considering a loss and expense claim for 13 specific calendar weeks.

16. He also disagreed with the judgment in *Edmund Nuttall Ltd v RG Carter Ltd* [2002] EWHC 400 (TCC), holding that the parties are not limited to the precise arguments, contentions and evidence put forward before the dispute crystallised. He held that the courts (and indeed adjudicators) should not adopt an over-legalistic analysis of what the dispute between the parties is. Whilst one needs to determine in broad terms what the disputed claim being referred to adjudication is, that dispute is not necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication.

17. Mr Justice Akenhead concluded that there was no breach of the rules of natural justice because the Defendant had sufficient opportunity to address the adjudicator on the quantum ramifications of there being a delay finding which reflected its own assertion that any prolongation occurred during a later period.

18. The Judge also dealt with (obiter) the difficult issue of severance: whether parts of an adjudicator's decision could be enforced and other parts not, where the adjudicator's want of jurisdiction or breach of natural justice related only to one part of the decision.

19. Until *Urvasco* it was thought that, if an adjudicator was in breach of natural justice or exceeded his jurisdiction, his decision would be unenforceable in its entirety. Mr Justice Akenhead noted that there was relatively little authority on this point, but cited Keating on Construction Contracts (8th ed.) para 17-045 which stated that in cases of breach of natural justice the whole decision will be unenforceable, and it would not be possible to sever good from bad. Mr Justice Akenhead commented that this was incorrect. Considering a paper by Peter Sheridan and Dominic Helps ([2004] 20 Const. LJ 71), Mr Justice Akenhead found *obiter* that if a decision properly addressed more than one dispute, a successful challenge on grounds of jurisdiction or natural justice on the part of the decision which deals with one dispute will not undermine the validity and enforceability of the part of the decision which deals with the other(s), unless the decision is simply not severable in practice, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted.

20. ***Quartzelec Ltd v Honeywell Control Systems Ltd*** [2008] EWHC 3315 (TCC): In another case where the Court refused enforcement, it was held that the adjudicator's failure to consider a discrete ground of defence amounted to a significant jurisdictional error and a breach of the requirements of natural justice.

21. The Claimant referred to adjudication a dispute concerning the Defendant's refusal to pay sums for a variation to the contract, claimed in an application for payment. At the time of the application the Defendant had not given reasons for refusing to pay the sum requested, nor had it issued a withholding notice. In its Response the Defendant argued for the first time that it was entitled to deduct a sum for another variation omitting part of the works from the sums claimed in the application. The Claimant argued that this new ground of defence was outside the scope of the dispute and hence not within the adjudicator's jurisdiction. The adjudicator agreed with the Claimant on the basis that this defence had not "*been in play prior to the Notice of Adjudication*".

22. In the ensuing enforcement proceedings before HHJ Stephen Davies, the Defendant resisted enforcement on the grounds that the adjudicator misconstrued his jurisdiction by declining to consider the discrete ground of defence raised by the Defendant; as a result the adjudicator acted in breach of the rules of natural justice. The Claimant argued on the other hand that the adjudicator was right to consider he had no jurisdiction; but argued in the alternative that, in any event, the adjudicator's decision on the discrete ground of defence could be severed, and the unaffected part of the decision enforced. The Claimant relied on *Urvasco.*

23. The judge accepted the Defendant's contention that it is open to the responding party to raise any defence to the claim, and that the adjudicator should not have restricted himself to arguments "*in play*" at the time of the original claim. He therefore dismissed the claim, holding that the adjudicator made a significant jurisdictional error which amounted to a breach of natural justice and rendered the decision unenforceable.

24. The judge went on to consider and reject the Claimant's alternative severance argument *obiter dicta*. Following the *Urvasco* line he held that a decision could only be severable if two or more disputes have been determined and the challenge only goes to one of those disputes. In the present case there was only one dispute hence the decision could not be severed. He drew a distinction between a 'dispute' and the various disputed issues which needed to be resolved as part of the process of deciding that dispute.

25. The judge noted that it may seem unfair that the Defendant should avoid having to pay anything to the Claimant because the adjudicator failed to consider a defence that was worth much less than the sum claimed. However, he commented that as a general principle it is difficult if not impossible for the court on enforcement proceedings to be completely confident that the adjudicator's decision on an issue which at

first blush appears to be discrete might not have been affected had he properly dealt with the offending issue. This decision confirms that the extent to which the court can sever adjudicator's decisions is limited to cases where more than one dispute was referred to adjudication.

26. Another important decision on natural justice, again decided by Mr Justice Akenhead was ***CJP Builders Ltd v William Verry Ltd*** [2008] EWHC 2025 (TCC), which , as discussed later may well prove to provide an important weapon in the hands of an adjudicator to take steps to avoid the natural justice complaint. In this case Mr Justice Akenhead declined to enforce an adjudicator's award on the basis that the adjudicator's refusal to consider the Defendant's late service of a Response (in breach of contract no less). The adjudicator labouring under an honest, but mistaken, belief that he had no discretion to do so, felt unable to look at the Response and this amounted to a material breach of natural justice.

27. CJP referred the dispute. There was a contractual timetable which required Verry's Response within 7 days of the Referral. Verry said it could not make this deadline and asked for more time. CJP initially refused but later, begrudgingly, gave an extended time.

28. Verry didn't help itself by serving its response five hours after the agreed extended deadline. CJP immediately said that the Adjudicator must ignore the Response because Verry was in breach of contract and had failed to meet the agreed timetable.

29. CJP took up the adjudicator's suggestion that the adjudicator had no discretion to consider a response served after the deadline and that the decision should therefore be made on the basis of the referral alone. He therefore proceeded on the basis of the referral alone and, unsurprisingly, decided in favour of CJP. However, the adjudicator remarked that, had he had such discretion, he would have considered the response.

30. CJP sought to enforce the decision by applying for summary judgment. Verry resisted on the basis of a breach of natural justice: the adjudicator had discretion but the adjudicator had shut his mind to it and ignored the whole of Verry's case. Mr Justice Akenhead concluded that the adjudicator had been wrong to find that he had no discretion to consider the response. Although the applicable rules in Clause 38A of the DOM/2 sub-contract imposed a timetable for service of the response, Clause 38A gave the adjudicator the power to "*set his own procedure*" and he had "*absolute discretion*" to ascertain those facts and law he regarded as necessary.

31. The adjudicator erred because rather than exercise discretion one way or another he concluded wrongly that he had no discretion at all and so ignored the Response. This was a material breach of natural justice because he thereby denied Verry a right to be heard. The extent of the breach was such that it

"*must have been material*", the test for materiality being whether there was a real possibility that the adjudicator could have reached a different decision had the response been considered. The breach went to the fairness of the reference and so the Judge refused to enforce the adjudicator's award.

32. The most recent decision of note is ***Bovis Lend Lease v Trustees of the London Clinic*** [2009] EWHC 64 (TCC) which also deals with natural justice, severability and whether there is a new dispute.

Adjudicators' Jurisdiction

33. For the last decade the orthodoxy has been that adjudicators do not have the ability to give binding rulings on their own jurisdiction (unless, unwisely, the parties have fallen into the trap of agreeing to let them do so more by accident than design).

34. That orthodoxy is now in question and the implications could be significant. It may be that the TCC will now begin to say that an adjudicator had jurisdiction to decide his own jurisdiction in cases where substance and jurisdiction overlap.

35. In ***Air Design (Kent) Limited v Deerglen (Jersey) Limited*** [2008] EWHC 3047 (TCC) Mr Justice Akenhead was faced with a not uncommon problem. There was a written contract which incorporated an adjudication clause more or less the language of the Act for major development works carried out in Jersey. Subsequent packages of works were let to the same contractor. There was a dispute about payment for these various packages and Air Design referred the dispute to adjudication arguing for monies to be paid under a contract as varied. The responding party straightaway argued that there were 2, 3 or 4 contracts rather than one varied contract and that a dispute under more than one contract had been referred to the adjudicator. Deerglen argued the adjudicator had no jurisdiction to decide the disputes in the Referral Notice. The Adjudicator considered submission on whether there was one or more contracts and decided that there was only one, as varied. He made an award requiring Deerglen to pay some of the money claimed.

36. On the enforcement proceedings, Deerglen ran the same point and said that it was not apt for summary judgment because it was a triable issue. Mr Justice Akenhead disagreed on the basis that it was an issue with a real prospect of success. He found that, as a matter of fact, the alleged separate contracts were no more than variations to the original agreement. Accordingly there was only one agreement, and the adjudicator had jurisdiction. In that respect the decision was uncontroversial.

37. However, Akenhead J made two further findings, which are potentially of huge significance. First, he decided that resolution of the dispute referred to the adjudicator "*necessarily involved*" a consideration of whether there was more than one contract. The judge's view was that it was therefore within the

adjudicator's jurisdiction to decide (as he did) that there was one contract as varied. The judge said that this was a case "*where substance and jurisdiction overlap*" – so that there could not be a subsequent challenge if the adjudicator decided, wrongly, that there was only one contract. The judge said that: "*I have therefore formed the view that the Adjudicator did have jurisdiction to rule on all the matters which he did decide in his Decision. Whether he was right or wrong to find or make the assumption that there was effectively one contract which was varied ... is immaterial.*"

38. Secondly, and perhaps even more importantly, in giving his reasons as to why the adjudicator had jurisdiction, the judge relied on the adjudication clause in the contract, which (as is usual) said that "*a dispute or difference*" under the contract could be referred to the adjudicator. He said that those wide words should be construed in the same way as the House of Lords construed such a provision in an arbitration clause in *Fiona Trust v Privalov* [2007] UKHL 40 - that is, so as to cover "*any dispute arising out of the relationship into which they have entered or purported to enter*" – so they were wide enough to give the adjudicator jurisdiction to decide if there was one varied contract or several contracts.

39. The decision marks possibly an important step in a different direction in adjudication jurisprudence. It is potentially a very wide ranging, not just on pure jurisdiction questions but also on the expanded remit of what adjudicators can substantively decide. If, following *Fiona Trust* adjudication clauses are to be construed like arbitration clauses, Adjudicators may now decide what the terms of the contract are, whether it was varied, whether it should be vitiated or voidable. There is perhaps a jurisprudential wrinkle if an adjudicator were to decide there is no contract at all for then he might be required to resign, without making a decision! Perhaps someone will argue separability for adjudication agreements.

40. If section 107 is to be repealed, the Air Design approach is almost certainly going to have to be followed: the ability of adjudicators to rule upon what is and is not part of the contract is going to be essential.

41. A second but less radical example of what may be emerging is the case of ***Euro Construction Scaffolding Ltd v SLLB Construction Ltd*** [2008] EWHC 3160 (TCC) just before Christmas.. In this case the challenge to enforcement was on grounds that the adjudicator did not have jurisdiction because the relevant contract was not wholly in writing. The respondent argued that there was an oral term as to fitness for purpose: the adjudicator had found that this was not an oral term but a mere representation that had no contractual effect.

42. The Court held that the adjudicator had jurisdiction to decide that there was no oral term, notwithstanding the parties (and in particular the respondent) had not given him jurisdiction. The adjudicator had investigated his own jurisdiction, taking into account submissions from the parties, and had concluded (correctly) that he did have jurisdiction to decide whether there was an oral term. Further, and in any

event, Mr Justice Akenhead considered that, the respondent having failed to establish that it had a real prospect of proving there was an oral term of the contract, the decision should be enforced. It is not entirely clear whether the decision would have been enforced even if the Judge had concluded that the adjudicator was wrong to conclude that there was no oral term of the contract.

Part 8 proceedings and section 9.4 applications for Declarations before, during and after Adjudication Proceedings

43. Three cases demonstrate the use that parties to adjudication (both referring parties and respondents) can make of the Part 8 procedure and section 9.4 of the TCC Guide to seek clarification of potential jurisdictional issues and to put down a marker for future challenges to enforcement.

44. The first case concerned proceedings brought by a referring party. In ***Vitpol Building Service v Samen*** [2008] EWHC 2283 (TCC) the TCC confirmed that it has jurisdiction to hear a Part 8 claim concerning the existence and terms of a contract where that decision will determine whether the claimant has the right to adjudicate, even where the Claimant had not yet referred the underlying dispute to adjudication and the parties had almost completed the pre-action protocol process in relation to that dispute.

45. The Claimant was engaged by the Defendant to convert a hotel into a family home. During the course of the works, the Defendant instructed the Claimant to vacate the site. A dispute arose over this instruction. The Claimant alleged that it was agreed at a meeting that the JCT Intermediate Form would be incorporated into the contract; the Defendant disputed this. Unless it could prove such incorporation the Claimant would not have a right to adjudicate the dispute because under s.106 of the Housing Grants, Construction and Regeneration Act 1996 it had no statutory right to adjudicate as the works were for a residential occupier. The Claimant and Defendant embarked on, and had almost completed, the pre-action protocol process in relation to the dispute when the Claimant commenced proceedings under Part 8 of the CPR, seeking a declaration that the parties had incorporated the JCT Intermediate Form into the contract.

46. At the first CMC in these proceedings, the Defendant argued that the court had no jurisdiction to hear the case because Paragraph 9.4.1 of the TCC Guide only permitted applications for declaratory relief after the *commencement* of adjudication proceedings. Mr Justice Coulson dismissed this argument, holding that the TCC Guide did not define the TCC's jurisdiction. He held that the TCC Guide could not shut out a *bona fide* dispute between the parties about the existence and/or terms of a contract. The Claimant was entitled to have that dispute resolved in advance of any subsequent adjudication, despite the advanced stage of the pre-action protocol process.

47. Mr Justice Coulson also rejected the Defendant's argument that the Part 8 procedure was inappropriate because there was a dispute of fact. The judge stressed that where oral evidence was needed in such a case, the court would be able to adapt its procedures and directions to accommodate it, even under Part 8 proceedings.

48. This judgment confirms that, if a jurisdictional challenge is anticipated, then the claimant can bring proceedings in the TCC under Part 8 for a declaration in advance of referring the dispute to adjudication. This course of action has the advantage that the claimant would know at an early stage whether it had a right to adjudicate, and any uncertainty over the existence and terms of the contract would be resolved prior to embarking on adjudication. This would avoid the delay and costs associated with a later challenge to jurisdiction by the respondent in enforcement proceedings.

49. But, be warned of things to come. The Judge was not at all happy with the fact that the Claimant having spent a long time on pre-action protocol steps, thereby proceeding on the basis that Court proceedings would ensue, only for the Claimant to change tack and deciding to adjudicate instead. Of course, nothing could prevent the Claimant from exercising its rights, but there was a strong hint of judicial disapproval of using adjudication proceedings tactically. The costs of the Part 8 were reserved, just in case the matter should come to Court again. Whether such a costs order is jurisprudentially sound it is becoming more prevalent.

50. Indeed a similar reserved costs order was made in ***Walter Lilly Co Ltd v DMW Developments Limited*** [2008] EWHC 3139 (TCC). In that case, Part 8 proceedings were issued after adjudication, not by way of an enforcement action, but to obtain a final determination of a question that arose in an adjudication. The idea seems to have been to get a ruling to resolve one particular argument about whether or not certain wood finishes in a house which faded (arguably naturally) could amount to a breach of contract – when the adjudicator had decided that the fading was a breach. The Defendant argued that this amounted to an attempt to appeal the adjudicator; Part 8 was not appropriate and that it was a matter that ought to be deal with in a full-scale Part 7 claim. On these points the Defendant was on the face of it unsuccessful although successful in the result because the wide declaration sought was not obtained. Instead the Judge gave a different sort of declaration that amounted to 'you're not in breach unless a breach is proved', which he accepted in his judgment might be seen to be a self-evident statement and the utility of it may depend upon what was likely to be a Part 7 claim on the wider issues in dispute. The Judge then reserved costs – in case the matter should come to Court again. The interesting aspect of the case, apart from the reserved costs order is the opening paragraph. Mr Justice Coulson said

> 'This dispute gives rise to interesting questions about the interrelationship between construction adjudication, CPR Part 7 and CPR Part 8. I apprehend that these are matters which will become

commonplace over the next year or so, as parties to construction contracts seek a quick resolution of their disputes in an uncertain economic climate'.

51. In ***The Dorchester Hotel v Vivid Interiors Ltd*** [2009] EWHC 70 (TCC) the responding party to an ongoing adjudication went straight to Court on a Part 8 claim and under section 9.4 of the TCC Guide to seek declarations from the court under the Part 8 procedure when it became clear that natural justice issues had arisen This is one of those "kitchen sink" final account claims referred to adjudication at 4pm on 19 December 2008. The referring party served 37 lever arch files of documentation together with new evidence (witness statements and expert reports). Further, the final account build-up across the sections was different from the final account discussed between the parties pre-adjudication.

52. The respondent sought a declaration that the timetable would lead to breach of natural justice because it had insufficient time to have a fair opportunity to respond. The referring party had proposed an extended but nevertheless tight timetable for the response in the adjudication, but had not allowed the respondent the extension of time it sought. The referring party opposed the claim for a declaration on the basis that the Court had no jurisdiction to interfere at this stage, and that the claim was premature.

53. Mr Justice Coulson rejected the argument that the Court had no jurisdiction to make a declaration at this stage. He decided that

' *the Court has the power to grant a declaration in respect of an adjudicator's jurisdiction in an ongoing adjudication, it also has the power to grant a declaration if it considers that there has been or will be a breach of natural justice which will have a significantly prejudicial effect on the responding part*' .

In support he cited *Vitpol v Samen* and *CJP v Verry* and observed that that, if the parties had come to court during those adjudication proceedings (instead of during enforcement proceedings), the Court could have given the same result earlier. The Judge went on to say

'*But I make it clear, as I hope I made clear in argument, that such a jurisdiction will be exercised very sparingly. It will only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication. It is important that, wherever possible, the adjudication process is allowed to operate free from the intervention of the Court. Applications of this sort will be very much the exception rather than the rule. They will only be granted in clear-cut cases such as (I venture to suggest) those that existed in* ***CJP Builders***.***'***

54. However, in the result Coulson J refused to grant the declaration as he considered that he was not in a position to say at that stage whether there would or would not be a breach of natural justice. But

nevertheless, Coulson J criticised the referring party's conduct, which he considered to be designed to obtain maximum tactical advantage and observed that

'*Such conduct is not uncommon. It is a matter of regret that the adjudication process, which was itself introduced as a method of dispute resolution which would avoid unnecessary legal disputes and procedural shenanigans, is now regularly exploited in the same way. I am confident that the enthusiasts for adjudication in and out of Parliament in 1996 did not envisage that the system would be used for the making of a claim of this type and in these circumstances. However, the Courts have long accepted that the 1996* ***Housing Grants (Construction and Regeneration) Act****, and the standard forms of building and engineering contracts amended in its wake, permit such claims to be made, and what is more those claims can be made "at any time". The difficulties that this latitude can create explain why the Claimant now seeks these declarations in accordance with CPR Part 8.'*

55. He went on to say, that the referring party's conduct had the effect of casting a shadow of uncertainty over the adjudication proceedings, raising the distinct possibility of a future challenge to the adjudicator's decision on grounds of breach of natural justice and jurisdiction.

56. Coulson J made it clear that the adjudicator would have to consider his duties (in light of the decision in *CJP v Verry*) carefully.

57. Finally Coulson J reserved the costs on the basis that, if it came to enforcement, it might be that the respondent's points were vindicated; but if the adjudicator's decision was accepted by both parties, then the costs would follow the event.

WHAT LIES AHEAD – THE COURTS?

58. The ground is never settled. Although natural justice challenges may be said to be rarely successful parties cannot afford to be complacent about the attitude the Court will take, if they perceive unfairness in procedure. The Courts are vigilant to adjudication being used as a weapon and seem willing to step in they need to, before during and after adjudication. Parties to big kitchen sink disputes need to be careful. As do adjudicators.

59. The recession may change the perspective of adjudication. It is not yet known how the TCC will react if it sees someone using adjudication to obtain a knock-out advantage which may result in putting the other side out of business. Coulson J for example has made clear he is against Shenanigans.

60. Some may now look more favourably on just going to Court in the first place. Part 8 and Part 24 may be quicker and get the result or thereabouts with costs and/or security for costs. Partly as a result of the

adjudication theme, litigation in the TCC has become more bespoke – maybe not all your case at once but in manageable chunks, and generally quickly. And nobody can complain of jurisdiction or natural justice.

61. If nothing else changes this year a point that should be on everyone's agenda for this year is dealing with the obviously increased insolvency risk and the 'can't pay won't pay' approach. Is the TCC enforcement procedure going to be effective where widespread insolvency looms. What happens when the TCC judge enforces the decision but then party says 'whistle for your money'.

62. A worrying sign is that of insolvency practitioners coming to the TCC with their rather different ideas. In one case I was involved in, the Defendant's insolvency Counsel informed the TCC quite frankly and fearlessly that whatever the TCC ruling was, the Defendant was not going to pay, that he expected subsequent adjudications to go in his favour, and, if the Claimant dared, the Defendant would see us in the insolvency courts where he would be entitled to raise the set-off that he could not run in the TCC enforcement. It didn't win him the battle on enforcement but at the end of the day the Claimant was left wondering what he could do? As I said earlier. Things might get a bit nasty.

63. An old fashioned garnishee might work: now a Third Party Debt order. But before doing so *Kier Regional Ltd (t/a Wallis) v City and General Holborn Ltd; (1) Cambridge Gate Properties Ltd (2) Temple Guiting Manor Ltd (third parties) [No. 2]* [2008] EWHC 2454 (TCC) repays reading.

64. In that case Coulson J refused an application to make final various interim third party debt orders under CPR r.72.2. The judgment debt arose out of the enforcement of an adjudicator's decision; that decision was subject to imminent arbitration proceedings.

65. Coulson J held that the third party debt orders should not be made final because there was no debt due from the third parties to the defendant; even if a debt had been due the court would not have exercised its discretion to make the orders final due both to the prejudice to the third parties (they would have been wound up) and the imminence of arbitration proceedings on the issues which formed the basis of the debt between the claimant and defendant.

66. These are just some of the important cases in 2008 and early 2009 relating to adjudication. At the end of this paper there is a list summarising most of the reported cases on adjudication over the past twelve months.

WHAT LIES AHEAD – THE ACT

67. Following a series of consultations, Parliament now proposes to amend the Construction Act substantially[2]. Yes we've heard it all before. This is one of those weather fronts that seems to move very slowly if at all. These amendments are not yet law; and it is not yet clear how many of these amendments will survive the next stages of legislative enquiry[3]. I summarise here the principal changes proposed, and discuss the likely implications.

68. The principal changes in the Bill at present include the following:

    68.1 The requirement that the construction contract be "in writing" before the Construction Act will apply is to be repealed;

    68.2 However, there will be a new requirement that the parties' adjudication agreement be in writing;

    68.3 The parties' adjudication agreement must allow the adjudicator to correct his decision to remove clerical or typographical errors, i.e. a slip rule; and

    68.4 Any agreement between the parties as to liability for costs of the adjudication is ineffective unless it is made in writing after service of the notice of intention to refer the dispute to adjudication.

69. There are other proposed changes which are relevant to the payment provisions of the Construction Act[4], but I will focus here on those four proposed changes to the adjudication provisions.

Contract need not be "in writing"

70. At present the Construction Act applies only to construction contracts "in writing" (section 107 of the Construction Act). The Courts have interpreted this requirement strictly, as in the leading case of *RJT Consulting Engineers Ltd v DM Engineers (Northern Ireland) Ltd* [2002] BLR 217 where it was held that what has to be in writing (or evidenced in writing) is the "whole agreement", not just part of it. Fall foul of that and adjudication under the Act is not available to parties entering into oral contracts. This requirement can also raise difficulties where the contract was in or evidenced by writing but part of the contract was agreed orally or by the conduct of the parties, or in cases where the contract was subsequently varied by oral agreement.

[2] The draft bill was issued to the public for review in 2008 and became Part 8 of the Local Democracy, Economic Development and Construction Bill introduced into the House of Lords on 4 December 2008.
[3] The Bill has yet to be fully debated in the House of Lords; after this stage it will be read several times in the House of Commons and will be subject to various committee and report stages.
[4] E.g. new payment provisions are proposed, which would involve scrapping the withholding notice.

71. But the s107 point is so often overplayed. In most cases, particularly where there is a standard form, there is a contractual agreement for adjudication, which the Courts will enforce just the same: see for example *Air Design*. Also see the earlier residential occupier cases which, though excluded from the Act under s106, all come in under a contractual adjudication. It is a point regularly missed.

New requirement for an adjudication agreement in writing

72. Given that the requirement that the agreement be in writing is to be repealed, it is rather odd that the Bill introduces for the first time a requirement that the adjudication agreement be in writing. There is no explanation for this new requirement.

73. This change is presumably designed to mirror the requirement in the Arbitration Act 1996 that the arbitration agreement be in writing. However, the rationale for that requirement is that it is important to have a clear indication in the contract that the parties are obliged to arbitrate any disputes before the parties' right to litigate can be excluded. There is no such imperative for adjudication agreements to be so clear-cut, because there is a statutory right to adjudicate (it is not an obligation), and that right does not preclude the parties from later litigating.

74. However, in practice this requirement is unlikely to cause too many difficulties. In default of a written adjudication agreement, the Scheme for Construction Contracts[5] ("the Scheme") will apply instead, so parties will not lose their right to adjudicate.

The slip rule

75. Some may be surprised that any slip rule is required at all. In practice it is sometimes the case that parties agree shortly after the publication of an adjudicator's decision that there is a typo or clerical error in the decision, and authorise the adjudicator to correct it. Sometimes the adjudicator corrects such an error on his own initiative[6].

76. However, this practice depends on both parties consenting to the correction. The difficulty that the new requirement seems aimed at is where one party does not consent to the correction of a clerical error. One can imagine a situation where an adjudicator intends to award the referring party £10000 but instead – through an obvious clerical error – awards £1000. Difficulties may arise if the respondent refuses to authorise the correction of this error and refuses to pay more than £1000.

[5] The Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 1998/649.
[6] Examples of the application of the slip rule in adjudication are: *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314; *Edmund Nuttall Ltd v Sevenoaks District Council* [2000] WL 1544581; and *CIB Properties v Birse Construction* [2004] EWHC 2365 (TCC).

77. The new requirement would prevent such a difficulty from arising. The application of the (previously unwritten) slip rule will not depend on each party consenting to the correction. The adjudicator will have the right to correct his error; and there is no time limit for such correction.

78. One problem that this new requirement raises is that, if the requirement is not expressly set out in writing in the adjudication agreement, then the adjudication agreement will be invalid and will be replaced in its entirety by the Scheme.

79. A further potential difficulty is that, in the absence of any time limit for the application of the slip rule, it would be possible for the error to be corrected long after the 28 day timetable for the decision has expired. This possibility could undermine the effectiveness of adjudication, which is designed to be a speedy means of resolving disputes.

80. This new requirement could also undermine the certainty of the adjudication process. At present parties are, on the whole, happy to live with the decisions of adjudicators notwithstanding this can be a rough and ready process. The application of the slip rule under the Civil Procedure Rules (CPR r.40.12) has been anything but straightforward[7]. This new requirement raises the spectre of a whole new raft of challenges to adjudication enforcement.

Agreements as to costs must be made after referral

81. The proposed new provision will stipulate that any agreement between the parties as to who will bear the costs of the adjudication is ineffective unless made after issue of the notice of intention to refer the dispute to adjudication. "Costs" is to include the adjudicator's fees and expenses.

82. At present the parties often agree (for example in the contract itself) that the adjudicator will have discretion to award costs or decide which party shall pay his or her fees. It is clear that Parliament's intention is that even this kind of agreement will be ineffective unless it is made after issue of the notice of intention to refer the dispute to adjudication[8].

83. This change may well have unfortunate consequences. Respondents are likely to be unwilling to enter into an agreement that the adjudicator have discretion on costs once the adjudication is underway, particularly if, for example, they have little confidence in their defence or in the appointed adjudicator. Alternatively they may refuse to agree to the adjudicator having such discretion simply because they want to hedge their bets. This would mean the referring party having no choice but to pay half of the

[7] E.g. *Tak Ming Co v Yee Sang Metal Supplies Co* [1973] WLR 300 where a late application for an award of interest was permitted under the slip rule; *In re Inchcape* [1942] Ch 394 where the Court held it had jurisdiction to consider an application for costs under the slip rule where counsel had omitted to ask for costs at the original hearing.
[8] As set out in the June 2007 Consultation Paper, page 24.

adjudicator's fees even if wholly successful in its claim. Claimants may be put off referring smaller value disputes to adjudication regardless of the strength of their claims due to the likelihood of having to pay half the adjudicator's fees in any event.

Conclusion

84. It will be some time before the Bill is enacted: there remain many more rounds of legislative examination. Some of these proposals may be changed, some may be disposed of altogether. The debate over these changes will continue to rage. However there is no doubt that the adjudication provisions will change sooner or later, and will no doubt lead to a new raft of different challenges to adjudicators' decisions and new jurisprudence.

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4 Pump Court, Temple
31 January 2009

Summary of Adjudication Enforcement Decisions 2008

- *Cubitt Building and Interiors Limited v Richardson Roofing (Industrial) Limited* (2008) CILL 2588: this case concerned the inter-relation between adjudication and arbitration. D commenced arbitration proceedings; C applied to the court for a stay of the arbitration pending adjudication. Mr Justice Akenhead refused to grant a stay, holding that a discretionary right to adjudicate did not mean that the arbitration must be stayed. Whether or not there should be a stay was entirely a matter for the arbitrator, it was not a matter for the court. This contradicted *obiter* comments of HHJ Coulson QC (as he then was) in *DGT Steel and Cladding Limited v Cubitt Building and Interiors Limited* (2007) BLR 37.

- *Edenbooth Ltd v Cre8 Developments Ltd* [2008] EWHC 570 (TCC) considered several of the exclusions to the Construction Act. Mr Justice Coulson held first that groundwork and drainage works did not fall within the exemption in section 105(2)(d) of the Construction Act and hence do amount to construction operations. Secondly, he held that the exclusion for residential contracts did not apply where the defendant was a property developer, even although the property may later be used by a residential occupier. To be a residential occupier a real person must be living in the premises. The judge commented that it was difficult to imagine how a company could ever be a residential occupier.

- *T&T Fabrications Ltd & anr v Hubbard Architectural Metalwork Ltd* [2008] EWHC B7 (TCC): Evidence that an agreement was partly written and partly oral, in circumstances where the oral term was not recorded in writing, will prove fatal to an application to enforce an adjudicator's decision.

- *VGC Construction Ltd v Jackson Civil Engineering Ltd* [2008] EWHC 2082 (TCC) concerned the crystallization of the dispute. Mr Justice Akenhead held that one must look at all the surrounding circumstances in deciding whether a claim is nebulous or ill-defined. This includes what the parties were saying or doing at the relevant time. A briefly defined one-line claim may not necessarily be nebulous or ill-defined, depending on the circumstances.

- *Makers UK Ltd v London Borough of Camden* [2008] EWHC 1836 (TCC) (25 July 2008): this case confirmed that the referring party may request that a particular adjudicator be appointed, and it would not invalidate the subsequent appointment if the referring party were to contact that adjudicator in advance of the application to check on his availability. However, the Court indicated that parties entering into communication with the adjudicator should do so in writing. Unilateral communication with the adjudicator (whether before, during or after the adjudication) should be avoided. It is prudent to copy the correspondence to the other side to avoid any allegations of breach of natural justice.

- *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC): in this important decision Mr Justice Akenhead found that any breach of natural justice must be material and more than peripheral if it is to invalidate an adjudicator's decision. A breach will be material if the adjudicator has failed to bring to the parties' attention a particular point which is either decisive or of considerable importance to the outcome of the dispute: this is a question of degree. Further, he held that courts and adjudicators should not adopt an over-legalistic analysis of what the dispute between the parties is: whilst one needs to determine in broad terms what the disputed claim being referred to adjudication is, that dispute is not necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication. Finally, if a decision addressed more than one dispute, a successful challenge on grounds of jurisdiction or natural justice on the part of the decision which deals with one dispute will not undermine the validity and enforceability of the part of the decision which deals with the other(s), unless the decision is simply not severable in practice, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted.

- *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC): in this case Mr Justice Akenhead declined to enforce an adjudicator's award on the basis that the adjudicator's refusal to consider the defendant's Response (under an honest, but mistaken, belief that he had no discretion to do so) due to late service amounted to a material breach of natural justice.

- *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC): It was held that the adjudicator's failure to consider a discrete ground of defence (on grounds that this defence had not been "*in play prior to the Notice of Adjudication*") amounted to a significant jurisdictional error and a breach of the requirements of natural justice.

- Two cases confirmed that a party may not refer to adjudication a dispute that is "the same or substantially the same as a dispute already decided by an adjudicator": *Birmingham City Council v Paddison Construction Ltd* [2008] EWHC 2254 (TCC) and *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC). The referring party cannot have a second bite at the cherry. In both cases the court refused to enforce the adjudicator's decision, holding the adjudicator had acted without jurisdiction.

- It was also confirmed that an argument by the defendant that enforcement should be stayed pending the decision in a cross-adjudication (or a second adjudication) is unlikely to succeed. In *Avoncroft Construction Ltd v Sharba Homes Ltd* [2008] EWHC (TCC), HHJ Kirkham rejected an application for a stay where the defendant relied on a second adjudication under the contract between the parties in which a decision was imminent.

- *Air Design (Kent) Limited v Deerglen (Jersey) Limited* [2008] EWHC 3047 (TCC): Akenhead J held that, on the facts of this case, an adjudicator had jurisdiction to consider whether the dispute related to more than one contract or simply variations to one single contract; and the adjudicator's decision on this point was binding (following similar reasoning as in *Fiona Trust v Privalov* [2007] UKHL 40 an on arbitration decision). This was a case "*where substance and jurisdiction overlap*" so that there could not be a subsequent challenge if the adjudicator decided, wrongly, that there was only one contract.

- In *Vitpol Building Service v Samen* [2008] EWHC 2283 (TCC) the TCC confirmed that it has jurisdiction to hear a Part 8 claim concerning the existence and terms of a contract where that decision will determine whether the claimant has the right to adjudicate, even where the Claimant had not yet referred the underlying dispute to adjudication and the parties had almost completed the pre-action protocol process in relation to that dispute.

- *Dorchester Hotel v Vivid Interiors Ltd*. Mr Justice Coulson refused to grant a declaration that there had been a breach of natural justice mid-adjudication (notwithstanding he found he had jurisdiction to grant such a declaration); however, he criticised the conduct of the referring party and warned the adjudicator to consider his obligations very carefully. Coulson J reserved the costs on the basis that, if it came to enforcement, it might be that the respondent's points were vindicated.

- *Balfour Beatty Construction Northern Ltd v Modus Corovest* (Blackpool) Ltd [2008] EWHC 3029 (TCC): Coulson J refused to grant a stay to enforcement proceedings for mediation on the basis that (a) the mediation agreement was only an agreement to agree; and (b) the nature of enforcement proceedings meant it was unlikely that a stay for mediation would ever be appropriate. Coulson J also rejected the argument that there had been a breach of natural justice due to the adjudicator's failure to give the respondent permission to serve a rejoinder, principally because the respondent had not sought such permission during the adjudication proceedings.

- *Euro Construction Scaffolding Ltd v SLLB Construction Ltd* [2008] EWHC 3160 (TCC): in this case the challenge to enforcement was on grounds that the adjudicator did not have jurisdiction because the relevant contract was not wholly in writing. The respondent argued that there was an oral term as to fitness for purpose: the adjudicator had found that this was not an oral term but a mere representation that had no contractual effect. The Court held that the adjudicator had jurisdiction to decide that there was no oral term. The respondent having failed to establish that it had a real prospect of proving there was an oral term of the contract, the decision was enforced.

- *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC): enforcement was refused because there were triable issues concerning whether the agreement was in writing. It was also

held that the adjudicator had no jurisdiction to award interest because there was no contractual term permitting the award of interest and the parties had not agreed or accepted that the adjudicator should have such jurisdiction.

- *Kier Regional Ltd (t/a Wallis) v City and General Holborn Ltd; (1) Cambridge Gate Properties Ltd (2) Temple Guiting Manor Ltd (third parties) [No. 2]* [2008] EWHC 2454 (TCC): Coulson J refused an application to make final various interim third party debt orders under CPR r.72.2. The judgment debt arose out of the enforcement of an adjudicator's decision; that decision was subject to imminent arbitration proceedings. Coulson J held that the third party debt orders should not be made final because there was no debt due from the third parties to the defendant; even if a debt had been due the court would not have exercised its discretion to make the orders final due both to the prejudice to the third parties (they would have been wound up) and the imminence of arbitration proceedings on the issues which formed the basis of the debt between the claimant and defendant.

Other developments

- CEDR re-launched its adjudicator nominating body service on 12 September 2008. This introduced a number of changes to the Rules, including incorporation of mediation into the Rules prior to delivery of the adjudicator's decision.