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The construction & energy law specialists

Case law update

Victoria Russell

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The construction and energy law specialists

The firm

Fenwick Elliott is the largest specialist construction law firm in the UK serving international clients in the building, engineering and energy sectors, including oil, gas and power.

Fenwick Elliott provides a comprehensive range of legal services on every aspect of the construction process. Our expertise includes procurement strategy; contract documentation and negotiation; risk management and dispute avoidance; project support; and decisive dispute resolution, including litigation, arbitration, mediation and adjudication.

The firm acts nationally and internationally for public and private sector clients, including state corporations, owners/developers, main contractors, specialist subcontractors, consultants, institutional investors, universities, local authorities and utilities. We have advised on a wide range of major infrastructure construction projects, including power stations, refineries, pipelines, process plants, dams, bridges, roads, airports, stadia, hospitals, universities and schools. The firm also advises on issues involving public/private finance and has a well-earned reputation for advising clients in the oil and gas sector, upstream and downstream. We are also actively involved in many major wind farm projects, both on and offshore, in the UK and Europe.

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Victoria Russell

vrussell@fenwickelliott.com

Partner

Victoria is an extremely experienced construction law specialist and is highly regarded within the construction industry. *Chambers UK* notes that "she has her fingers on the pulse"; "an acknowledged expert" and is "a forceful and effective lawyer for high profile contentious work", whilst clients comment that she has "great interpersonal and mediative skills, alongside the ability to dissect the finer points of a case without losing sight of the bigger picture" and "a real champion of construction lawyers – she's good to have in your corner".

Victoria's dispute resolution work focuses on litigation, arbitration and adjudication claims for a wide range of clients including developers, universities, schools, main contractors and local authorities. She has dealt with issues on projects ranging from offices and motorways to hospitals, laboratories, housing developments, airports, factories, waste to energy plants and power stations in the United Kingdom and overseas. A number of her cases in the High Court and in the Court of Appeal have been reported.

Victoria is experienced in all principal building and engineering contracts including JCT, ICE, NEC, GC/Works and FIDIC; she also drafts and negotiates professional appointments and bespoke forms of domestic and international construction contract, including facilities management and service agreements.

Specialist expertise

Victoria has strong experience in the higher education sector and provides advice to numerous universities on contractual and dispute issues relating to their capital and campus projects. She is a Technology and Construction Solicitors' Association-registered adjudicator and a member of several adjudicator panels. She is a practising arbitrator and is also a Centre for Effective Dispute Resolution accredited mediator with extensive experience in alternative dispute resolution.

Examples of Victoria's expertise include:

- acting for a main contractor in myriad disputes relating to the design and construction of an iconic and award-winning building in Central London. Amount in dispute £6m;
- acting for a major university in a successful series of adjudications against its main contractor in connection with the development of a new medical research institute. Amount in dispute £5.5m;
- acting for a major university in the drafting and negotiating of separate 7-year contracts to outsource its catering and facilities management services to external providers;
- acting for a housing association in disputes with its contractor and the professional team under the PPC2000 Partnering Contract. Amount in dispute £3.5m;
- acting for a main contractor in pursuing its entitlements to extensions of time, loss and expense and payment for its measured work in connection with the construction of a leisure centre. Amount in dispute £6.5m;
- acting for an employer in disputes with its service provider arising under a 20-year CHP Contract. Amount in dispute £5.75m.

Other activities

Victoria has written numerous articles on construction, arbitration, adjudication and alternative dispute resolution. She lectures at conferences in the UK and overseas, and has contributed to various training aides.

Victoria's memberships/positions include:

- fellow of the Chartered Institute of Arbitrators;
- fellow of the Chartered Institute of Building;
- fellow of the Forum of the Built Environment;
- past Chairman of the Society of Construction Law;
- past President of the European Society of Construction Law;
- first female Master of the Worshipful Company of Arbitrators;
- past Master of the Worshipful Company of Constructors;
- member of the International Bar Association;
- member of the London Court of International Arbitration;
- member of the Law Society's panel of arbitrators.

Savoye and Savoye Ltd v Spicers Ltd [2015] EWHC 33 (TCC) (15 January 2015)

St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd [2015] EWHC 96 (TCC) (21 January 2015)

Secretary of State for the Home Department v Raytheon Systems Ltd [2015] EWHC 311 (TCC) (17 February 2015)

Paice & Anr v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661 (TCC) (10 March 2015)

Ecovision Ltd v Vinci Construction UK Ltd [2015] EWHC 587 (TCC) (11 March 2015)

CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd [2015] EWHC 667 (TCC) (11 March 2015)

Wycombe Demolition Ltd v Topevent Ltd [2015] EWHC 2692 (TCC) (31 July 2015)

Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC) (14 August 2015)

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030 (Court of Appeal – 13 October 2015)

Husband and Brown Ltd v Mitch Developments Ltd [2015] EWHC 2900 (TCC) (16 October 2015)

Science and Technology Facilities Council v MW High Tech Projects UK Ltd [2015] EWHC 2889 (TCC) (21 October 2015)

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2015] EWHC 2915 (TCC) (23 October 2015)

Reid v Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs) (28 October 2015)

Severfield (UK) Ltd v Duro Felguera UK Ltd [2015] EWHC 3352 (TCC) (24 November 2015)

Matthew Harding (t/a MJ Harding Contractors) v Paice and Springall [2015] EWCA Cib 1231 (Court of Appeal – 1 December 2015)

RMP Construction Services Ltd v Chalcroft Ltd [2015] EWHC 3737 (TCC) (21 December 2015)

Brown and Another v Complete Building Solutions Ltd [2016] EWCA Civ 1 (Court of Appeal – 13 January 2016)

John Sisk & Son Ltd v Duro Felguera UK Ltd [2016] EWHC 81 (TCC) (25 January 2016)

Deluxe Art and Theme Ltd v Beck Interiors Ltd [2016] EWHC 238 (TCC) (12 February 2016)

Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC) (15 February 2016)

RMC Building and Civil Engineering Ltd v UK Construction Ltd [2016] EWHC 241 (TCC) (15 February 2016)

Cofely Ltd v Anthony Bingham & Knowles Ltd [2016] EWHC 240 (Comm) (17 February 2016)

Adjudication

Meaning of "construction operations"

Savoye and Savoye Ltd v Spicers Ltd [2015] EWHC 33 (TCC) (15 January 2015)

Spicers engaged Savoye (a French company) and Savoye Ltd (a related British company), together "*Savoye*", to design, supply, supervise and commission a new automated conveyor system at its existing factory in the West Midlands to fulfil orders for office products. The system comprised conveyors and other equipment for the packing of the products and the printing of labels. The conveyors were attached to the ground floor concrete slab by some 2,000 bolts but the other substantial and/or important pieces of equipment were not all mechanically attached to the floor.

Savoye completed the installation towards the end of 2013; however, disputes arose between the parties regarding payment to Savoye and the quality and performance of the installation. Ultimately Savoye gave notice of adjudication. Spicers objected to the jurisdiction of the adjudicator on the basis that the works were not "*construction operations*" within the meaning of section 105 HGCRA. The adjudicator's non-binding opinion was that he had jurisdiction and he proceeded to find that Spicers should pay Savoye approximately £828,000 plus VAT, interest and his fees.

When Spicers failed to pay, Savoye commenced enforcement proceedings in September 2014. However, Mr Justice Akenhead refused the application for summary enforcement on the basis that there were triable factual issues and because he felt that a site visit was necessary. The expedited trial still took place promptly on 3 December 2014.

There were two issues that the Judge had to consider. First, was the conveyor system sufficiently attached to the floors so as to give rise to a proper conclusion that it was "*forming, or to form, part of the land*" for the purposes of section 105 HGCRA? Second was section 105(1) engaged in that the installation of the conveyor system represented "*construction operations*"?

Mr Justice Akenhead's decision is, of course, very specific to the facts of the case and the construction and purpose of the conveyor system in question. Nevertheless, it provides useful guidance on the definition of "*construction operations*" and the meaning of "*forming, or to form, part of the land*" for the purposes of section 105 HGCRA and highlights that section 105(1)(b) includes the provision of industrial plant within the definition.

In addition, the Judge noted that section 105 mentions "*forming, or to form, part of the land*" as a part of the definition of "*construction operations*". He formed the view that whilst the law relating to fixtures in the context of the law of real property casts useful light on whether the item of work forms part of the land, it is not a pre-condition for the purposes of section 105:

> *"Whether something forms part of the land is a question of fact and this involves fact and degree … [it] is informed by but not circumscribed by principles to be found in the law of real property and fixtures …"*

Furthermore, in relation to the object or installation forming part of the land, one should have regard to the purpose of the object or installation in question.
Where machinery or equipment is installed on land or within buildings, particularly if it is all part of one system, regard should be had to the installation as a whole, rather than each individual element on its own. Simply because something is installed in a building does not necessarily mean that it is automatically a fixture or part of the land.

The evidence in the view of the Judge was clear that the conveyor system was attached to the concrete floor slab on the ground floor and the raised and rising conveyors to

the steelwork forming part of the mezzanine; in addition, at the mezzanine level, it was attached by bolts to the floor. The real question was whether the conveyor system taken as a whole was sufficiently attached to the floors and underside of the mezzanine floor as to give rise to a proper conclusion that it was forming or intended to form part of the land. Mr Justice Akenhead held that the conveyor system did form part of the land for the purposes of section 105:

> *"a) There were extensive and substantial fixings (by bolts) of the system to the body of the building… There were large numbers (in the thousands) of bolts drilled into the floors…;*
>
> *b) The conveyor system is very substantial and large. It covers a large section of the ground floor and a significant part of the mezzanine floor…;*
>
> *c) The conveyor system was clearly intended, both subjectively and objectively, to be relatively permanent and to perform a key role in the warehouse…;*
>
> *d) ...*
>
> *e) The fact that some of the elements comprising the system … were not as such mechanically attached to the floor does not undermine the conclusion…*
>
> *f) The fact that parts of the system are relatively easily removable does not itself weigh particularly heavily against the conclusion which I have reached…"*

The Judge found that it followed from the above that section 105(1) HGCRA was engaged and that the installation of the conveyor system did represent "construction operations". Mr Justice Akenhead accordingly held that the adjudicator had jurisdiction to decide the dispute and enforced the decision.

Restricting or "pruning" the issues in dispute

St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd [2015] EWHC 96 (TCC) (21 January 2015)

St Austell relied on two grounds in support of their case that the adjudicator did not have the necessary jurisdiction. The first was the "*well-worn suggestion*" (the words of Mr Justice Coulson) that the dispute had not crystallised between the parties at the time of the notice of adjudication. The second was the "*rather more novel*" submission that, because the claim that was referred to adjudication related only to a part of Dawnus' original interim application, and expressly excluded other elements of that application, the Adjudicator was not empowered to order the payment of any sums which he found due.

The Judge noted that the crystallisation argument is almost never successful and this point was promptly dismissed. For example, the Judge noted that here the detail of Dawnus' outstanding claims had been the subject of discussion before they were formally advanced in application 19, which was the subject of the adjudication.

The Judge also noted that it was not uncommon for employers to say that no dispute has arisen because there were elements of the contractor's claim that required further particularisation or explanation. He referred to the case of *Gibson (Banbridge) Ltd v Fermanagh District Council* where Weatherup J had said that it was clear that the claim should have been assessed long before it eventually was, and that if supporting documentation was missing, that would no doubt be reflected in any subsequent assessment by the employer or his agent.

The second jurisdictional objection was that the adjudicator did not have the power to order St Austell to make any payment, because the dispute that was referred was strictly limited to just one part of interim application 19. Here the Judge referred to the decision

of HHJ Thornton QC in Fastrack Contractors Ltd v Morrison Construction Ltd in 2000 where the Judge referred to the "*pruning*" that may be made by the referring party of any existing claim before it was referred to the adjudicator and said this:

> *"21. Fastrack suggested that the reference that I am concerned with consisted of a number of disputes, each of which was one of the individual heads of claim that had been referred. Fastrack also suggested that the dispute that could be referred to an adjudication pursuant to the HGCRA need not be identical to the pre-existing dispute, it need be no more than a dispute which was substantially the same as that pre-existing dispute.*
>
> *22. Neither of these contentions of Fastrack is sustainable. The statutory language is clear. A "dispute", and nothing but a "dispute", may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference. It would then be for the relevant adjudicator nominating body to decide whether it was appropriate to appoint the same adjudicator or different adjudicators to deal with each reference. Equally, what must be referred is a "dispute" rather than "most of a dispute" or "substantially the same dispute."*
>
> *23. In some cases, a referring party might decide to cut out of the reference some of the pre-existing matters in dispute and to confine the referred dispute to something less than the totality of the matters then in dispute. So long as that exercise does not transform the pre-existing dispute into a different dispute, such a pruning exercise is clearly permissible. However, a party cannot unilaterally tag onto the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute."*

Following Fastrack, the Judge considered that a referring party is entitled to prune his original claim for the purposes of his reference to adjudication. So if his interim application for payment is for measured work and loss and expense, he may decide that, because the loss and expense claim could be difficult to present in an adjudication, he will instead focus in those proceedings on just the more straightforward claim for measured work. Indeed, Mr Justice Coulson said:

> *"That is not only permissible, but it is a process that is to be encouraged. Claims advanced in adjudication should be those claims which the referring party is confident of presenting properly within the confines of that particular jurisdiction. What if, in my example, the claim for loss and expense is recognised by the referring party as being very difficult to sustain? What if he in fact decides that he no longer intends to pursue it? It would be a nonsense if he had to include such a claim in his notice of adjudication merely because that claim formed part of his original interim application."*

Further, the adjudicator's decision will therefore be a decision reflecting St Austell's existing liability to pay. It manifestly does not create a liability to pay when none existed before.

The Judge also gave the following example. First one should assume, in St Austell's favour, that they had some sort of cross-claim, whether by reference to a claim for overpayment, or a claim for liquidated damages, or a claim for damages for defects which arose for assessment at the same time as interim application 19. Second, assume that the cross-claim would have reduced or even extinguished the sum due by reference to the measured work element of the 115 changes. In the view of the Judge, the mere fact that Dawnus had limited their own claim to the measured work value of the 115 changes, did not and would not in any way limit or prevent St Austell from defending that claim, and raising their own cross-claim by way of set-off: *"That would have been an entirely legitimate defence to the claim in the adjudication, whatever the notice of adjudication or the referral might have said."*

Relief under s.68(3) of the Arbitration Act 1996 – whether to remit or set aside arbitral award

Secretary of State for the Home Department v Raytheon Systems Ltd [2015] EWHC 311 (TCC) (17 February 2015)

The Secretary of State for the Home Department ("*Y*") engaged Raytheon Systems Ltd ("*Z*") to design, develop substantial technology systems. The value of the Contract was a nine figure sum.

The Contract was purportedly terminated in July 2010 by Y. Issues arose with regard to the responsibility for such termination and Y instituted arbitration proceedings. A panel of three arbitrators ("*the Tribunal*") was constituted.

A lengthy Partial Final Award was issued on 4 August 2014. In broad terms the Tribunal held that Y had unlawfully terminated the Contract, that Y had repudiated the Contract and that Z had accepted the repudiation. The Tribunal awarded damages to Z which included £126,013,801 for a claim known as claim A4 – Transfer of Assets. Other sums awarded amounted to £59,581,658 plus interest.

By proceedings issued in 2014, pursuant to s.68(2)(d) of the Arbitration Act 1996 ("*the 1996 Act*") Y sought to have the Partial Final Award set aside and declared to be of no effect. Y claimed that there had been "*serious irregularity*" on the part of the Tribunal in failing to deal with all the issues that were put to it, in particular important parts of Y's case on liability and quantum in relation to Claim A4.

In a judgment delivered in December 2014, Mr Justice Akenhead held that there had been serious irregularity on the part of the Tribunal. He held over the question of relief to a separate hearing.

With regard to relief, Y argued that the Partial Award should be set aside. Z argued that it should be remitted to the Tribunal.

Whilst remission is the default option, given the circumstances the Judge decided that it would be inappropriate to remit in this case. The Partial Award should be set aside in total and the matter resolved by a different tribunal.

An order to set aside an arbitral award is rare, as the Judge pointed out in the course of his judgment. This was a substantial international arbitration, with large legal teams and 42 hearing days taking place over six months. To re-run such an arbitration would be a significant undertaking.

The Judge made clear that what the Court needs to do in deciding whether to remit or set aside is to "*consider all the circumstances and background facts relating to the dispute, the award, the arbitrators and the overall desirability of remission and setting aside, as well as the ramifications, both in terms of costs, time and justice, of doing either*". In essence, this is a "pragmatic consideration of all the circumstances and relevant facts to determine what it is best to do but it necessarily covers the interests of justice as between the parties".

Here, the Judge considered the irregularity to be very serious; that there could be problems with justice being seen to be done if the matter was remitted to the Tribunal; that there should not be any significant re-drawing of the issues in the arbitration should it be re-heard; that much of the factual and expert evidence could be re-deployed and possibly rationalised; and, that in any event if the matter was remitted to the Tribunal by the time the arbitrators heard the matter they were unlikely to have a significant recall of the evidence. Accordingly, the Judge decided that this was a case suitable for being set aside and then re-heard.

Contact with adjudicators

Paice & Anr v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661 (TCC) (10 March 2015)

In Makers UK v Camden [2008] EWHC 1836 (TCC), Mr Justice Akenhead said:

> *"(1) It is better for all concerned if parties limit their unilateral contact with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent.*
>
> *(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.*
>
> *(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions."*

Here, there had already been three adjudications. This case was an attempt to enforce the decision in adjudication four. Mr Justice Coulson said:

> *"If the procedural history of this matter is regrettable (four adjudications, one enforcement hearing, one injunction hearing and one on-going appeal to the Court of Appeal), the current disputes are nothing short of extraordinary, involving as they do allegations of apparent bias and defamation; two lengthy statements from the adjudicator expressed in trenchant terms, two statements from the adjudicator's practice manager and wife; and allegations of telephone records fraudulently obtained. On that basis, this case might be thought to be many miles away from the "clear system of dispute resolution" promoted by supporters of adjudication during the debates in the House of Lords about the Housing Grants, Construction and Regeneration Act 1996.*
>
> *There are two grounds of challenge to the summary enforcement of the decision in the fourth adjudication: apparent bias on the part of the adjudicator, and a lack of jurisdiction, because it is said that he purported to decide something which had already been decided (in completely contrary terms) in the third adjudication …"*

The adjudicator in adjudication four had previously been appointed in two of the first three adjudications. Some two months before the fourth adjudication, an hour-long telephone call had taken place between the claimant and the adjudicator's office manager (his wife). The evidence showed that whilst there was some discussion about procedural matters, the call went further, with the claimant noting how dissatisfied they were with their previous advisors, discussing issues related to the first two adjudications as well as the final account which was to be the subject of adjudication four. No file note was made. There was a further telephone conversation the following day, in which the claimant asked the office manager for details of people who could assist them in their final account dispute. The adjudicator knew about this conversation but did not disclose details of it either at the time of his appointment or later on when specifically asked about it during adjudication four.

The first question for the Judge was whether the adjudicator should have written to the parties, disclosing the conversations, and asking if they had any objections to his continuing to act. Mr Justice Coulson thought that it was "*self-evident*" that those conversations should have been disclosed.

They were material conversations, which included discussion about the final account with one party, and fairness required that the existence of those conversations should have been disclosed once the adjudicator learnt of his appointment. It did not matter that the

call was with the practice manager. Nor did it matter that there was a two-month gap between the call and the adjudication. What mattered was not the timing, but what the conversation was about. The Judge said that the long call should not have taken place at all and should have been curtailed at the outset. Once it had proceeded, a detailed file note should have been made. Finally, the adjudicator had had a second opportunity to reconsider and disclose the conversation but did not do so. This led the Judge to conclude that a fair-minded observer would consider that there was a real possibility that the adjudicator was biased. Accordingly, the claimants' claim for summary judgment failed.

In his judgment, Mr Justice Coulson set out a helpful summary of the law relating to apparent bias, the test for which was set out by Lord Phillips in his judgment in *Re Medicaments and Related Classes of Goods No 2* [2001] 1WLR 100:

> *"… The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the Tribunal was biased". He went to say that "The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The Court does not have to rule whether the explanation should be accepted or rejected. Rather, it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias, notwithstanding the explanation advanced".*

This approach was subsequently approved by the House of Lords in Porter v McGill [2002] AC 357, save that Lord Hope deleted the words "*or a real danger*" and focused simply on whether or not there was a real possibility that the Tribunal was biased.

Mr Justice Coulson continued as follows:-

> *"18. In Lanes Group plc v Galliford Try Infrastructure Ltd [2011] EWCA Civ 1617, Jackson LJ noted that the fair-minded observer must be assumed to know all relevant publicly available facts; must be assumed to be neither complacent nor unduly sensitive or suspicious, must be assumed to be perspicacious, and must be able to distinguish between what is relevant and what is not relevant. Moreover, he must be able to decide what weight should be given to the facts that are relevant. Jackson LJ noted that there were conceptual difficulties in creating a fictional character, investing that character with this ever growing list of qualities and then speculating about how such a person would answer the questions before the Court. He said the obvious danger was that the Judge would simply project on to that fictional character his or her personal opinions. However, he accepted that the approach involving the fair-minded observer was established by high authority and was therefore the exercise that had to be undertaken in cases where apparent bias was alleged."*

The Judge reviewed various cases in which unilateral communications between the Adjudicator and one of the parties had given rise to sustained allegations of apparent bias and then considered the RICS Guidance, which was applicable in this instance as the Adjudicator in question had been appointed by the RICS. That Guidance stated as follows:-

> *"2.1.4 Adjudicators considered suitable for nomination are approached and asked to confirm …*
>
> - *That no significant involvement exists or has existed in the last five years either personally or within the organisation with either party to the dispute …*
>
> *In deciding whether to agree to be nominated it is recommended that respective nominees take into consideration and disclose all matters that might give rise to the possibility or appearance of bias. They are required by RICS to disclose every matter*

which could reasonably be considered to create a conflict of interest. However, even matters over five years old may constitute a potential conflict of interest; if there is any doubt as to whether a connection with a property, a party, or a representative of a party might give rise to a conflict of interest RICS expects it to be disclosed.

The test as to what constitutes a conflict of interest is an objective one. It is not restricted to specific conflicts that surveyors themselves may have. It extends to the partners and others in their firm or organisations.

3.1.5 Communication with the Adjudicator

It is not recommended that adjudicators speak to or meet with a party alone concerning substantive matters and any conversations should be limited to procedural matters only. In circumstances where adjudicators do meet or talk to a party without the other being privy to the conversation, their actions must be seen as being fair. It is therefore essential in such circumstances to ensure that they personally make the other party aware as soon as is practicable what went on in sufficient detail, together with the impressions and/or views that they have formed as a result to enable the other party to address them".

Jurisdiction – correct adjudication procedure

Ecovision Ltd v Vinci Construction UK Ltd [2015] EWHC 587 (TCC) (11 March 2015)

Vinci Construction UK Limited ("Vinci") engaged Ecovision Ltd ("Ecovision") to carry out the design, supply and installation of a ground source heating and cooling system for an office development called Vanguard House in Cheshire. Vinci was the main contractor for the development under a contract with the Northwest Development Agency ("the Employer") dated 19 February 2010 ("the Main Contract").

The Main Contract was based on the NEC3 form of contract, June 2005 with amendments June 2006, Option C. The Subcontract was based upon the corresponding NEC3 subcontract.

Part One of the Subcontract Data stated that the Adjudicator in the subcontract was the President of the RICS and that the Adjudicator nominating body ("ANB") was named at Appendix 6 to the Subcontract.

In fact, Appendix 6 did not name an ANB and instead stated that the adjudicator was to be the President (or if he was unable to act, any Vice-President) of the RICS.

The Subcontract contained the standard EC3 adjudication clause, used both in the form of main contract and subcontract, Option W2. Option W2 states that if the adjudicator is not identified in the (Sub) Contract Data then the parties may choose an adjudicator jointly or a party may ask the ANB to choose an adjudicator.

The additional conditions of the Subcontract (the Z clauses) purported to incorporate by reference the first 50 pages of the Main Contract, including an amendment that deleted large parts of Option W2 and provided instead that the contract was subject to English law and that adjudication should take place in accordance with the TeCSA Rules.

Therefore the Subcontract contained 3 slightly different sets of terms under which a party could request adjudication: (i) Option W2 of the Subcontract; (ii) Option W2 of the Main Contract, as amended; and (iii) if neither of the first two was operable or applicable, the Scheme for Construction Contracts ("*the Scheme*").

In or around March 2011, Ecovision completed the Subcontract works. In December 2012 an operational failure of the ground source heating and cooling system at Vanguard

House occurred and Ecovision and Vinci fell into dispute with regard to the adequacy of the design of the system. In June 2014 Vinci decided to refer the issue of liability only to adjudication.

On 11 June 2014, Vinci served its Notice of Adjudication on Ecovision. With regard to the appointment of the adjudicator, Vinci's solicitors ("Systech") inquired whether the President or any Vice-President of the RICS was free to act and, on being told that they were not, filed a request for the nomination of an adjudicator with the RICS. The RICS nominated an adjudicator, on 16 June 2014. Vinci then served its Referral Notice on 18 June 2014.

On 23 June 2014, Ecovision's solicitors ("RPC") wrote to the adjudicator challenging his jurisdiction on the basis that the dispute had not been properly notified or referred to adjudication. In particular, RPC requested clarity as to the adjudication procedure being followed. There then followed correspondence between RPC, Systech and the adjudicator in which RPC continued to challenge the jurisdiction of the adjudicator and on 2 July 2014 RPC notified the adjudicator that Ecovision would not be participating in the adjudication. The adjudicator maintained that he had jurisdiction and issued his decision on 17 July 2014, granting Vinci a declaration as to liability and directing that Ecovision pay his fees. Ecovision applied to the court for a declaration that the adjudicator's decision was of no effect and Ecovision was not obliged to comply with it.

The Judge held that the correct adjudication procedure had not been followed. Accordingly the adjudicator did not have jurisdiction, his decision had no effect and Ecovision was not obliged to comply with it.

The Judge's comments with regard to the ability of an adjudicator to decide his own jurisdiction are worth noting. In particular, the Judge stated that even where it is common ground that a construction contract exists under which there is a right to claim adjudication, the adjudicator has no power to determine what rules of adjudication apply if there is a dispute about those rules and the dispute affects (i.e. makes a material difference as to) the procedure for appointment, the procedure to be followed in the adjudication or the status of the decision.

Beyond ensuring clear drafting from the outset, the referring party in a situation such as existed in this case will always be in a difficult position unless it can obtain agreement from its opponent as to the correct procedure to follow, which may not be easy against a background of a dispute between the parties. For absolute certainty a declaration as to the correct interpretation of the contract is an option, but involves the time and cost of making the relevant application to court.

Adjudicator appointment process

CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd [2015] EWHC 667 (TCC) (11 March 2015)

In this adjudication enforcement case, a number of defences were unsuccessfully raised. One of these was that the appointment was invalid. Mr Justice Coulson noted that the decision in *Eurocom Ltd v Siemens plc [2014]* EWHC 3710 (TCC) had "*shaken public confidence in the adjudication process*". Here, the adjudicator was appointed by CEDR. The application to CEDR for the appointment, made by the claimant's representatives, included the sentence: "*It is preferred that any of the adjudicators in the attached list are not appointed.*" The evidence before the court was that that sentence was included in error, and the Judge suggested that it may be that it came from a template that those representatives habitually used. However, the important thing was that there was no attached list. Therefore, not only was that sentence included in error, but also no list of "*preferred adjudicators not to be appointed*" was ever completed or attached. In those circumstances, therefore, the situation was entirely different to that in Eurocom. In Eurocom, Ramsey J identified three issues arising in a fraudulent misrepresentation case, namely: "*First, whether a false statement was made;*

second, whether any false statement was made fraudulently or recklessly and thirdly, the effect of any such statement". There was no false statement because there was no list and, since there was no statement, it could not have had any effect.

Enforcement

Wycombe Demolition Ltd v Topevent Ltd [2015] EWHC 2692 (TCC) (31 July 2015)

This was a case to enforce a decision awarding money from the Defendant Employer to the Claimant Contractor. It was common ground that there was a construction contract between the parties but there was a dispute as to when the contract was made and the relevant terms of the contract. The sum at stake was £113,666, together with interest and the adjudicator's fees and expenses.

Mr Justice Coulson commented that the Referral Notice, which ran to 56 closely typed pages was "*much too long and managed to complicate what was, in essence, a simple claim*".

In their Response, Topevent raised two key issues. First, the ascertainment of a fair and a reasonable valuation of Wycombe's claim for varied and extra works and the sums due under the contract and, second, the circumstances in which Wycombe left the site. Topevent said Wycombe were in breach of contract and they set out a counterclaim in respect of the value of the works outstanding, for £180,000, representing the costs of completion.

In addition, Topevent wanted the adjudicator to visit the site in order to complete his assessment of any revaluation. The adjudicator felt that such a visit would be neither necessary nor cost effective and made his decision on the basis of the documents only. He decided that, on the evidence before him, the parties had probably ended the contract by mutual consent; as to the valuation of Wycombe's work:

> *"Much of Topevent's Response is comprised of their allegations without supporting evidence. WDL's case is, in contrast, well supported with documentary and witness evidence and also appears to be reasonably complete".*

Topevent relied on three grounds in seeking to avoid summary judgment, namely:-

(i) An alleged reference to the adjudicator of multiple disputes;

(ii) An alleged breach of natural justice in the adjudicator's refusal of the site meeting/visit, and

(iii) An alleged breach of natural justice in the adjudicator's decision on valuation, said to be on a basis that had not been advanced by either party.

The first challenge, that the adjudicator had not had jurisdiction because more than one dispute had been referred to him, was rejected. Here there was a claim for payment of all outstanding sums; Wycombe wanted one final payment so as to be able to close their books on this contract. That could only be achieved if the adjudicator addressed all their outstanding financial claims. These were not separate disputes. In the event, paragraph 11.1 of the TeCSA Rules, which applied to this adjudication, makes clear that the Adjudicator can deal with "*any further matter which all Parties agree should be within the scope of the Adjudication*".

The Judge considered that the suggestion that the adjudicator's failure to visit the site was a material breach of natural justice was "*hopeless*". He said that:-

> *"The organisation of an adjudication, the procedure and process to be adopted and the steps required before the decision is issued to the parties, are all matters uniquely for*

> *the adjudicator. It is up to him or her to decide what he or she needs in order to reach their decision. In this case, the adjudicator did that, and he carefully explained why a site visit/meeting was not a proportionate use of his time and therefore the costs of the adjudication. It is not and cannot be for this court to second guess that decision. That is particularly so, given the plentiful authority for the proposition that an adjudicator is not generally obliged to arrange or attend any sort of meeting: see ROK Building Ltd –v- Celtic Composting Systems Ltd No. 2 [2010] EWHC 66 (TCC)….*
>
> *In this case I also conclude that a site visit or meeting would have been of no assistance in valuing the variations and the work carried out on site, which was the principal issue between the parties. No submissions to the contrary have been provided. The valuation exercise was a paper exercise, and if necessary, photographs of the site could be – and were – provided. So not only was there no basis for the suggestion that [the adjudicator] acted in breach of natural justice, but any alleged breach was simply immaterial and therefore could not prevent enforcement in any event".*

The final complaint was that the adjudicator had failed to decide the valuation dispute on the basis of the parties' respective submissions and instead decided it on a basis upon which the parties had not had an opportunity to address him. It was alleged that this was a material breach of natural justice.

The Judge concluded that this was not a submission "*which ultimately should succeed*". He noted that the adjudicator had been faced with a "*myriad of different approaches to valuation*" and had concluded that "*the invoices generally properly reflect the sums due*" although he made a number of adjustments.

The Judge said that:

> *"It seems to me that, on those facts, far from coming to a decision that was based on his own independent approach to the figures, the adjudicator carefully considered both parties' submissions and then, as he was entitled to do, provided his own valuation based on those submissions".*

The Judge suggested that the following analysis was appropriate:

> *"An adjudicator has to do his best with the material with which he is provided. He has considerable latitude to reach his own conclusions based on that material, and he is certainly not bound to accept either one or other of the figures advanced by the parties. In my view, this latitude will inevitably be even wider now that the original constraint provided by the 1996 Act, that there had to be a written contract between the parties, has been removed by amendment. As happened here, an adjudicator's conclusion about the nature and terms of the contract could affect his approach to valuation issues".*

He said that what an adjudicator cannot do, certainly not without warning the parties in advance of his decision, is to make good the deficiencies in the claiming party's case or to plug what he sees as a gap in that case by having regard to something which he is being told expressly to ignore. That had not happened here.

Topevent had also attempted to avoid summary judgment by suggesting that they had a counterclaim in respect of the costs of completion. That counterclaim had been raised by Topevent during the adjudication but had been rejected by the adjudicator. The Judge said:

> *"It is axiomatic that a defending party cannot seek to prevent enforcement of an adjudicator's Decision by reference to a counterclaim that the adjudicator has himself considered and rejected".*

Summary judgment was given in favour of Wycombe, together with interest and costs.

Liquidated damages

Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC) (14 August 2015)

In these Part 8 proceedings, Mr Justice Akenhead had to consider whether Henia (or any employer) could rely on a Certificate of Non-Completion even though the CA had failed to make a decision on a contractor's claim for an extension of time. The contract was the JCT Standard Building Contract Without Quantities 2011, as amended. The Judge looked at the wording of the principal liquidated damages provision, clause 2.32, which was not drafted in a way that suggested that the obligation on the part of the CA to operate the extension of time provisions was a condition precedent to an entitlement to deduct liquidated damages. In contrast, it did expressly seek to impose two other conditions precedent, namely the need for the CA to have issued a Certificate of Non-Completion for the Works and for the employer to have notified the contractor before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated damages. It therefore seemed "*odd*" to the Judge, if there was to be a condition precedent that no liquidated damages should be payable or allowable unless the extension of time clauses had been operated properly, when it was not spelt out as such.

Mr Justice Akenhead also noted that a contractor is not left without a remedy both in the short term through adjudication and in the long-term final dispute resolution processes; it can challenge the refusal to grant an extension and/or the deduction of liquidated damages and, in the case of adjudication, secure relief if it can convince the adjudicator that it is right and that the employer and the CA are wrong in whole or in part. The Judge noted that it may seem unfair on a contractor to have liquidated damages deducted at a time when the CA has failed to deliver the process of considering extension of time claims. There were two answers to this: the ready availability of short- and long-term remedies and the fact that there are numerous potential defaults on the part of both employer and contractor which can give rise to serious financial consequences for the other, and merely because unfairness can happen in the short term it does not necessarily or obviously lead to the need to construe clauses as conditions precedent to the ability of one party to secure such financial advantage in that short term.

Therefore, a failure on the part of the CA to operate the extension of time provisions did not debar Henia from deducting liquidated damages where the other expressed conditions precedent in the relevant JCT clauses had been complied with.

Payless Notices and Insolvency

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030 (Court of Appeal – 13 October 2015)

In this case, four interim certificates had been issued, totalling £1.2 million. Wilson, the Employer, only paid one. Further, it had not issued pay less notices for the other three, which remained outstanding.

Harbour View suspended its work and both parties served notices of termination. Harbour View then issued a winding up petition and Wilson sought an injunction to restrain presentation of the petition, claiming that it was disputed on substantial grounds and that Wilson had serious and genuine cross claims which exceeded the sums allegedly due. Before the first hearing, Harbour View gave notice that a meeting of creditors was to be held for the purposes of appointing a liquidator.

The contract between the parties was the JCT Intermediate Building Contract with Contractor's Design, 2011 Edition. Clause 8.5.3 of that contract provided that as from the date a contractor became insolvent, whether or not the Employer had given notice of termination, clause 8.7.3 would apply as if such notice had been given. Clause 8.7.3 noted that an Employer need not pay any sum that had already become due if the Contractor,

after the last date upon which a pay less notice could have been given, had become insolvent.

The Court of Appeal agreed that this meant that the proposed petition debt, based on the sums set out on the interim payment certificates, was genuinely disputed as, given the provisions of clause 8.7.3, such sums were no longer payable after the contractor had entered into the creditors' voluntary liquidation.

Lady Justice Gloster noted that an employer who accepts that interim payments have become due because of the failure to serve pay less notices is not prejudiced by this when it seeks to raise a serious and genuine cross claim. The fact that interim payments had fallen due under the Housing Grants, Construction and Regeneration Act 1996, because of the failure to issue pay less notices, did not prevent Wilson from challenging the valuation at a later date or raising a cross claim in response to a winding up petition, provided that it could demonstrate that its cross claims were reasonably arguable and sufficiently strong to be tested in court proceedings.

The Court of Appeal held that the Judge at first instance should have granted the injunction sought by Wilson, restraining the issue of a winding up petition. Their appeal was therefore successful.

Contracts for construction operations

Husband and Brown Ltd v Mitch Developments Ltd [2015] EWHC 2900 (TCC) (16 October 2015)

In this case, Husband and Brown claimed an outstanding fee due under an oral agreement made between them and the Defendant. The Defendant was engaged in commercial property development and intended to purchase a site in order to construct a care home to be operated by its operational arm. The Defendant identified a suitable site. Husband and Brown was engaged in the business of land acquisition planning and development and was able to achieve a significant saving for the Defendant on the purchase price. A dispute arose over the incentive fee which was payable.

The Defendant sought a declaration that the adjudicator had had no jurisdiction to make his decision.

One of the heads of claim was for adjudication costs, which the Claimant said was a foreseeable and recoverable consequence of the breach by the Defendant.

For a contract to be covered by the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996, it must be an agreement to carry out construction operations or to arrange for the carrying out of construction operations.

The Defendant submitted that this was not a construction contract under the Act and the dispute should therefore not have been referred to adjudication. Counsel for the Defendant submitted that the agreement between the parties involved negotiation of a price for land and negotiations subject to contract but did not involve anything to do with building or works on the land.

The Judge said:

> *"In my view the Defendant is correct in its interpretation that this was not a construction contract within the meaning of the Act. It was not an agreement to carry out construction operations or to arrange for the carrying out of construction operations……*
>
> *In this case the matter did not fall within the scope of the Act and in my view this means that it was not reasonably foreseeable that the costs of adjudication would result. Even if I*

am wrong on this, to allow the Claimant to recover its costs of adjudication would subvert the statutory scheme which does not allow for such costs. The costs of the adjudicator and the associated legal fees are not therefore recoverable".

Paying the Adjudicator's Fees

Science and Technology Facilities Council v MW High Tech Projects UK Ltd [2015] EWHC 2889 (TCC) (21 October 2015).

This was an application for summary judgment, seeking to enforce two decisions of an adjudicator.

The Defendant disputed the validity of the decisions because it said that the adjudicator did not have jurisdiction under the contract between the parties to determine the dispute at all; the Defendant said that the Scheme applied but because the adjudicator had been appointed under the contractual provisions, and not under the Scheme, he lacked jurisdiction. The appointment had been invalid.

By agreement of the parties, the adjudicator's decision concerning the parties' costs, and the allocation of his costs between the parties, was issued separately. He decided that of his fees of £9,408, £7,056 would be payable by the Defendant and the balance by the Claimant. At the enforcement hearing, it was confirmed by the Defendant that it had indeed paid the adjudicator the sum for his fees that he had ordered. Payment had been made by BACS and there was therefore no covering letter explaining the basis of the payment. The Claimant relied upon this as demonstrating that the Defendant had treated the adjudicator's decision as valid and that as a result, the Defendant could not now challenge it and assert it was invalid.

The question for the Judge to decide was thus whether the Defendant, because it had paid the adjudicator's fees, was treating his decision as binding and had waived or lost the right to maintain any objection to it.

The adjudicator's terms and conditions expressly provided as follows:

"Each party to the reference shall be liable for my fees on a joint and several basis save that if, in my sole discretion, I consider that I have no jurisdiction to proceed with the reference my fees shall be payable solely by the Referring Party….

3. My fees will be payable notwithstanding that my decision is subsequently found by a court to be unenforceable by reason of lack of jurisdiction".

The Claimant objected to the Defendant relying upon these terms as neither party had expressly accepted them after the adjudicator had sent them to them. The Claimant submitted that silence cannot amount to acceptance, and so the terms and conditions were not agreed, relying upon Linnett –v- Halliwells LLP [2009] EWHC 319 (TCC) as authority for the proposition that silence does not amount to acceptance of the adjudicator's terms and conditions. In that case, Ramsey J set out the various options available to a party who objects to jurisdiction but who nevertheless continues to participate in an adjudication.

Mr Justice Fraser, whilst respecting that decision, pointed out that it is a matter of contract as between the adjudicator and the relevant party and is therefore a fact specific situation. He said that:

"It is possible to signify acceptance of proposed contract terms by conduct and I find that is what the Defendant did".

Agreement of the Defendant to the adjudicator was given following a full reservation of rights.

Mr Justice Fraser did not accept that by merely paying the fees, the Defendant had in these specific factual circumstances lost the right to challenge jurisdiction on enforcement. Taken together, the express terms of the letter reserving the Defendant's rights and paragraph 3 of the adjudicator's terms and conditions were "*compelling*" evidence to allow the Defendant to challenge jurisdiction on enforcement, irrespective and regardless of the payment by the Defendant of the adjudicator's fees.

In the event, the Judge decided that there was nothing in the points raised by the Defendant and the Decisions should therefore both be enforced, with summary judgment.

Order for delivery up of documents

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2015] EWHC 2915 (TCC) (23 October 2015)

Pursuant to a contract based on the NEC 3 Form, ICI engaged MMT to install steelwork and tank works at ICI's new paint processing plant in Northumberland. Disputes arose between the parties about the quality of the welding carried out by MMT and as to the value of MMT's work, resulting in an adjudication in which MMT claimed £7.5 million. The Adjudicator decided that ICI had not served a valid payment notice with the result that MMT was entitled to the sum claimed.

During the course of the referral, the contract was terminated. MMT argued that as a result of that termination, it was no longer required to perform obligations under the contract, including the provision of various project documents which ICI sought for the operation of the plant. ICI therefore started a second adjudication, seeking declarations that it was entitled to certain documents that it listed in a schedule to the Notice of Adjudication and, further, for delivery up of those documents. The adjudicator made a declaration that ICI was entitled to these documents but did not make an order for delivery up to them.
ICI applied to the Technology & Construction Court for enforcement of the adjudicator's decision by way of a declaration in respect of the entitlement to the documents and also sought an order for delivery up of them.

Mr Justice Edwards-Stuart held that ICI was not entitled to an order for delivery up of the documents. He said:

> *"…not only are there triable issues but also there does not exist sufficient information upon which the court can make a decision about the extent of the disclosure that ICI really needs. I suspect that a significant part of the documentation listed at Schedule 1 would, if provided, be of limited, if any, use to ICI. Conversely, I can understand that there may be some documents for which ICI does have an immediate need. The difficulty is that, upon the information presently available, it is impossible to know where to draw the line.*
>
> *From this it must follow that the court is not in a position to formulate an order for delivery up that would fairly reflect the adjudicator's declaration of entitlement, even if it would otherwise be appropriate to do so. Indeed, as I have already mentioned, even if it were possible to draw up such an order – in other words to identify the documents that ICI really needed – I consider that to make such an order would be going further than a mere declaration of entitlement would warrant.*
>
> *This is an application for summary judgment, so unless the position is very clear, relief should be refused. This is particularly so if the relief that is sought is for specific performance or a mandatory injunction to deliver up documents….*
>
> *In my view the only way in which the position might be preserved, and effect thereby given to the adjudicator's declaration of entitlement, would be by way of an interim injunction requiring MMT to preserve the documents until further order so that relevant documents, if sufficiently identified, could be the subject of a more focused application for delivery up.*

However, ICI has not made such an application and so it would not be appropriate to grant relief in that form on this application.

So far as the declaration is concerned, the question of ICI's entitlement to the documents is not one that has been explored before me on the merits. It would therefore be inappropriate for the court to make any declaration of entitlement, but what it can and should do is to declare that the adjudicator's decision is valid and binding. That means that the adjudicator's declaration of entitlement will stand unless and until it is overruled by a decision of the court made on the merits".

Mediation

Failure to Mediate: A Reminder

Reid v Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs) (28 October 2015)

This was a clinical negligence case; Master O'Hare had to rule upon the Claimant's entitlement to costs.

The Claimant's solicitors had made two Part 36 Offers to settle, one in respect of all of the costs to be assessed and the other in relation to counsel's fees, and prior to those offers had invited the Defendant's solicitors to proceed to mediation. In the end, the Defendants failed to beat either offer, so the Claimant sought remedies pursuant to Part 36.17, together with further penalties having regard to the Defendant's refusal to agree to mediation.

Master O'Hare said as follows:

"In respect of the Defendant's failure to mediate, I think the only sanctions available for me to impose are to award costs on the indemnity basis and to award interest on those costs from a date earlier than today, today being the normal date. I am persuaded that the Defendant's refusal to mediate in this case was unreasonable. It took six weeks to reply to the offer and they then replied in the negative. …

I want to end with a brief note of caution about sanctions imposed on parties who unreasonably refuse to mediate. Case law on this topic is largely about penalties imposed on parties who are in other respects the successful party. In Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576 and in other cases, penalties imposed upon winners. They do not involve the imposition of further penalties upon losers. One can see that throughout the judgment in Halsey. I will read out a sentence from paragraph 28:

"As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation." If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponents costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this Defendant's conduct but only as from the date they are likely to have received the July offer to mediate"

Payment Principles

Severfield (UK) Ltd v Duro Felguera UK Ltd [2015] EWHC 3352 (TCC) (24 November 2015)

Although this was not an adjudication enforcement case, it raised a number of issues, some of them described by Mr Justice Coulson as "novel", concerning the HGCRA 1996.

The Judge said:

> *"In particular, it highlights the potential difficulty of payment provisions under a contract concerned with both construction operations and operations which are excluded by the 1996 Act (sometimes referred to as a hybrid contract), and the particular consequences for such a contract of the notice provisions in Sections 110, 110A, 110B and 111 of the Act, and the recent line of authorities spelling out the consequences for an Employer of failing to serve the notices required by those provisions."*

The claimant sought £1.4m by way of summary judgment. The project involved the construction of two power generation plants, each comprising several different structures. It was common ground that some of this work comprised construction operations (as defined) but that some of the works were not construction operations, because they related to power generation and were therefore excluded from the provisions of the 1996 Act.

The Judge noted that "*it is plain that the parties were unaware of this distinction at the time that they entered into the Contract. Accordingly, they agreed a payment regime which, although entirely understandable, was not in accordance with Part 2 of the 1996 Act*".

He set out the express terms relating to payment which the parties had agreed, and the relevant provisions of the 1996 Act (as amended). He then provided a very useful summary of the recent case law in cases where there had been an absence of notices. He said as follows:

> *"23. Over the course of the last year there has been a flurry of cases in which Edwards-Stuart J has considered the situation in which a contractor has notified the sum due in a Payment Notice, and the Employer has failed to serve either its own Payment Notice or a Pay Less Notice … in essence, these three cases are authority for the proposition that, if there is a valid Payment Notice from the contractor, and no employer's payment notice and/or pay less notice, then the employer is liable to the contractor for the amount notified and the employer is not entitled to start a second adjudication to deal with the interim valuation itself…*
>
> *24. All of these cases concern the situation where the contractor is seeking to take advantage of the absence of any notices from the employer to claim, as of right, the sum originally notified. That approach is in accordance with the amended provisions of the 1996 Act. But because of the potentially draconian consequences, the TCC has made it plain that the contractor's original payment notice, from which its entitlement springs, must be clear and unambiguous."*

The Judge then reminded the parties of the words of Mr Justice Akenhead in the *Henia Investments v Beck Interiors Ltd* case earlier in the year, when he said:

> *"If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."*

Mr Justice Coulson rejected the suggestion that the provisions of the 1996 Act ought to be incorporated wholesale, even in a hybrid contract, to apply to all the works. Although it was "*uncommercial, unsatisfactory and a recipe for confusion*", the result of Parliament excluding certain construction operations from the 1996 Act was that in situations such as this case, there would be two very different payment regimes.

The payment notice relied upon was for £3.7m, of which £1.4m related to works under the HGCRA element of the Contract. However, the payment notice identified the sum due as £3.7m and the £1.4m now claimed was not said to be the sum due, and was not the notified sum. There was no reference in the payment notice to the sum of £1.4m and it

was held therefore not to be a payment notice in respect of that claim. The sum notified could not be "*converted … by refining it later on*".

After refusing the application for summary judgment, the Judge said as follows:

> *"62. I should add this. All of the difficulties here, in both the old and the new proceedings, can be traced back to section 105 of the 1996 Act and the legislators desire to exclude certain industries from adjudication. A review of the debates in Hansard reveal that Parliament was aware of the difficulties that these exceptions would cause, but justified them on the grounds that (1) adjudication was seen as some form of "punishment" for the construction industry from which (2) the power generation and some other industries should be exempt, because "they had managed their affairs reasonably well in the past".*
>
> *63. I consider that both of these underlying assumptions were, and remain, misconceived. Adjudication, both as proposed in the Bill and as something that has now been in operation for almost 20 years, is an effective and efficient dispute resolution process. Far from being a "punishment", it has been generally regarded as a blessing by the construction industry. Furthermore, it is a blessing which needed then – and certainly needs now – to be conferred on all those industries (such as power generation) which are currently exempt. As this case demonstrates only too well, they too would benefit from the clarity and certainty brought by the 1996 Act."*

Whether previous dispute actually decided

Matthew Harding (t/a MJ Harding Contractors) v Paice and Springall [2015] EWCA Cib 1231 (Court of Appeal – 1 December 2015)

During March 2013 Mr Paice and Ms Springall ('the employers') engaged Mr Harding, trading as M J Harding Contractors, ('Harding') to complete works on two residential houses at Purley in Surrey. The contract incorporated the adjudication provisions of the Scheme for Construction Contracts ('the Scheme').

Paragraph 9(2) of the Scheme provides that an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication.

Harding commenced work on 8 April 2013 but relations with the employers soon deteriorated and on 18 September 2013 the employers issued a notice of termination.

During October 2013 Harding commenced two adjudications against the employers and was successful in both, recovering some £285,022.00.

On 8 August 2014 Harding issued an account claiming a further payment of £397,912.00, and on 1 September 2014 commenced adjudication seeking recovery of this sum. The employers served a purported pay less notice on 2 September 2014.

In this third adjudication, in a decision dated 6 October 2014 the adjudicator found that: (i) the pay less notice of 2 September was invalid, having failed to specify the basis of the employers' contentions so that the employers were required to pay the notified sum of £397,912.00; and (ii) it was not necessary to decide whether or not the £397,912.00 amounted to a correct valuation of the works. In paragraph 185 of his decision the adjudicator stated:

> *"… I have not decided on the merits of Harding's valuation and have not decided that £397,912.48 represents a correct valuation of the works. The parties made submissions in this adjudication about the proper valuation but these did not fall to be considered by me because of the rule relating to a notified sum becoming automatically due in the absence of a valid pay-less notice."*

On 14 October 2014 the employers started a fourth adjudication seeking declarations as to the valuation of the contract works.

On 21 October 2014 Harding commenced proceedings in the TCC seeking an injunction to restrain the fourth adjudication on the basis that all of the valuation issues raised by the employers had already been decided in the third adjudication so that the adjudicator in the fourth adjudication lacked jurisdiction. On 21 November 2014, the TCC refused the injunction, on the grounds that: (i) the failure to serve a compliant pay-less notice could not permanently deprive the employers of the right to challenge the contractor's account; and (ii) paragraph 9(2) of the Scheme applied where a dispute previously referred to adjudication had actually been decided. Harding then started an appeal. On 15 December 2014 the Adjudicator in the fourth adjudication issued his decision requiring Harding to pay the employers some £325,484.00. However, that decision was not enforced on grounds of apparent bias. Whether or not the employers could commence what would be a fifth adjudication depended upon the outcome of Harding's appeal.

Harding appealed on two grounds: that in refusing the injunction the Judge had misinterpreted paragraph 9(2) of the Scheme and had incorrectly analysed the scope and effect of the adjudicator's decision in the third adjudication.

The Court of Appeal found that the judge had not erred in his interpretation of the Scheme as in paragraph 9(2) the word "decision" meant a decision in relation to the dispute now being referred to adjudication. The Court therefore rejected Harding's submission that if a similar dispute had been referred to adjudication without having been decided, that was sufficient to trigger paragraph 9(2).

The Court also dismissed the second ground on the basis that in the third adjudication the adjudicator had made it clear in paragraph 185 of his decision that he had not dealt with the valuation issue nor carried out a valuation exercise. Accordingly, the Judge had been correct to find that there had been no previous decision by an adjudicator on the valuation dispute referred by the employers in the (abortive) fourth adjudication. Hence paragraph 9(2) would not prevent the employers from referring this dispute to (a fifth) adjudication.

The Court of Appeal joined the Judge in adopting a common sense approach to paragraph 9(2) of the Scheme. As Jackson LJ observed, if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, it could not be right that the Scheme would prohibit future adjudications about the other matters. This approach will require incoming adjudicators to scrutinise previous decisions very closely to see what disputes/issues have and have not been decided, but as Jackson LJ pointed out, this should not create any particular difficulties.

In his judgment Lord Justice Jackson set out the summary by Mr Justice Edwards-Stuart in the case of Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412, when he described what he had intended to decide in the earlier case of ISG Construction Ltd v. Seevic College [2014] EWHC 4007 (TCC). Lord Justice Jackson said:

> *"I shall not embark upon an analysis of those two cases. Instead I shall set out the judge's own summary in Galliford… This appears at paragraphs 18 – 20 of Galliford as follows:*
>
> > *"18. I held [in ISG v Seevic] that if an employer fails to serve the relevant notices under this form of contract it must be deemed to have agreed the valuation stated in the relevant interim application, right or wrong. Accordingly, the adjudicator must be taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.*
> >
> > *19. However, I made it clear that this agreement as to the amount stated in a particular interim application (and hence as to the value of the work on the relevant valuation*

> *date) could not constitute any agreement as to the value of the work at some other date (see paragraph 31).*
>
> *20. This means that the employer cannot bring a second adjudication to determine the value of the work at the valuation date of the interim application in question. But it does not mean any more. There is nothing to prevent the employer challenging the value of the work on the next application, even if he is contending for a figure that is lower than the (unchallenged) amount stated in the previous application. If this was not made clear by my judgment, then it should have been, and it is certainly made clear by the decision by the Court of Appeal in Rupert Morgan Building Services (LLC) v Jervis [2004] 1WLR 1867 in particular the passage from paragraph 14 that is set out in paragraph 30 below. My judgment in ISG v Seevic was not intended to go below that".*
>
> *I do not need to decide whether or not that passage is correct in relation to interim valuations and interim payments. In almost all construction contract special contractual provisions apply to interim payments. Mistakes can usually be put right at a later stage, although that was not possible in Galliford because the contract prevented negative valuations.*
>
> *The important point for present purposes is that the quoted passage (whether right or wrong in relation to interim valuations) does not apply to final accounts. Edwards-Stuart J said so in Galliford at [25], where he emphasised the "fundamental difference" between payment obligations which arise on an interim application and those that arise on termination.*
>
> *In the present case we are concerned with a final account following termination of the construction contract. Clause 8.12.5 of the contract conditions require an assessment of the amount which is "properly due in respect of the account". This clause expressly permits a negative valuation. Mr Linnett did not carry out any such valuation exercise in the third adjudication. Therefore PS were entitled to refer that dispute for resolution in the abortive fourth adjudication. They will be entitled to do so again in the proposed fifth adjudication. This conclusion is consistent with the reasoning of HHJ Humphrey Lloyd QC in Watkin Jones and the reasoning of the Court of Appeal in Rupert Morgan. Nothing in ISG or Galliford contradicts this conclusion.*
>
> *One may then ask, what did the third adjudication achieve? The answer is that the third adjudication achieved an immediate payment to the contractor. Harding will be entitled to retain the monies paid to him unless and until either the adjudicator in the fifth adjudication or a judge in litigation arrives at a different valuation of Harding's final account under clause 8.12…*
>
> *In my view the employer's failure to serve a pay less notice (as held by the previous adjudicator) had limited consequences. It meant that the employer had to pay the full amount shown on the contractor's account and argue about the figures later. The employer duly paid that sum, as ordered by the previous adjudicator. The employer is now entitled to proceed to adjudication in order to determine the correct value of the contractor's claims and the employer's counterclaims. Therefore the judge's decision was correct."*

Contract Formation

RMP Construction Services Ltd v Chalcroft Ltd [2015] EWHC 3737 (TCC) (21 December 2015)

This was an adjudication enforcement case, where it was agreed that RMP had worked for Chalcroft pursuant to a construction contract, but there was disagreement over how that contract was formed. RMP alleged that it was formed by an email sent by Chalcroft on 5 December 2014, which had accepted RMP's offer. Chalcroft argued a number of alternatives and said that if the contract was formed by, or included, a Letter of Intent

dated 8 December 2014, or by, or included, a sub-contract order placed on 13 April 2015, the contract incorporated a Standard Form of JCT wording. They agreed that whatever contractual route applied, it was a construction contract for the purposes of the HGCRA 1996 and further agreed that the adjudication provisions of the Scheme applied. No adjudicator nominating body had been specified by the parties. Whichever the correct contractual analysis was, the procedure for appointing the adjudicator was the same, namely that laid down by the Scheme.

The issue over the correct contractual route was relevant as to whether or not the contractor had served a pay less notice in time. If the sub-contractor's argument was correct, the pay less notice sent by the contractor was late, whereas if the contractor was correct, it was at least arguable that its pay less notice was valid and served in time.

The adjudicator accepted the sub-contractor's analysis of the contract and made a non-binding decision to that effect. The adjudicator then decided that the Main Contractor, Chalcroft, should pay the sub-contractor just under £260,000 plus VAT.

In the enforcement proceedings, RMP said that once it was acknowledged that the adjudicator would have had jurisdiction and would have acquired jurisdiction by the same procedural route whichever contractual interpretation was correct, the fact that different contractual interpretations may have led to different substantive outcomes was irrelevant. In such circumstances, the adjudicator was validly appointed and if, which was disputed, he misinterpreted the substantive contractual provisions so as to come to an incorrect answer, then that was no bar to enforcement of his decision.

Mr Justice Stuart-Smith noted that the distinction between jurisdictional challenges to enforcement and challenges alleging substantive error should be approached in two different stages. The first question is whether or not the adjudicator had jurisdiction. The answer to that question here was that he did, on any contractual route being proposed by either party. He was to be appointed under the Scheme. Chalcroft's only point on jurisdiction was that RMP had not properly identified the contract that gave rise to the Scheme route to jurisdiction.

Whilst the Judge noted that it may be "*linguistically and even technically correct*" to describe Chalcroft's various alternative formulations as different contracts from the contract alleged by RMP, that difference should not be determinative when it was remembered that the court was concerned with one contracting process, with the only question being which party had correctly identified where in that process the relevant binding contract was formed. Where it was agreed that each of the alternatives was sufficient to found jurisdiction under the identical route of the Scheme, it seemed to the Judge that to rule RMP "*out of court*" because it may have misidentified the contractual provisions that would give the adjudicator jurisdiction under the Scheme was a *"return to the formalistic obstacle course*".

The Judge noted that:

> *"The adjudication system was and is meant to provide quick and effective remedies to parties, equally accessible to those who are legally represented as to those who are not; and I bear in mind that the system now covers not only written contracts but also oral contracts which increases the likelihood that they may be mis-described*".

The Judge awarded RMP summary judgment. He decided that the adjudicator had had jurisdiction because, however the contractual arrangements between the parties were correctly to be described, they mandated the use of the Scheme and the adjudicator had been properly appointed by the Scheme's procedure. The present case was to be treated as one where the adjudicator had jurisdiction to resolve the dispute that was referred to him, namely how much was owing to RMP under its interim application for payment, and

address the correct question without bias, breach of natural justice or any other vice which would justify overturning his Decision. The Judge concluded that:

> *"If, which cannot be resolved now, he has made an error of law in referring to the wrong contractual provisions when deciding the substantive question that was referred to him, that falls within the category of errors of procedure, fact or law which the Court of Appeal has repeatedly emphasised should not prevent enforcement".*

Same dispute

Brown and Another v Complete Building Solutions Ltd [2016] EWCA Civ 1 (Court of Appeal – 13 January 2016)

This was an appeal against summary judgment enforcing an adjudicator's decision. Mr & Mrs Brown (the "*Employer*") argued that an adjudicator had no jurisdiction because he had been asked to adjudicate the same or substantially the same dispute as had been decided by another adjudicator in an earlier adjudication. The contractor contended, as the Judge had found in the Technology & Construction Court, that the adjudicator did have jurisdiction.

The employer had engaged the contractor under a JCT Minor Works Building Contract (2011 Edition) to demolish a dwelling house and build a new one. The architect certified practical completion and subsequently issued a Certificate of Making Good Defects and a Final Certificate. The contractor sent a letter to the employer, claiming a final payment of £115,450. This sum was not paid and the contractor duly served a Notice of Adjudication. The first adjudicator was then appointed by the nominating body.

He issued his Decision in April 2014, concluding that, as was common ground, the Final Certificate was ineffective. However, he also found that the contractor's letter claiming the final payment was not a valid payment notice for the purposes of clause 4.8.4.1 of the contract. His reasons for reaching this conclusion were (a) it was based on the Final Certificate being issued late, whereas it was in fact invalid, and (b) the terms of the contractor's letter did not comply with clause 4.8.4.1 in view of the way it was expressed – it did not make clear that it was a Notice and that it was issued pursuant to that clause. He found that, since no payment notice had been served, no sum was payable.

The contractor immediately sent a new payment notice and, some three weeks later, issued another Notice of Adjudication. An adjudicator was subsequently appointed. The employer disputed his jurisdiction on the grounds that the dispute referred to him was the same, or substantially the same, as that decided by the first adjudicator. The employer therefore refused to participate in the adjudication and did not serve a counter notice, which it was entitled to do under clause 4.8.4.3, and in the absence of which it was obliged to pay the contractor the sum stated in the contractor's notice.

The second adjudicator issued his decision, finding that the dispute which had been referred to him was not the same, or substantially the same, as that which had been referred to the first adjudicator. The second adjudicator found that the first adjudicator had decided that no Final Certificate had been issued in accordance with the contract and that that decision was binding on both the parties and him. He also decided, however, that the contractor's latest payment notice was effective, and that the employer's refusal to make payment had created a dispute which was not the same or substantially the same as that which had been referred to and decided by the first adjudicator. Therefore, and in light of the fact that the employer had not served a counter notice, the second adjudicator decided that the employer was required to pay the £115,000 plus interest and the adjudicator's fees.

The employer refused to pay this amount so the contractor began enforcement proceedings in the Technology & Construction Court where they obtained summary judgment. The employer appealed.

The Court of Appeal referred to the applicable principles as summarised by Mr Justice Coulson in Benfield Construction Ltd –v- Trudson (Hatton) Ltd [2008] EWHC 2333 (TCC) as well as the observations of Lord Justice Dyson in Quietfield Ltd –v- Vascroft Construction Ltd [2006] EWCA Civ 1737 and the recent decision of the Court of Appeal in Matthew Harding (trading as MJ Harding Contractors) –v- Paice and Springhall [2015] EWCA Civ 1281, citing Lord Justice Jackson in the latter case, when he said that:

> *"It is quite clear from the authorities that one does not look at the dispute or disputes referred to the first adjudicator in isolation. One must also look at what the first adjudicator actually decided. Ultimately it is what the first adjudicator decided which determines how much or how little remains available for consideration by the second adjudicator".*
>
> *The Court of Appeal reiterated that the "starting point is the Adjudicator's view of whether one dispute is the same or substantially the same" as the other, this being "a question of fact and degree".*

The Court of Appeal found that the second adjudicator was entitled and correct to conclude that he was not considering the same or substantially the same dispute as the first adjudicator. He had recognised that both parties were bound by the first adjudicator's original finding that the Final Certificate was ineffective and that the contractor's letter seeking payment did not constitute a valid payment notice, and that he was being asked to decide whether a different notice, served some four months later, had different consequences. Whilst both adjudications were dependent on the ineffectiveness of the Final Certificate and were for the same sum, the contractor was not seeking re-determination of any matter which had already been decided by the first adjudicator. The contractor "*was not making good a shortcoming in the earlier letter; it was approaching its claim via a new and different route, one which relied on the letter of 1 April and thereby raised a different dispute*".

The Court of Appeal concluded that "*the analysis might have been different if the Respondent had tried in some way to cure a defect in the earlier Notice so as to rely on it, but that was not the position here. It was the new notice and only the new notice which founded the Respondent's entitlement to be paid*". The appeal was therefore dismissed.

Delegation of Decision Making Function

John Sisk & Son Ltd v Duro Felguera UK Ltd [2016] EWHC 81 (TCC) (25 January 2016)

Sisk applied to the court to enforce a decision of an adjudicator in which he had awarded them a sum in excess of £10M. The Defendant, Duro, resisted the application on the ground that there were breaches of natural justice and/or a wrongful delegation of the adjudicator's decision making function.

Duro relied on three matters. First, they said that there was a real danger that the adjudicator had approached certain issues with a closed mind. Second, he had delegated, or at least he had appeared to have delegated, certain parts of his decision making role to a third party, without notifying the parties of this or seeking their consent. Third, he purported to rectify or to amend the contract in circumstances where neither party had submitted that it should be rectified and without giving the parties any notice of his intention to take that approach.

In his judgment, Mr Justice Edwards-Stuart dealt with many issues which commonly arise in adjudication enforcement proceedings, relating to a breach of the rules of natural justice, such as bias or pre-determination, the adjudicator not consulting the parties and going off on a "frolic of his own". In this instance, he enforced the adjudicator's decision, holding that the adjudicator did not breach the rules of natural justice and that he did not wrongfully delegate parts of his decision making role to a third party.

The third party concerned was a quantity surveyor and a qualified lawyer. He was not an adjudicator. He attended a meeting but no comment was raised by or on behalf of Duro about his involvement until over two weeks after the adjudicator had issued their decision and nearly two month after the meeting in question.

When queried as to the third party's role, the adjudicator replied by saying that he had taken a note for him so the adjudicator, "could concentrate on the matter in issue. At other times he also did certain items of checking and research into matters that I directed he review on my behalf. I have made no charge for his involvement for the time he worked on this application".

Further enquiries of the adjudicator then followed, with the adjudicator describing the inference that the third party was the author of integral parts of his decision as "*plainly incorrect*".

The Judge said that he could see no basis for doubting the adjudicator's statement that he had asked the third party to produce spreadsheets that assembled similar items of work from different areas of the project so that the adjudicator could deal with all similar items in a consistent manner. The Judge said that:

> *"In my judgment, that exercise is simply one of assembling information in a particular order; it does not involved any decision making (save the very mundane level of deciding which items should be grouped together)".*

The Judge could find "*no evidence that any material decision or valuation*" was taken by the third party, rather than by the adjudicator and, felt that, on the contrary, the documents were entirely consistent with the adjudicator's explanation that the third party's role "*was that of a data handler and manipulator and a general administrative assistant*".

The Judge said:

> *"61. Stepping back for a moment and looking at the position overall, I have to say that the more that I have examined Duro's submissions in relation to the role of Mr Hutchinson [the third party] the less compelling I have found them to be. The Adjudicator had to assimilate within the very short timescale allowed in an adjudication information that was in some 20 lever arch files. Without the assistance of someone who could assemble and manipulate the data in a manner that made the figures manageable, the Adjudicator's task would have been almost insuperable. I find it surprising that the court has been given no explanation for the delay of almost two months that elapsed after the meeting of 3 September 2015 before [Duro's solicitors] raised the question of Mr Hutchinson's involvement in the adjudication. It seems extraordinary that no one in Duro's camp asked about his role unless, of course, it had been explained at the outset of the meeting on 3 September 2015 as the Adjudicator has described. Adjudication is a private and confidential process and so, if there was an outsider at that meeting whose position and role was not explained, I find it hard to believe that Duro's representatives… would not have asked what he was doing…*
>
> *62. In these circumstances, Duro has come nowhere near persuading me that any relevant part of the decision making process was delegated to Mr Hutchinson. Regrettably, it appears that Duro is effectively challenging the honesty of the Adjudicator's responses to the questions put to him without having any reasonable justification for doing so."*

Duro's challenge to the adjudicator's decision therefore failed on every ground, and Sisk was awarded summary judgment.

An adjudicator may be in breach of the rules of natural justice by failing to consult with both parties about taking advice from a third party. Although the challenge in this case failed, adjudicators should take note and make sure that they consult with the parties and clearly explain the role of any third party engaged to assist with the adjudication process.

More than one dispute

Deluxe Art and Theme Ltd v Beck Interiors Ltd [2016] EWHC 238 (TCC) (12 February 2016)

The Claimant sought summary judgement to enforce two decisions by the same adjudicator. The enforcement application was resisted by Beck. At the centre of the application was a dispute about whether, pursuant to paragraph 8(1) of the Scheme, an adjudicator has the jurisdiction, without the consent of all parties, to adjudicate at the same time on more than one dispute.

In the introduction to his Judgment, Mr Justice Coulson expressed his *"consternation that a relatively simple enforcement dispute was the subject of no less than six full lever arch files. Four of these files were never referred to. It is exceedingly rare that any adjudication enforcement dispute requires more than one lever arch file of documents. The time is fast approaching when, unless the parties and their solicitors cooperate properly and comply with the TCC Guide, the court will simply refuse to hear cases with such promiscuous and unnecessary bundling"*.

Beck had engaged DATL as a sub-contractor to supply and install joinery items in the Lanesborough Hotel at Hyde Park Corner. Beck were refurbishing the hotel as the main contractor.

There were three adjudications between the parties, each started by DATL. On each occasion, the RICS appointed the same person as the adjudicator.

The first adjudication was concerned with variations and acceleration costs. The adjudicator awarded DATL £72,888.95 plus VAT and interest; that sum was paid.

The second adjudication was concerned with DATL's claim for an extension of time and prolongation costs. The adjudicator awarded DATL £120,559 plus VAT and interest together with an extension of time up to 30 June 2015.

The third adjudication, which was started during the currency of the second one, concerned Beck's failure to reduce the rate of retention from 5% to 2.5% upon practical completion of the sub-contract works. The adjudicator awarded DATL nearly £39,000, plus VAT and interest.

By letter sent while the second and third adjudications were taking place, Beck objected to the adjudicator dealing with two disputes at the same time, the third adjudication having been started before the decision had been given in the second one. Beck did not comply with the second and third decisions, so DATL applied for summary judgment to enforce them.

Mr Justice Coulson first looked at whether or not adjudications two and three encompassed a single dispute between the parties or whether they in fact encompassed two separate disputes. He said that he was "*in no doubt that there were two separate disputes in this case*" for a number of reasons.

Firstly, he said that it was "*plain*" that DATL themselves considered that there were two disputes. If the dispute about retention monies was already included in the second adjudication, there would have been no need for them to issue the fresh Notice in the third adjudication.

Secondly, the adjudicator ruled at the outset that these were, to all intents and purposes, different disputes.

Thirdly, the Judge considered that "*on an application of well known principles, the dispute about extensions of time and loss and expense was a different dispute to the dispute about retention*". He referred to the judgment by Mr Justice Akenhead in Witney Town Council

–v- Beam Construction (Cheltenham) Ltd [2011] EWHC 2332 (TCC), when he said that:

> *"A useful if not invariable rule of thumb is that, if disputed claim No. 1 cannot be decided without deciding all or parts of disputed claim No. 2, that establishes such a clear link as points to there being only one dispute".*

In this case, DATL's claim for an extension of time and loss and expense could easily be decided without any reference to the claim for the failure to reduce retention, which was a separate and standalone claim.

Mr Justice Coulson said:

> *"It should be noted that there is no authority to support the proposition that two different disputes, deliberately raised by the claiming party in two separate adjudication notices, and described in very different terms, could still somehow be part of the same dispute. All of the authorities about the reference of more than one dispute, which culminate in Witney Town, were cases where there was one notice of adjudication, and the outcome depended on the nature of the issues that had been referred to the adjudicator under that single notice. Thus, whilst I accept that the mere fact that there were two notices may not necessarily be determinative, it might be thought that it would take a very unusual set of circumstances to conclude that the disputes referred to in the adjudication notices, started at different times, both formed part of the same dispute".*

The Judge concluded that there were two disputes between the parties, which were the subject respectively of adjudications two and three.

The Judge then asked:

> *"Does it matter?".*

He said:

> *"In my view, this finding does matter. That is because the weight of the adjudication authorities is that an adjudicator only has the jurisdiction to deal with a single dispute at any one time. …. Accordingly, as there were two disputes between the parties, the question then arises as to whether the adjudicator had the jurisdiction to deal with those two disputes at the same time".*

The Judge then examined in detail paragraph 8 of Part 1 of the Scheme, which provides as follows:

> *"8(1) the adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.*
>
> *(2) the adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes…."*

He noted that paragraph 8(1) allows the adjudicator to deal with more than one dispute at the same time but only with the consent of all the parties. Here, Beck did not consent to the disputes in the second and third adjudications being dealt with by the same adjudicator at the same time. On the face of it, therefore, paragraph 8(1) provided what the Judge referred to as "*an insurmountable jurisdictional hurdle for DATL*".

The Judge considered a number of points put forward on behalf of DATL, including that paragraph 8(1) was ultra vires because it was contrary to Section 108(2)(a) of the HGCRA, providing for the ability to adjudicate "*at any time*".

The Judge decided that "*the clear words*" in paragraph 8(1) of the Scheme do prevent an adjudicator dealing with more than one dispute at the same time, if there is no consent for them to do so. In his judgment, the complication arose from the decision to start the third adjudication before the second had been concluded, and to ignore the clear requirement of consent. He said:

> *"I cannot accept that, in some way, the words at paragraph 8(1) relate only to the situation where there are a number of different disputes on the same piece of paper (the adjudication notice) and not to the situation where there are a number of different disputes on many different such pieces of paper. That makes no sense. Moreover, there is nothing in paragraph 8(1) to allow such fine distinctions to be drawn. Whilst these type of points have only ever arisen before in cases where there was a single notice of adjudication, that is pure happenstance. It does not affect the proper construction of paragraph 8(1).*
>
> *I do not accept that in some way the Scheme is unlawful or ultra vires. The parties can adjudicate at any time. That is what the Act provides. All they have agreed here is that, if one party wants to adjudicate more than one dispute at the same time before a particular adjudicator, then that party needs the consent of the other party. That does not unreasonably fetter or impinge upon the underlying right to adjudicate at any time. The Scheme comprises a sensible and practical series of rules governing the way in which that right can be exercised".*

Mr Justice Coulson held that the adjudicator had the necessary jurisdiction when he was appointed to deal with the second adjudication, but did not have the jurisdiction to deal with the third one. Since he never had the jurisdiction to deal with the third adjudication, it was a nullity and could not have affected his continuing jurisdiction in respect of the second adjudication. The decision in the third adjudication was therefore unenforceable, but this had no bearing on the decision in the second adjudication, which decision was therefore enforced.

As a consequence of this judgment, the practice of referring separate disputes to the same adjudicator at the same time will have to come to an end, at least in situations where the Scheme applies and insofar as the parties have not consented to such a practice. Alternatively, if parties want the same adjudicator to decide the dispute, any subsequent referral will have to wait until the adjudicator's decision in the previous adjudication has been received. For adjudicators, it will be one more question they need to ask at the outset, when they are considering accepting an appointment.

Implied Term where the Scheme could not remedy breach of the HGCRA 1996

Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC) (15 February 2016)

Manor, the Employer, engaged Demolition Services, the Contractor, to carry out demolition works at a project in Hull. The parties entered into a contract using the JCT Minor Works Building Contract with Contractor's Design, 2011 Edition. They subsequently amended the contract to provide for milestone payments, with payment in relation to the first milestone "to be made within 72 hours of receipt of invoice, issued when the milestone is achieved". Demolition Services submitted its invoice in respect of the first milestone. Manor served an alleged pay less notice and did not pay the full invoiced amount.

Demolition Services started an adjudication, claiming that its invoice should have been paid in full and that the alleged pay less notice was invalid. Manor argued in turn that its pay less notice was valid and that Demolition Services had failed to achieve the milestone for which it claimed payment.

The Adjudicator found in favour of Demolition Services, deciding that they had achieved the relevant milestone and that the alleged pay less notice had been served late. The

contract provided that a pay less notice must be served "not later than 5 days before the final date of payment". As amended, the final date for payment was 72 hours after receipt of the invoice", which in this case was 26 October 2015. Counting back 5 days from 26 October gave a deadline for serving the pay less notice of 21 October 2015, which was actually before the invoice was submitted. The alleged pay less notice was served on 28 October 2015.

Manor did not comply with the adjudicator's decision and started Part 8 proceedings for a declaration that the decision was unenforceable because the adjudicator had breached the rules of natural justice. It depended on allegations that the adjudicator had failed to take account of evidence the employer had submitted during the adjudication, and that he had given no warning that he was proposing to decided that the pay less notice should have been served before the date of the invoice, thus depriving the employer of the chance to make submissions about such an approach. The employer also sought a declaration on the correct deadline for submitting a payless notice. In turn, Demolition Services sought summary judgment enforcing the adjudicator's decision.

Mr Justice Edwards-Stuart set out in his judgment the relevant provisions of the contract, both as it was originally made and then as it was amended, together with the relevant statutory provisions. He ordered summary judgment, enforcing the adjudicator's decision, finding that the adjudicator had not acted in breach of the rules of natural justice, because, firstly, he had taken account of all of the evidence, and, secondly, the employer had had ample opportunity to make submissions about the timing of the pay less notice, and had in fact made voluminous submissions on this point. Further, even if the Adjudicator had breached the rules of natural justice by not allowing the employer to make submissions about the pay less notice, that would have made no difference, because the pay less notice was served too late in any event.

The Judge said:

> *"…It seems difficult for MAL to say that it was deprived of the opportunity to, still less prevented from, making all relevant submissions as to the timing of the issue of a pay less notice. Its "Jurisdictional Challenge Response" served in the adjudication ran to over 25 closely typed pages. Almost every possible permutation of payment due dates and final date for payment was considered. If anything, the problem was that the adjudicator was presented with far too many submissions, not too few. The scattergun approach always carries with it the risk of obfuscation, not clarification".*

The Judge then considered the issue raised by the final declaration sought, namely when was the final date for payment. He considered the law as to the correct approach to the construction of the contract and the implication of terms, quoting the well known words of Lord Hoffmann in the Privy Council Decision of Attorney General of Belize v Belize Telecom [2009] 1WLR 1988, which Mr Justice Edwards-Stuart described as "authoritative" but giving "rise to some differences of interpretation". He noted that the approach by Lord Hoffmann to the construction and the implications of terms had recently been revisited in the judgments of the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72, quoting from the judgment of Lord Neuberger.

The Judge said:

> *"I shall therefore approach Lord Hoffman's observations in Belize Telecom in the light of the qualifications made by Lord Neuberger in Marks & Spencer. However, the overriding point to be borne in mind is that before implying any term the court must conclude that the implication of that term is necessary in order to give business efficacy to the contract or, to put it another way, it is necessary to imply the term in order to make the contract work as the parties must have intended".*

When considering the true construction of the amendment to the contract, he said:

> *"56. It seems to me that it goes without saying that the hypothetical reasonable person described in the authorities would expect the amendment to be lawful and, if there was more than one way of reading it, would read it in a way that did not infringe any relevant legislation or which would undermine the purpose of the contract…*
>
> *58. The words "Payment to be made within 72 hours of receipt of invoice" are, to my mind, clear and unequivocal: they cannot reasonably be construed to mean payment at some later (unspecified) date. It seems to me that, unless there is a compelling reason to give them any other meaning, then they must be understood as referring to "the final date for payment" within the meaning of the Act. The adjudicator came to the same conclusion…*
>
> *59. Similarly, I regard the amendment as making it clear that the payment of the relevant percentage of the contract value mentioned becomes due on the achievement of the event described: in the case of the first milestone, "when demolition passes the black line"…*
>
> *60. Construed in this way, the amendment is compliant with sub-sections 110(1) and 110A(1) of the Act because the invoice to be issued by [Demolition Services] is the notice that complies with section 110A(1)(b). Although the amendment does not say in terms that the invoice must be given not later than 5 days after the milestone is achieved, the amendment does say that it has to be issued on completion of the milestone (i.e. straight away, and therefore within 5 days). Similarly, an invoice stating the relevant percentage of the contract value due following achievement of the milestone (and the sum paid to date) would comply with section 110A(3). No further explanation would be necessary or possible.*
>
> *61. "The "notified sum" for the purposes of sub-section 110A(3), is clearly the percentage amount stated in the invoice, which must then be paid (to the extent not already paid) on or before the final date for payment: see section 111(1).*
>
> *62. So far, I regard this as fairly straightforward. The potential difficulty is presented by the provisions of the Act relating to pay less notices, which the payer is entitled to give pursuant to section 111(3) of the Act. By sub-section (5) the pay less notice must be given "not later than the prescribed period before the final date for payment" but not before the notice by reference to which the notified sum is determined. In my opinion, that notice is obviously [Demolition Services] invoice.*
>
> *63. As I have already mentioned, the Act makes it clear that the pay less notice cannot be issued before the invoice to which it relates. That is why the Adjudicator was wrong to find MAL should have issued a pay less notice before 23 October 2015.*
>
> *64. The core of the problem is the absence of any express agreement as to "the prescribed period". As I have already pointed out, if the amendment is treated as a situation in which there has been an absence of such agreement, then the result is one that is prohibited by the Act because the pay less notice would have to be given before the issue of [Demolition Services] notice to which it relates.*
>
> *65. The only solution to this problem that I can identify is the one that I mentioned to counsel both at and following the hearing, namely that when making the amendment the parties impliedly agreed that the prescribed period was to be reduced to nil. Thus MAL could issue a payless notice at any time before the final date for payment: that is to say, within the 72 hour period between receipt of the invoice and the final date for payment 72 hours later.*
>
> *66. The question that now arises is whether or not this is a solution that it is open to the court to adopt… Did the parties impliedly reach such an agreement?*

68. By parity of reasoning with Lord Hoffmann's observations in the Belize Telecom case, in this situation the most usual inference would be that no provision in relation to pay less notices was intended (because if the parties had intended something to happen, the amendment would have said so).

69. But on that reasoning the parties will have reached no agreement about the prescribed period, with the result that it is 7 days and the amendment falls foul of the Act for the reasons already discussed. In my view it is most unlikely that the parties could have intended this.

70. Accordingly, in my judgment this is one of those cases where, to adapt Lord Hoffmann's words, the reasonable person in the position of the parties would understand the amendment to mean something else. He or she would consider that the only meaning consistent with the other provisions of the contract, read against the relevant background (in particular, the provisions of the Act), is that something is to happen.

71. Faced with a stark choice between rendering the amendment wholly ineffective or enabling it to work, the parties must surely have intended the latter… The only way in which it can be made to work, whether by so construing the contract or implying a term, is to say the prescribed period was to be nil – thus enabling MAL to serve a pay less notice at any time within 72 hours after receipt of the invoice. In my judgment such an agreement is necessary and it is not inequitable…

72. I therefore declare that, as a result of the amendment, the final date for payment is 72 hours after receipt by MAL of [Demolition Services] invoice following achievement of a milestone. Two other conclusions necessarily follow from the reasoning that leads to this conclusion; first, the due date for payment is the date when the milestone is achieved and, second, the parties are to be taken to have agreed by necessary implication that the "prescribed period" for the service by MAL of any pay less notice is nil (in other words, it can be served at any time between receipt of [Demolition Services] invoice and the expiry of the 72 hours following such receipt.)"

The Judge concluded that the decision reached by the adjudicator that MAL's notice of 28 October 2015 was not a valid pay less notice was correct, albeit for the wrong reasons. MAL's challenges to the validity of the decision had therefore failed.

This case was unusual, with the amendment to the contract meaning that the payment mechanism contravened HGCRA 1996; replacing the offending clause with the relevant provision of the Scheme did not remedy the breach. The solution to the problem was suggested by the Judge and even at that point expressed as a departure from the usual assumption that the parties intended no additional provision beyond what they had expressly agreed. This case identifies an implied term as a possibility that parties' representatives and adjudicators may previously not have considered and may well give rise to more arguments in the future about implied terms in contractual payment mechanisms.

RMC Building and Civil Engineering Ltd v UK Construction Ltd [2016] EWHC 241 (TCC) (15 February 2016)

RMC started an adjudication against UK Construction in relation to its application for payment No. 8. No pay less or other notice had been served by UK Construction and after a few months of unsuccessful negotiations, RMC concluded that it had no choice but to adjudicate.

UK Construction raised various challenges to the adjudicator's jurisdiction but he rejected them and continued with the Referral, eventually ordering UK Construction to pay RMC the sum claimed.

During the adjudication, UK Construction had put before the adjudicator some of the email exchanges between the parties during the negotiations. RMC contended that it should not have done so, as these documents were all "*without prejudice*", being evidence of negotiations to resolve a dispute. Since the dispute was not resolved, RMC submitted that none of the documents, and certainly not those which were said to contain admissions by RMC, should have been put before the adjudicator.

Mr Justice Edward-Stuart considered as a preliminary point whether the communications upon which UK Construction relied had been made on a "*without prejudice*" basis and were therefore not admissible in evidence.

These exchanges between the parties had not been referred to in either the Notice of Adjudication or the Referral Notice; some of them were set out for the first time in the Response. RMC had therefore not waived the "without prejudice" protection. Further, some of the emails upon which UK Construction now relied were not referred to even in its Response (which was called its Reply).

The Judge said as follows:

> *"26. In my view, the exchanges between the parties referred to in the Reply are a classic example of the type of discussions that are protected by the without prejudice rule. That is to say, that admissions against interest made in the course of such discussions are not admissible in evidence. This is because those discussions took place against the background of a dispute and were part of an attempt to resolve it.*
>
> *28. The evidence of these discussions or any admissions made in the course of them should not have been put before the Adjudicator in the first place and they cannot be relied on by UKC in these proceedings as admissions against interest by RMC".*

The Judge also examined whether the adjudicator had exceeded his jurisdiction by awarding a sum in excess of the "*cap*" referred to in paragraph 2(4) of Part II of the Scheme, which seeks to provide a cap on the amount of any stage payments. The cap is described as the difference between the contract price and the aggregate of the instalment stage payments. The Judge held that this challenge failed on the "*very simple*" ground that UK Construction had not shown what the contract price was. They had submitted that it was the original contract sum, notwithstanding the fact that they themselves had certified a far greater amount as being the value of the work undertaken so far.

Having rejected these and other challenges made by UK Construction to the jurisdiction of the adjudicator, the Judge gave RMC summary judgment. He then had to look at whether there should be a stay of enforcement of some or all of the judgment sum. UK Construction based their application for a stay on the assertion that not to give one would amount to a manifest injustice. They argued that such injustice would greatly outweigh any detriment suffered by RMC, which could, in any event, be compensated by a subsequent award of interest.

The Judge said:

> *"The provisions introduced by the Act and the Scheme are all about maintaining cash flow. That purpose is not achieved by simply giving judgment for a sum and then staying its enforcement: interest is often no compensation for a lack of cash flow. …*
>
> *62…. At the very least, the court is entitled to expect that a party seeking a stay of enforcement of a judgment must show either (a) that it will suffer severe financial hardship if required to pay the full amount or (b) that there is a real risk that it may be unable to recover any overpayment (if it is subsequently shown that there was one) from the other party when the dispute is finally resolved….*

> *66 UKC must have known that if it wished to avoid enforcement of all or any part of any judgment, it would have to put forward some credible evidence as to its financial position. Having failed to do so, it cannot expect the court to make assumptions in its favour. Further there is no evidence to the effect that RMC will be unable to repay the balance (if any) between the judgment sum and its true entitlement, if less. In the circumstances, I do not regard this as one of those rare cases in which there should be a stay of enforcement of any part of the judgment sum".*

Cofely Ltd v Anthony Bingham & Knowles Ltd [2016] EWHC 240 (Comm) (17 February 2016)

In this case, heard in the Commercial Court, Cofely sought an order that the First Defendant, Tony Bingham, be removed as arbitrator from an on going arbitration between Cofely and Knowles, pursuant to section 24(1)(a) Arbitration Act 1996, on the grounds that circumstances existed which gave rise to justifiable doubts as to Mr Bingham's impartiality. Those doubts about his impartiality were alleged to involve apparent bias, not actual bias. The defendants disputed the existence of such circumstances and questioned whether Cofely had lost the right to raise the objection under section 73 of the Act.

Cofely had appointed Knowles in 2010 to advise upon and then progress its claims against Stratford City Developments Ltd and the Olympic Delivery Authority. Cofely became concerned about the escalating costs and discussed new terms of remuneration with Knowles, which culminated in the conclusion of a successful fee agreement.

Cofely's dispute with its employers subsequently settled. Knowles alleged that, in settling their claims without Knowles' involvement, Cofely had acted in breach of various provisions of the success fee agreement, and claimed at least £3.5M as fees.

There was an arbitration agreement in the success fee agreement and in January 2013, Knowles gave notice of arbitration to Cofely and applied to the Chartered Institute of Arbitrators for the appointment of an arbitrator. They stated in their application that it was preferable that the arbitrator had both quantity surveying and delay analysis experience and the appointment of Mr Bingham was sought. He was subsequently appointed as arbitrator.

In February 2015, Cofely wrote to Knowles, requesting information in relation to its dealings with Mr Bingham in the light of the decision of Mr Justice Ramsey in Eurocom Ltd v Siemens Plc [2014] EWHC 3710 (TCC), in which judgment had been delivered on 7 November 2014. The Eurocom case concerned a summary judgment application made by Eurocom again Siemens in respect of an adjudication decision by Mr Bingham. The application failed on the grounds that Siemens had real prospects of successfully defending the claim on the basis that Mr Bingham had no jurisdiction because of the representations made by Knowles in applying for the appointment of an adjudicator on Eurocom's behalf. In their application, Knowles had requested that one of three nominees be appointed, one of whom was Mr Bingham. They stated that numerous other named candidates had conflicts of interest and were therefore unable to act. Mr Justice Ramsey held that there was a "very strong prima facie case that [Knowles] deliberately or recklessly answered the question as to whether were conflicts of interest so as to exclude adjudicators who [they] did not want to be appointed".

Cofely explained that they had concerns arising out of the Eurocom case and Mr Bingham's conduct of the arbitration to that time and asked various questions seeking further information concerning the nature and extent of the professional relationship between Knowles and Mr Bingham. Knowles answered five of the questions and Cofely's solicitors then asked more. They also wrote to Mr Bingham, requesting related information. In one email, Mr Bingham stated that in the last 3 years, he had been appointed as adjudicator/arbitrator a total of 137 times. It transpired that, of this total, 25 were Knowles related appointments.

Mr Bingham called a hearing, which took place on 17 April 2015. Mr Bingham subsequently issued his "Arbitrator's Ruling" as to whether the tribunal was "properly constituted", concluding that it was, and that he had no conflict of interest.

Cofely stressed in the court proceedings that neither of the parties had actually requested a ruling on either of these issues and that Mr Bingham appeared to adopt Knowles' figures and other information without undertaking his own independent investigation.

Questions were then put to Mr Bingham to obtain specific total figures as to his income over the past 3 years, and the amount of fees he had earned from appointments involving Knowles. This request was put by Knowles, not Cofely. Mr Bingham provided the information sought.

In his judgment, the judge set out extracts from the transcript of the hearing of 17 April to reflect the tone of the hearing.

The Judge said:

> *"74. The fact that an arbitrator is regularly appointed or nominated by the same party/ legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence…*
>
> *75. The Tribunal's explanations as to his/her knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer may need to consider when reaching a view as to apparent bias… In this regard Cofely relies in particular on Paice v Harding… per Coulson J at [46] – [51] in which it was held that the explanations given by the Adjudicator made apparent bias more rather than less likely having regard in particular to the "aggressive" and "unapologetic" terms in which they were expressed which suggested that he had concluded that something had gone wrong and that "attack was the best form of defence".*

Cofely submitted that an "objective and fair minded observer" would note that:

> *"1. Mr Bingham was clearly someone Knowles was keen to see appointed (even at the expense of making fraudulent misrepresentations to manipulate the appointment process);*
>
> *2. Knowles was also very keen to exclude (for inappropriate reasons) many other potential adjudicators from acting;*
>
> *3. Knowles indicated that this was its usual approach when seeking appointments via appointing bodies such as the RICS.*
>
> *4. One possible explanation for this approach was that Knowles (and its clients) were treated favourably by Mr Bingham on prior occasions and that it expected that he would do so again in the future. A possible reason for this was that Mr Bingham was predisposed to favour Knowles or its clients (perhaps by virtue of his familiarity with Knowles or the regularity in which he was appointed in relation to claims involving them as a party or client representative);*
>
> *5. Mr Bingham would have been aware from copies of the appointment forms that Knowles were in the habit of both (1) nominating individuals that it liked and (2) excluding those that it did not…"*

Cofely also contended that by the way in which Mr Bingham had responded to the questions they posed, a fair minded observer would have increased their concern regarding the possibility that he was biased. They described him as having a "*defensive approach*" and a "*hostile stance*", with an "*aggressive and dismissive demeanour*".

Of the 25 times in the past three years in which Mr Bingham had acted as arbitrator or adjudicator in cases involving Knowles as a party or the representative of a party, 22 of the appointments related to cases where Knowles acted for the claimant/referring party. Knowles itself was the claimant/referring party in three cases. Given that he had been appointed as arbitrator or adjudicator 137 times in the last three years, 18% of Mr Bingham's appointments involved Knowles.

According to Knowles, of those 25 appointments, they had specifically requested that Mr Bingham be appointed in two, they had suggested a list of three names, including Mr Bingham, in three, Mr Bingham was already the tribunal in a case arising out of the same contract in one and in the other nineteen, he was nominated by the relevant nominating body. Knowles however admitted that it had requested in all 25 of the cases that the candidate be both a "QS and barrister" and in most cases "a *QS and practising barrister*", thereby significantly reducing the pool of possible candidates and increasing the likelihood of Mr Bingham being appointed. Of the 109 possible candidates in the case of the RICS, only five are both practising barristers and quantity surveyors. In 18 of those 25 cases, Mr Bingham found in favour of Knowles or Knowles' client (72%) and 25% of his total income as an adjudicator/arbitrator in the past 3 years had come from the 25 appointments involving Knowles.

Knowles made the point that "*the world of construction professionals is relatively small and it is inevitable that Mr Bingham will have had exposure to Knowles and vice versa*" and emphasised that he had never acted as counsel for, or advised, Knowles.

Mr Bingham's position was one of neutrality but he did make the point that none of the appointments identified over the last 3 years had involved Knowles appointing him directly, whereas Cofely had sought his appointment by specific reference to his name in the past.

The Judge decided as follows:

> *"98. The following findings are made viewing the facts as a fair minded and informed observer having regards to the guidance provided by the authorities referred to above and the evidence and submissions of Mr Bingham and Knowles.*
>
> *103. I do…consider that Grounds (1) - (5) raise concerns of apparent bias.*
>
> *104. The starting point is the relationship between Mr Bingham and Knowles as now disclosed by the evidence. This is set out in detail in paragraph 91 above, but of most significance is that it shows that over the last 3 years 18% of Mr Bingham's appointments and 25% of his income as arbitrator/adjudicator derives from cases involving Knowles.*
>
> *105. Mr Bingham's attitude to this, as made clear at the hearing and as maintained in his statement, is that this is irrelevant as all these appointments were made by an appointment body rather than Knowles directly. On this logic even if all his income derived from cases involving Knowles there would still be no cause for concern.*
>
> *106. It is to be noted, moreover, that the CIArb acceptance of nomination form calls for disclosure of "any involvement, however remote", with either party over the last five years. Acting as arbitrator/adjudicator in cases in which Knowles is a party or a representative of a party is a form of involvement.*
>
> *107. Further, the evidence shows that even though Knowles does not appoint an arbitrator/adjudicator directly, it is able to influence and does influence such appointments, both positively and negatively. It does so positively by putting forward the name of its chosen appointee either on his/her own or with others. It also does so more indirectly by identifying required characteristics that will only be shared by a small pool of people. It does so negatively by putting forward a list of those potential appointees that it does not wish to be*

appointed and who are said to be inappropriate. These practices would be apparent from the appointment forms which, as was common ground, would have been forwarded to Mr Bingham. Their significance is highlighted by the Eurcom case which provides a striking example of Knowles steering the appointment process towards its desired appointees, and doing so as a matter of general practice.

108. The existence of Knowles appointment "blacklist" is itself a matter of significance. It means that the arbitrator/adjudicator's conduct of the reference may lead to him/her falling out of favour and being placed on that list and thereby effectively excluded from further appointments involving Knowles. That is going to be important for anyone whose appointments and income are dependant on Knowles related cases to a material extent, as is the case for Mr Bingham.

109. It is right to observe that only 3 of the 25 cases (including the present case) involved Knowles as a party. However, that would be sufficient to trigger disclosure… In any event, it is self-evident that, in many cases in which Knowles acts as claims consultant for the referring party, it is likely to have a significant say both in who should be put forward as arbitrator/adjudicator, either expressly or impliedly by reference to narrow qualification requirements, and also in who should be sought to be excluded…

111. Whilst it was reasonable for Mr Bingham to call for a meeting to seek to address the concerns raised by Cofely, the meeting instead became a means by which Mr Bingham would arrive at a "ruling" on apparent bias. Neither party, however, was seeking such a "ruling", nor was it an appropriate matter for him to be making a "ruling" upon. As was made clear, all Cofely was seeking was further information in order to decide what position to adopt in relation to the concerns it had raised… Mr Bingham gave the impression that he was seeking to pre-empt that process by pressuring Cofely into acknowledging that there was no issue to be explored.

112. Of further concern is the manner in which this was done at the hearing. Excerpts of the transcript have been set out above. They illustrate how Mr Bingham was effectively cross-examining Cofely's counsel and doing so aggressively and in a hostile manner. …

114. In addition the statement (by Mr Bingham) does suggest that Mr Bingham regarded and regards Cofely's request for information as "assertive, challenging, perhaps even bullying behaviour". This is consistent with his own assertive response at the time. However, the reality is that in general Cofely's enquiries were reasonably made and expressed, particularly insofar as they sought a general statement as to the proportion of appointments and income derived from Knowles' related cases over the last 3 years. Mr Bingham appears, however, to have considered Cofely's enquiries to amount to an unwarranted attack on him and in turn to have seen attack as the best form of defence – this involved descending into the arena.

115. For all these reasons I consider that there is force in Grounds (1) – (5) relied upon by Cofely and that considered cumulatively they do raise the real possibility of apparent bias.

116. Where there is actual or apparent bias there is also substantial injustice and there is no need for this to be additionally proved…

118. For the reasons outlined above I find that Cofely have established the requisite grounds for removal of Mr Bingham as arbitrator under section 24(1)(a) of the Act".

Fenwick Elliott

The construction & energy law specialists

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
T +44 (0)20 7421 1986

www.fenwickelliott.com