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Adjudication Update No.5

14 October 2021

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Today's Agenda

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- Payment disputes: where are we now?
- Adjudication and insolvency: the limits of Bresco
- Case law update

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Payment disputes: where are we now?

Recap I

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- ISG v Seevic College [2014] EWHC 4007 (TCC)
  - Pay the notified sum
  - And *no right* to demand a revaluation of the sum due in that payment cycle
  - The archetypal "smash and grab"
- This makes sense in the context of an interim application
  - Pay the sum due now, and sort it out in the next payment cycle
  - Employer is out of the money for a month or two

Recap II

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- Harding v Paice [2015] EWCA Civ 1231
- In a *final account context*, the Adjudicator's task is to assess the sum "properly due"
- Easy to see why that decision was reached: the Employer has no opportunity, after the final account, to deal with an overvaluation in the next cycle
- But slightly unsatisfactory as a decision, because it turned on the specific words of the JCT form in question, rather than setting down a general point of principle

Recap III

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- Grove v S&T [2018] EWCA Civ 2448
- Sir Rupert Jackson to the rescue
- Parties *can* adjudicate the true value of an interim application
- But only *after* they have paid the notified sum:

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What is really going on?

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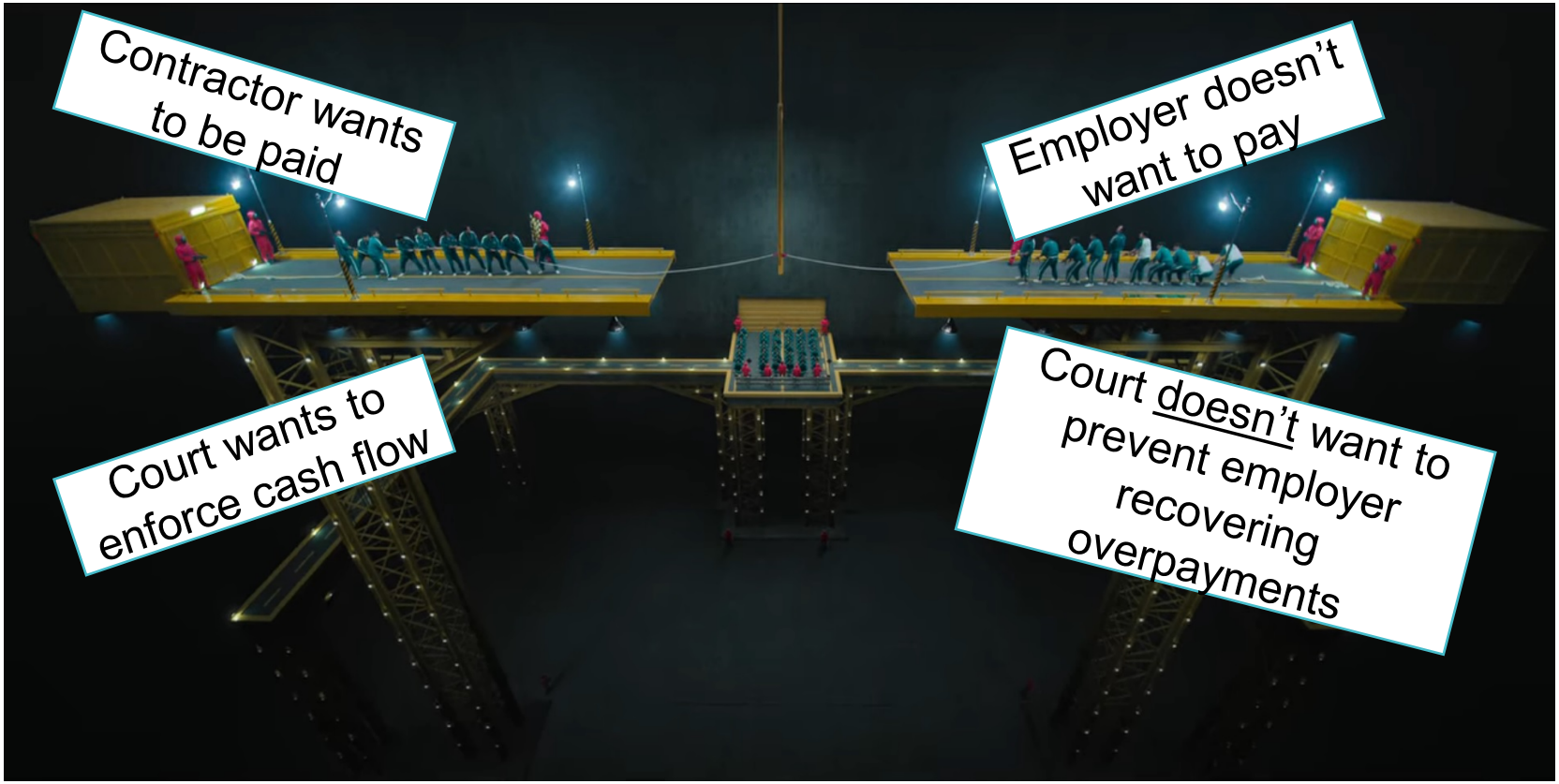

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Where is the front line now?

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- Jackson in Grove:

> "*Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation*."

- But this has not stopped Employers from trying

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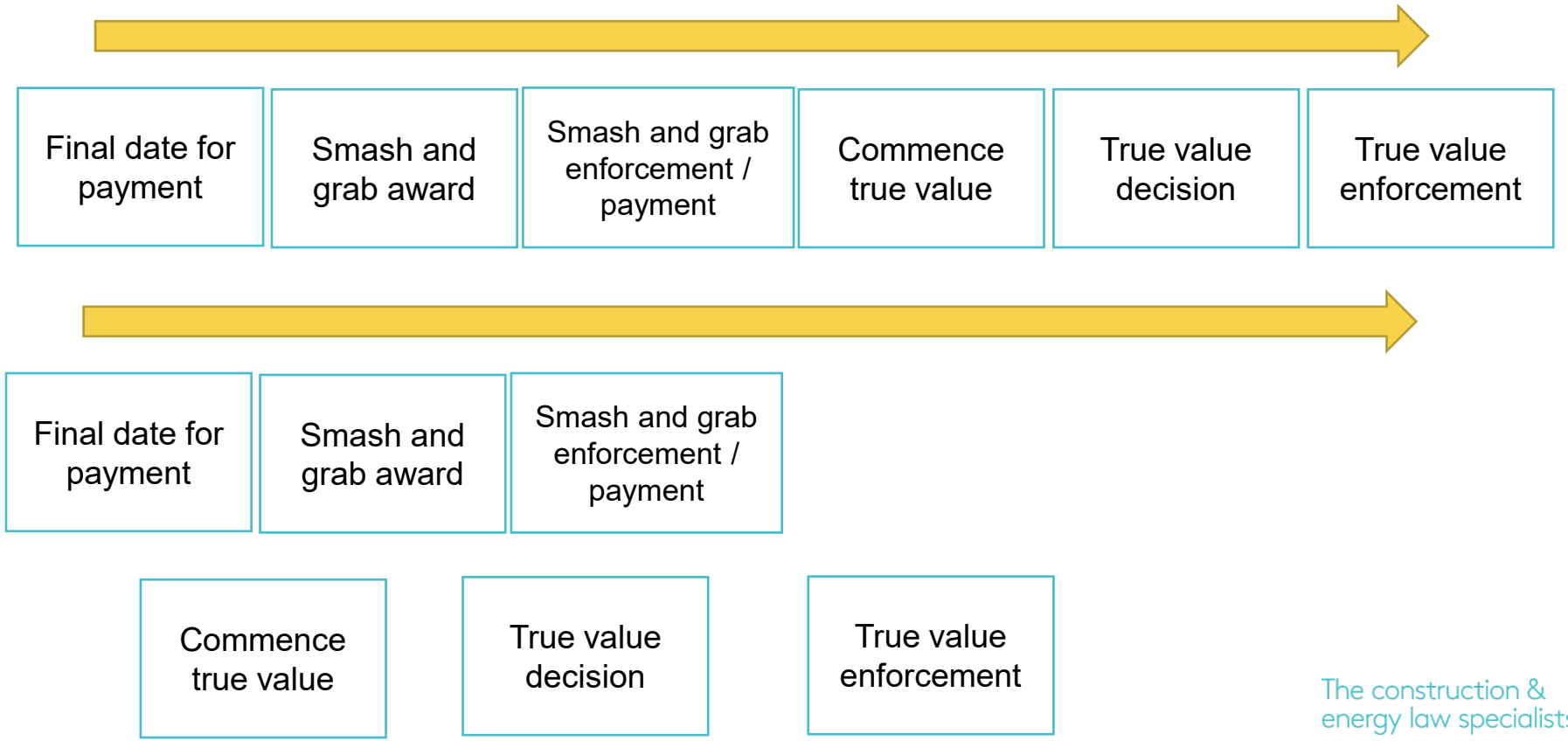
Two recent cases

- Davenport v Greer [2019] EWHC 318 (TCC): "*it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication*"
    - But also: "*the employer must make payment … before it can commence a 'true value' adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation*"
- Brosely v Prime Asset Management : "*attacking the validity of that Decision without prior payment of the amount awarded in Decision No. 1 would be a remarkable intrusion into the principle established in S & T: it would permit the adjudication system to trump the prompt payment regime…*"

So which is it? Cannot commence or cannot rely?

- Really significant for an Employer who is out of the money:



If you cannot *commence* true value, what is the status of such an adjudication?

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- Is it a point that goes to the jurisdiction of the adjudicator?
- Or does the adjudication somehow become valid at a later date?
- Or, per Davenport, is it incumbent on the contractor to try and injunct the true value adjudication?

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Adjudication and insolvency: the limits of Bresco

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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First case since Bresco

Can an insolvent company enforce an adjudicator's decision?

CA judgment handed down on 7 October 2021

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Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25

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- An adjudicator has jurisdiction to deal with a dispute referred by an insolvent company
- Insolvency doesn't mean that there is no longer a dispute or claims fall away
- Bresco had a contractual and statutory right to adjudicate – would ordinarily be inappropriate for a court to interfere with the exercise of those rights.
- Adjudication is a speedy, cost effective form of dispute resolution – purpose of adjudication not limited to cashflow – adjudication was proportionate for of dispute resolution for Bresco's liquidators to pursue.

Therefore, Bresco could continue with the adjudication it started in 2018.

- *Obiter* comments from Lord Briggs which suggested that summary judgment to enforce an adjudicator's decision will frequently be unavailable when a claimant is in liquidation with the court either refusing it outright or granting it with an immediate stay of execution

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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Parties entered into a subcontract for landscaping works at Olympic Park – based on NEC3 – provided for adjudication

In 2012, just before completion of works, John Doyle went into administration and ceased work. Erith had to complete works itself. 2013 – John Doyle went into Creditors Voluntary Liquidation.

A dispute arose as to final account.

In 2016, John Doyle's claims were assigned to a third party, Henderson & Jones.

In 2018, John Doyle commenced adjudication claiming £4m. Erith argued that John Doyle had already been overpaid by £3m.

Adjudication took 5 months. Eventually, Adjudicator awarded John Doyle £1.2m

In 2020, John Doyle sought to enforce the adjudicator's decision

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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Adjudication binding pending final resolution by court

Security for the principal sum - risk that if Erith paid the £1.2m, it would be lost in the liquidation and there would be little or nothing recovered if it later transpired that Adjudicator had been wrong and Erith had overpaid.

Also, security for Erith's costs?

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

TCC – Fraser J

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Security for Repayment of principal sum

- No undertakings or security had been offered by liquidators. The security that had been offered, in the form of letter of credit and ATE policy, had come from Hendersons
- Having analysed security offered, determined it was inadequate

Security for costs

- Security offered was again in form of ATE insurance policy. There was also reference to a template Deed of Indemnity which was said to deal with exclusions in the ATE policy to which Erith objected.
- Again decided that it was inadequate

Therefore, summary judgment to enforce decision refused but even if John Doyle had been entitled to SJ, Judge would have granted a stay of execution in any event

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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Grounds for John Doyle's appeal:

Security for principal sum

1. Judge should have found that not only had liquidators offered security, but the security they offered, being a payment of the judgment sum by Erith into an escrow account or court, was adequate.

(argument not address at first instance as Erith said this was not the basis on which John Doyle had argued security at that time)

Security for costs

2. Judge was wrong to decide that inadequate security for costs had been provided on basis that the Deed of Indemnity would only be engaged by commencement of proceedings by *John Doyle*, not Erith.

3. Even if ATE and/or Deed of Indemnity did not themselves constitute adequate security for costs, Judge had erred in law deciding that Rule 6.42 of Insolvency Rules did not provide adequate security for Erith

(Erith submitted that this argument was not put to the Judge at first instance and so could not be raised on appeal)

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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CA's initial observations

- Any undertakings offered must be clear, evidenced and unequivocal
- John Doyle had failed in to follow these simple steps

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John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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Ground of Appeal 1 dismissed:

- Suggestion by John Doyle that Erith should pay the £1.2m into an escrow account or court had not been a clear and unequivocal offer.
- What was required was an undertaking by liquidators to ring-fence the £1.2m so it was not available for distribution in the liquidation. The liquidators had given no such undertaking.
- In any event, liquidators could not have made offer to accept payment of the £1.2m into escrow account or court because under terms of agreement between liquidators and Hendersons, payment was to be made to Henderson.
- Questionable whether payment in the court was a proper way to provide security in respect of an adjudicator's decision – goes against principle of maintaining construction industry cash flow as would deprive a working contractor of cash whilst left sitting uselessly in court.

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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Ground of Appeal 2 dismissed:

- It was acknowledged that the draft Deed of Indemnity only related to security for John Doyle's costs in a claim against Erith, not the other way around but John Doyle said an email from insurer indicated that the Deed included any claim brought by Erith against John Doyle.

- Rejected by CA: upon analysis the Deed of Indemnity did not provide adequate security

Ground Appeal 3 dismissed:

- S.6.42(4)(a) of Insolvency Rules prioritises expenses incurred by a liquidator in legal proceedings over the costs and expenses of the liquidation.

- Argument that s.6.42 provided security for costs not open to John Doyle on appeal as it had not argued point in TCC.

- In any event, s.6.42 was not relevant.

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [EWCA] Civ 1452

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Is a company in liquidation entitled to enter summary judgment on its claim arising out of an adjudicator's decision, without regard to the paying party's set-off and counterclaim?

John Doyle argued that John Doyle was entitled to SJ because the sum due was the 'net balance'; there were no significant claims under other contracts and there were no non-contractual claims. Because these conditions had been met, there was, subject to security, an entitlement to SJ. Further, adjudication was pointless without summary enforcement.

CA held that even if Judge had erred regarding inadequacy of security offered, John Doyle would not have been entitled to summary judgment:

- John Doyle's arguments rewrite Bresco - obiter comments in Bresco did not support proposition that an insolvent claimant in adjudication enforcement should always be entitled to summary judgment.

- suggestion that John Doyle is entitled to SJ in current circumstances is contrary to the principles established in Bouygues

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Although result may be considered unsatisfactory, CA said this assumes that SJ is the only weapon to a claimant:

- a claimant can seek a larger sum though the courts but offer to accept adjudicator's lower figure, thereby putting defendant on cost risk
- It may be possible for claimant to demonstrate entitlement to interim payment under CPR. 25

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Stay of execution

- Even if John Doyle had been entitled to summary judgment, CA would have granted a stay of execution
- This would have been consistent with the authorities and with the way the court has sought to enforce judgments against claimants in a risky financial position e.g. Bouygues and Wimbledon v Vago

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Recent cases

Prater v John Sisk
[2021] EWCH 1113 (TCC)

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- Prater seeks to enforce an adjudication decision (in adjudication 4 between these parties)
- Sisk resists enforcement on the basis that:
  - Decision in Adjudication 4 relied on findings in Adjudication 2
  - AND decision in Adjudication 2 was without jurisdiction, because the Adjudicator purported to decide multiple disputes in the same adjudication

First issue: can Sisk use a jurisdictional challenge to Adjudication 2 to resist enforcement of Adjudication 4?

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- Sisk had served a notice of dissatisfaction with the decision in Adjudication 2, but not taken any steps to challenge that decision in Court or in Arbitration
- Sisk argues they don't have to take any active steps: if the Adjudicator in Adjudication 2 lacked jurisdiction, the decision was a nullity.
- Court says no: decision in Adjudication 2 is binding unless and until overturned by the Court: if Sisk wanted to avoid being bound by those findings, it should have sought to overturn the decision in court or arbitration

Second issue: was the decision in Adjudication 2 without jurisdiction?

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- Prater sought to refer *some* but not all elements of its final account (EoT, provisional sums, contracharges claimed by Sisk)
- Sisk says: this is a classic example of multiple disputes being referred in one adjudication, so adjudicator lacked jurisdiction
- Prater says: no, the issues we referred are part of one larger dispute, which is the dispute as to the value of the final account
- Court agrees: "*each issue was therefore linked to determining the real dispute between the Parties… it would not be practicable for a party to be faced with either bringing all issues going to a complex account dispute in a single adjudication, or bringing a whole series of different adjudications in relation to each and every issue arising…*"

Second issue: was the decision in Adjudication 2 without jurisdiction?

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- Court agrees: "*each issue was therefore linked to determining the real dispute between the Parties… it would not be practicable for a party to be faced with either bringing all issues going to a complex account dispute in a single adjudication, or bringing a whole series of different adjudications in relation to each and every issue arising…*"
- This is a seriously useful tactical tool in the context of a final account dispute

Quadro Services v Creagh Concrete Products [2021] EWHC 2637 (TCC)

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- Quadro seeks to enforce an adjudication decision as to its entitlement to be paid the sums demanded in three undisputed invoices
- Creagh resists enforcement on the basis that this constitutes three separate disputes: one under each invoice

Quadro Services v Creagh Concrete Products [2021] EWHC 2637 (TCC)

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- Court says no: "*the fact that it is technically possible to determine whether each individual invoice is due without determining whether the other invoices are due does not mean that those issues cannot be sub-issues in the wider dispute as to the whether the Claimant is entitled to the sum it claims is due to it under the contract.*
- *If the Defendant's argument were right, the result would be that the parties would be put to the very significant cost and inconvenience of numerous separate adjudications to recover a single claimed balance under a single contract. That would be contrary to the policy underlying the adjudication process of efficient, swift and cost-effective resolution of disputes on an interim basis.*"

When is a warranty a construction contract?

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- Parkwood Leisure v Laing O'Rourke [2013] EWHC 2665 (TCC):
  - To be determined on the wording of the warranty
  - But where there is a warranty to the effect that the warrantor promises to undertake works in a particular way, or in accordance with the terms of another contract, that is a contract "for construction operations" for the purposes of the 1996 Act.
  - So a promise that *past works* have been done in a particular way is unlikely to be a construction contract

When is a warranty a construction contract?

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- Toppan Holdings v Simply Construct [2021] EWHC 2110 (TCC):
  - Contractor warrants that it will perform and has performed "*diligently its obligations under*" the construction contract
  - BUT the warranty was not executed until four years after practical completion: at that point the only issue outstanding, possibly, was liability for latent defects
  - Properly construed against that factual background, this was not a contract for the carrying out of construction operations: they had already been done

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Disputes arising from multiple contracts

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Delta Fabrications v Watkin Jones & Sons [2021] EWHC 1034 (TCC)

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- Parties had entered into two sub-contracts for works at student accommodation: one for roofing and one for cladding.
- Later in the Project, parties began administering payment for both subcontracts together, including one final account.
- Disputes arose over final account which Delta referred to adjudication.
- Watkins Jones resisted enforcement on grounds that adjudicator lacked jurisdiction because Delta had referred disputes under two separate contracts to the adjudicator in the same adjudication.

Delta Fabrications v Watkin Jones & Sons [2021] EWHC 1034 (TCC)

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Delta argued that adjudicator did have jurisdiction on three grounds:

1. The parties agreed to vary the contracts by their conduct (by the way the parties dealt with payment applications) so that there was only one contract

2. Even if the parties' conduct did not amount to a variation so that there was only one contract for all purposes, it had the effect of amalgamating the contracts into one contract for the purposes of the HGCRA; alternatively

3. Watkin Jones was estopped from denying that there was a single contract within the meaning of HGCRA

Delta Fabrications v Watkin Jones & Sons [2021] EWHC 1034 (TCC)

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Issue 1: Had the parties varied the contracts by conduct so there was only one contract?

No. Following a detailed factual analysis HHJ Sarah Watson decided:

1. Combining payment applications was not the same thing as combing two contracts;

2. Clear evidence would be required to combine two contracts – that was lacking here

3. Parties conduct before and after alleged agreement to amalgamate indicated that they had not intended contracts to be amalgamated.

Delta Fabrications v Watkin Jones & Sons [2021] EWHC 1034 (TCC)

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Issue 2: Had the contracts been amalgamated for the purposes of the HGCRA's adjudication provisions?

No.

1. The parties treating the contracts as one for the purposes of payment was not the same as treating them as treating them as one for the purposes of adjudication under HCGRA

2. Judge wasn't persuaded that it is possible for two contracts which she had already decided had not been amalgamated into one under common law (i.e. issue 1) could fall within the definition of "a construction contract" under HGCRA.

Delta Fabrications v Watkin Jones & Sons [2021] EWHC 1034 (TCC)

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Issue 3: Was Watkin Jones estopped from denying that there was a single contract within the meaning of HGCRA?

No.

1. Delta had put forward no evidence to support the three essential requirements for estoppel (representation, reliance and detriment).

2. Therefore, Watkin Jones was not estopped from denying that the contracts should be treat as one.

Conclusion: adjudicator lacked jurisdiction; decision not enforced by TCC.

Breach of Rules of Natural Justice / decision not severable

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Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

- Downs Road engaged Laxmanbhai under a JCT design and build contract
- Downs Road had adopted a practice of issuing payment notices valued at £1 or 97p to gain time to make assessment of sum it actually believed to be due, then issuing a further payment notice.
- February 2021 – Laxmanbhai submitted interim application 34 for £1.8m
- Downs Road issued a payment notice 34 for net payment of 97p saying that a further payment notice would be issued in due course.
- March 2021 – Downs Road issued payment notice 34a for net payment of £657k
- Laxmanbhai commenced adjudication

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

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Adjudicator:

- Refused to deal with Downs Road's cross-claim in respect of am alleged defective capping beam built by Laxmanbhai, saying it fell outside his jurisdiction
- Decided that the true value of interim application 34 was £771k

Downs Road commenced Part 8 proceedings challenging the enforceability of the decision on the basis that the adjudicator had failed to address a line of defence asserted by Downs Road.

However, Downs Road also contended that the decision was still binding as to the true value of interim application 34

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

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TCC – HHJ Eyre QC

Adjudicator had breached the rules of natural justice

"Where the adjudication is concerned with a party's entitlement to be paid money then a defence with would if successful remove that entitlement or diminish the sum to be paid will potentially be an issue in the adjudication"

(paragraph 54 of judgment)

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

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"I find that in adopting that approach the adjudicator took an unduly narrow view of his jurisdiction. The exercise in which he was engaged in his decision was to address the sum due in a particular payment cycle. He set out a conclusion as to the correct figure and stated that interest was payable on the outstanding balance. The capping beam claim was being put forward as a matter which the Employer said reduced the amount which was due in that cycle. It was, accordingly, being raised as a defence in respect of the matter in issue in the adjudication and in respect of which Mr. Entwistle had jurisdiction……If the adjudicator had considered the capping beam claim and had concluded that the defence did not operate to reduce the amount due his decision would have been unimpeachable……. I am satisfied that by deliberately deciding not to address this defence the adjudicator was declining to address a defence which the Employer was entitled to advance and entitled to have considered by the adjudicator."

(paragraph 61 of judgment)

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

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Did the adjudicator's decision on the true value of interim application 34 remain binding?

No – this would turn a single decision with reasoning into a series of separate decisions.

"Where there is such a single decision severance is unlikely to be appropriate even where the stages in the chain of reasoning leading to the adjudicator's conclusion are set out and can be said to be logically distinct. Severance in those circumstances is unlikely to be appropriate because it would involve an artificial division of a continuous chain of reasoning and would create the risk of imposing on the parties an outcome which could not have resulted from the adjudication"

(paragraph 92 of judgment)

Breach of natural justice but decision severable

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CC Construction Ltd v Mincione [2021] EWHC 2502 (TCC)

- Parties' contract was JCT DB, as amended, for private dwelling in Knightsbridge.
- PC certified
- CC issued Final Statement
- Dispute arose regarding sum due to CC and LADs.
- CC referred to adjudication
- Adjudicator:

- Decided Final Statement was conclusive (a letter sent by Mincione did not prevent this) as Mincione had not issued required payment and pay less notice;
- Decided that LADs claim was not part of dispute referred and could not be raised as a set off

CC Construction Ltd v Mincione [2021] EWHC 2502 (TCC)

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TCC – HHJ Eyre QC

- The Adjudicator's failure to consider Mincione's defence that LADs operated as a set off was a failure by the adjudicator to exercise their jurisdiction, which amounted to a breach of natural justice.
- Judge could sever the decision and therefore enforce the balance over the amount of Mincione's LADs claim

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Thank you!
Questions?

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