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Adjudication Update

22 October 2020

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Introduction

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A review key case law over the last few months:

Mark Chennells	Simon Tolson
C Spencer v MW High Tech Projects UK	*MW High Tech Projects UK v Balfour Beatty Kilpatrick Ltd*
John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd	*Dickie & Moore Ltd v Trustees of McLeish*
PBS Energo v Bester	*Lane End Developments Construction Ltd v Kingstone Civil Engineering*
J&B Hopkins v Trant Engineering	*Engie Fabricom Ltd v MW High Tech Projects UK*

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C Spencer v MW High Tech Projects UK

[2020] EWCA Civ 331

C Spencer v MW High Tech Projects UK [2020] EWCA Civ 331

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- Concerned a hybrid contract relating to a waste-to-energy project.

- Per Coulson LJ at [3]:

"… In the last 20 years, much too much time and judicial resource has been spent grappling with the problems created by such hybrid contracts, of which this appeal is but one example. But until the Act is amended to do away with these unnecessary distinctions, the courts have to do their best to resolve the resulting, self-inflicted problems."

- The issue in the case summarised at [4]:

"The issue is whether, in the case of a hybrid contract (which therefore provides for the execution of both construction operations within the Act and construction operations outside the Act), a valid payment notice is required to identify separately the sum due in respect of construction operations only, along with the basis on which that sum has been calculated."

C Spencer v MW High Tech Projects UK [2020] EWCA Civ 331

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Relevant facts:

- Hybrid contract (construction and non-construction operations)
- Provision for periodic interim payments: here milestone payments
- Provisions for payment reflected the requirements of the 1996 Act
- CSL's Application 32: separated out (for first time) sums claimed for construction operations and sums claimed for non-construction operations
- MW's Response: Payment Notice 35: negative payment, with basis set out in spreadsheet. Did not allocate any sums by reference to construction operations only.
- CSL claimed sum for construction operations per Application 32 in full, on the basis there was no valid payment notice or pay less notice, because Payment Notice 35 did not allocate a sum for construction operations only.
- Claimed in Part 8 proceedings in court.

C Spencer v MW High Tech Projects UK [2020] EWCA Civ 331

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- S.104(5):

  "Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations."

- Following sections make provision for adjudication, payment notices, pay less notices.
- CSL's case: the words of s.104(5) ("only so far as it relates to construction operations") had to be read into every section and sub-section of the Act concerned with payment (i.e. ss. 109 – 111) so that where the contract was a hybrid contract, the failure to specify, within the overall sum notified, the amount related to construction operations only, was a failure to comply with the Act.
- Rejected by the Court of Appeal (as it had been at first instance).

C Spencer v MW High Tech Projects UK
[2020] EWCA Civ 331

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1. Proper starting point: the contract terms. Nothing in those terms which required to differentiate in their payment notices between sums notified for construction operations, and sums notified for non-construction operations.

   NB. Coulson LJ expressed doubt as to suggestion of Jackson LJ in *S&T v Grove* to the effect that the primary source of the obligation to pay the notified sum lay in Section 111 of the Act, even if the contractual term mandating payment complied with the Act.

2. There is nothing in the Act stipulating that, in a hybrid contract, payment terms must provide for the separate and distinct notification and breakdown of sums due in respect of construction operations only.

3. There is no basis upon which to "read in" the words "only in so far as it relates to construction operations" to the later sections of the Act. Per Coulson LJ at [51]:

   "It is important to understand what s.104(5) is doing. It is making plain that parties can have a hybrid contract if that is what they want but, if they do, they cannot contract out of the Act in respect of construction operations. As explained further below, it seems to me that s.104(5) does not prevent the parties from contracting in, if that is also what they want. It would therefore be contrary to s.104(5) to use it as a means of restricting the parties' rights and liabilities."

C Spencer v MW High Tech Projects UK [2020] EWCA Civ 331

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4. Parties are at liberty to extend the payment provisions deriving from ss.109 – 111 to cover both construction operations and non-construction operations. That is not only permissible, but to be welcomed.

5. The adjudication provisions made expressly clear that they applied "only to the extent (if any) required by the Act", but there was no similar provision in respect of the payment provisions.

6. This approach accords with the purpose of the Act: upholding stage payments; providing greater certainty and transparency in respect of stage payments. Nobody wants to end up with two separate payment processes, subject to different procedural requirements, to produce two separate sums.

7. Having to undertake an allocation in a contract such as this (with milestone payments covering both operations) would be very difficult, if not impossible.

C Spencer v MW High Tech Projects UK [2020] EWCA Civ 331

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Residual difficulties?

- Unless the parties have agreed a (compliant) contractual adjudication procedure covering both construction and non-construction operations, the Act and Scheme will apply but only in respect of payments in respect of construction operations.
- Starting point: how does the contractor know that he is dissatisfied with the sums paid in respect of the construction operations, and thus wishes to refer the dispute to adjudication?
- How is the contractor to ensure that he refers only his claims for payment in respect of construction operations to adjudication (and thus to ensure that the adjudicator has jurisdiction)?
- How is the contractor to take advantage of his statutory right to suspend (assuming there is no general contractual right to suspend that complies with the Act)?
- All has to be considered at the contract drafting stage.

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John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd [2020] EWHC 2451 (TCC)

John Doyle v Erith
[2020] EWHC 2451 (TCC)

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- Supreme Court in *Bresco* held that companies in liquidation had the right to adjudicate disputes, and that the problems caused by liquidation identified by the Court of Appeal in *Bouygues v Dahl Jensen* [2000] EWCA Civ 507 and in *Bresco* could all be considered at the enforcement stage.

- In *John Doyle v Erith*, the TCC had to consider and apply the principles that govern a party in liquidation seeking to enforce an adjudicator's decision in its favour by way of summary judgment.

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John Doyle v Erith
[2020] EWHC 2451 (TCC)

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Relevant facts:

- Concerned work done by JDC for Erith in respect of hard landscaping to Olympic Park
- JDC into administration June 2012 and creditors voluntary liquidation June 2013
- JDC commenced adjudication on final account January 2018
- Awarded c.£1.2m

John Doyle v Erith
[2020] EWHC 2451 (TCC)

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(1) <u>Summary judgment: In what circumstances will a company in liquidation be entitled to summary judgment on a valid adjudicator's decision in its favour</u>?

- Court considered decisions of Court of Appeal in *<u>Bouygues v Dahl Jensen</u>* and *<u>Bresco</u>*, and of the Supreme Court in *<u>Bresco</u>*

- At [54], Fraser J summarized the principles to be applied when considering an application for summary judgment on an adjudication decision in favour of a company in liquidation:

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John Doyle v Erith
[2020] EWHC 2451 (TCC)

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1. Whether the dispute in respect of which the adjudicator has issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.

2. Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.

3. Whether there are other defences available to the defendant that were not deployed in the adjudication

4. Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.

5. Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

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John Doyle v Erith
[2020] EWHC 2451 (TCC)

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Note:

- Re 1 (is the decision in respect of the whole of the parties' financial dealings): "smash and grab" adjudications will rarely, if ever, be susceptible to enforcement by way of summary judgment by a company in liquidation ([55]).
- 4 and 5 (undertakings / security; real risk of deprivation of security): may be different ways of expressing the same principle.
- Three mechanisms for security in *Meadowside* not exhaustive, but likely to be the three main ways of providing security:
  - Undertakings by liquidators
  - Third party guarantee / bond
  - ATE insurance

John Doyle v Erith
[2020] EWHC 2451 (TCC)

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- Per Fraser J at [62]: Circumstances where summary judgment would be available to a company in liquidation who seeks to enforce an adjudicator's award in its favour:

1. The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract.

2. Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application.

3. There is no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim.

John Doyle v Erith
[2020] EWHC 2451 (TCC)

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- As to the third (real risk):
  - [80]:
    - Primary concern of the court is as to recovery of the sum paid by way of satisfying the adjudicator's decision.
    - Secondary concern: the costs that would be expended in doing so.
  - [85]: As per *Meadowside*: the correct approach is to ensure that "as near as possible, the safeguards [offered by way of security] must seek to place the responding party in a similar position to if the company was solvent."

John Doyle v Erith
[2020] EWHC 2451 (TCC)

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2) Stay: Would a stay of execution be granted in any event?

- Correct approach is as per *Wimbledon v Vago* [2005] EWHC 1086 (TCC) (plus *Gosvenor London v Aygun Aluminium UK* [2018])
- Emphasis here on principle at [26(e)] in *Wimbledon v Vago*: "If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted."
- [125]: Unless there are some exceptional circumstances that would justify not awarding a stay of execution, the most that JDC could achieve would be summary judgment on the sum awarded by the adjudicator, with a stay of execution.
- [126]: "Exceptional circumstances" would cover the same ground as whether a real risk that summary enforcement would deprive the paying party of its right to have recourse to that claim as security for its cross-claim.

John Doyle v Erith
[2020] EWHC 2451 (TCC)

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- *Meadowside*: possible means of providing security to take the case out of the normal run of things.
- Recent case in which adequate security given and decision enforced: *Style & Wood (in administration) v GE CIF Trustees* [2020] EWHC 2694 (TCC)
  - Ring-fencing of sums paid over
  - ATE policy as security for costs

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- Final point: procedural issue: expedition / abridgment of time procedure for TCC enforcement proceedings unlikely to be appropriate or available for claims for summary judgment brought by companies in liquidation in respect of historic disputes.

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PBS Energo v Bester

[2020] EWCA Civ 404

PBS Energo v Bester
[2020] EWCA Civ 404

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A case concerning fraud

- Facts:
  - 2 adjudications: (1) held appellant entitled to terminate; (2) awarded consequential quantum of c.£1.7m
  - TCC refused to summarily enforce decision in adjudication 2.
  - Respondent's case on mitigation rejected in the adjudication on the basis that the plant in question was held for the appellant's benefit upon payment BUT it subsequently transpired that this was arguably untrue.
  - That emerged from an analysis of disclosure made available in the TCC proceedings for a final determination of the underlying dispute.
  - The point was not taken in the adjudication and could not reasonably have been taken.
  - This was therefore the rare case of an adjudicator's decision arguably having been procured fraudulently.

PBS Energo v Bester
[2020] EWCA Civ 404

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- Summary of principles per Coulson J at [23]:

1. If the allegations of fraud were made in the adjudication then they were considered (or will be deemed to have been considered) by the adjudicator in reaching his decision, and cannot subsequently amount to a reason not to enforce the decision.

2. The same principle applies if the allegations of fraud were not made in the adjudication but could and should have been made there.

3. If the adjudication decision was arguably procured by fraud or where the evidence on which the adjudicator relied is shown to be both material and arguably fraudulent then, on the assumption that the allegations of fraud could not have been raised in the adjudication itself such allegations can be a proper ground for resisting enforcement.

PBS Energo v Bester
[2020] EWCA Civ 404

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- Two further points addressed by the Court of Appeal:

1. Although a defendant seeking to resist summary enforcement of an adjudicator's decision by raising an allegation of fraud may be well-advised to plead a defence, the pleading and service of such a defence is not a condition precedent which has to be fulfilled before the defendant can rely on such an allegation.

2. In a case where substantial allegations of fraud are found to be arguable, the right course will usually be to refuse summary judgment. In such a case, no question of a stay of execution then arises.

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J&B Hopkins v Trant Engineering

[2020] EWHC 1305 (TCC)

J&B Hopkins v Trant Engineering [2020] EWHC 1305 (TCC)

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- An attempt to resist summary judgment on a "smash and grab" adjudication decision on an interim application – or to seek a stay of execution – on the basis that the "payment cycle" had moved on
- Whilst there is a "correction principle" – i.e. the true value of the work can be corrected in subsequent applications – the amount on the prior application remains due, and the dispute on that does not disappear.
- The principles in respect of stay are those in *Wimbledon v Vago* and *Gosvenor v Aygun Aluminium*. There is no broader principle to the effect that a stay can be ordered so as to avoid "manifest injustice" or otherwise.

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MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited

A reminder on Crystallisation

MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited [2020] EWHC 1413 (TCC)

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The central issue faced by Mrs Justice O'Farrell was whether the submission of an expert report was **supplemental** to an existing claim or whether it gave rise to a **new** claim. The effect of contractual response periods on the crystallisation of a construction dispute.

MW engaged BBK under an amended JCT Design and Build Sub-Contract, 2011 Edition to carry out M&E services at a new £23m laboratory

BBK served five notices of delay between March 2018 and February 2019, as required by clause 2.17 of the parties' JCT Design and Build Sub-contract. MW, did not respond to these notices or request further particulars to support the extension of time (EOT) claimed within the 16-week period specified in clause 2.18.

The job was late, so in August 2019 BBK referred to adjudication its claim for an EOT. On 10 October 2019 the adjudicator published his decision, awarding BBK the full EOT sought and ordering MW to pay the adjudicator's fees.

MW sought Part 8 declaration that an adjudicator's decision was of no legal effect. The basis for this claim was that no dispute existed between the parties, and therefore the adjudicator did not have jurisdiction.

MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited [2020] EWHC 1413 (TCC)

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Was serving a delay report eight days before commencing the adjudication, the crystallisation of a dispute?

Timeline

- JCT DB 2011 Sub-Contract; x 5 Notices of delay issued on 2 March 2018, 13 April 2018, 29 June 2018, 1 October 2018 and 27 February 2019. No response.
- 30 July 2019: Blackrock Goodman Report served.
- 8 August 2019: Notice of adjudication. *"A dispute has arisen between the Parties in relation to BBKL's entitlement (as at 18 November 2018) to an extension to the period of completion for Section 3 of the Sub-Contract Works…"*
- The Adjudicator awarded Balfour Beatty the full extension of time claimed.

MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited [2020] EWHC 1413 (TCC)

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- MW argued it was entitled to the full 16 weeks to assess a claim under the contract - no dispute could crystallise until a reasonable time had elapsed for MW to consider the claim and either accept or reject it.
- For an expert Report to constitute a fresh notice, it was found there must have been a "***material change***" in the notice which altered the "fundamental nature and basis of the claim".
- The five delay notices sent by BBK complied with the Sub-Contract.
- A relevant factor was "MW's silence as it gave rise to an inference that the delay claim set out in the notices was not admitted" but MW had abjectly failed to respond to the notices as required by clause 2.18.

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Clause 2.17.1 JCT Design and Build Sub-Contract, 2011, Notice by Sub-Contractor of delay to progress

> *"If and whenever it becomes reasonably apparent that the commencement, progress or completion of the Sub-Contract Works or such works in a Section is being or is likely to be delayed the Sub-Contractor* ***shall forthwith give notice to the Contractor of the material circumstances****, including, insofar as the Sub-Contractor is able, the* ***cause or causes of the delay****, and* ***shall identify*** *in the notice* ***any event*** *which in his opinion is a Relevant Sub-Contract Event"*

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Clause 2.17.2

> *"In respect of each event identified in the notice the Sub-Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give* ***particulars of its expected effects****, including an* ***estimate of any expected delay*** *in the completion of the Sub-Contract Works or such works in any Section beyond the relevant period or periods for completion stated in the Sub-Contract Particulars (Item 5) or any previously revised period or periods"*

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Clause 2.17.3 the continuing duty on subbie

> *"The Sub-Contractor **shall forthwith notify** the Contractor of **any material change in the estimated delay** or any other particulars and supply such further information as the Contractor may at any time reasonably require"*

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Clause 2.18.2 - Fixing period for completion

> *"Whether or not an extension is given, the Contractor shall notify the Sub-Contractor of his decision in respect of any notice under clause 2.17 as soon as is reasonably practicable and in any event* ***within 16 weeks of receipt of the required particulars****…"*

The reason that the "no crystallised dispute" jurisdictional challenge is so rarely successful is, seen two earlier cases O'Farrell J referred to of Sir Rupert Jackson and Sir Robert Akenhead, namely *Amec v SoSfT* and *Cantillon v Urasco…*

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No new law

Jackson J's seven propositions in *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC) at para 68 (*Halki Shipping Corporation v Sopex Oils Ltd; Edmund Nuttall Ltd v R G Carter; Beck Peppiatt Ltd v Norwest Holst etc…)*

1. The word "dispute" should be **given its normal meaning** etc …Jackson J's 'seven propositions' on the dispute/no dispute issue were upheld by the CA…

2. The **mere fact** that one party **notifies the other** party of a claim does **not automatically** and immediately give rise to **a dispute**. A dispute does not arise unless and until it emerges that the claim is not admitted.

3. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure.

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4. Equally, **a stated deadline** and the **reasons for its imposition** may be **relevant factors** when the court comes to consider what is a reasonable time for responding.

5. If the claim is **so nebulous and ill-defined** that the **respondent cannot sensibly respond to it**, neither silence nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

6. **If the claimant imposes** upon the respondent **a deadline** for responding to the claim, **that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding**…

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Cantillon Ltd v Urvasco Ltd [2008] EWHC 82 at para 55, Akenhead J covered the principles for defining when a dispute has crystallised:

"…One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other ***before*** *the referral to adjudication or arbitration…"*

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- Question was whether the additional information, objectively assessed, gave rise to a new claim.
- Necessary to construe the provisions in a *"sensible and commercial way"* (Paragraph 53).
- Goodman Report did not amount to a fresh notification, whether under Clause 2.17.1, 2.17.2 or 2.17.3.
- *"It contained a detailed critical path analysis and the total extension of time claimed was **marginally longer** than the previous cumulative extension claimed but it was **not materially different** to the delay claim advanced in the earlier notices…"* (Paragraph 59).

MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited [2020] EWHC 1413 (TCC)

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O'Farrell J:

*"60. The Goodman Report was **evidence by way of expert analysis to support BBK's claim** for an extension of time to Section 3 of the works in respect of which there was a crystallised dispute.*

61. The dispute referred to adjudication was BBK's disputed claim for an extension of time to Section 3 of its works. It follows that the adjudicator had jurisdiction to determine the dispute and the adjudication decision was valid"

MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited [2020] EWHC 1413 (TCC)

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- As the delays claimed in BBK's notices were cumulative, a dispute had crystallised at the end of the 16-week period after receipt of the latest notice.
- The Report did not amount to a fresh notification under clause 2.17 and so MW was not entitled to a restart of the 16 week-period (per clause 2.18.2).
- Although the global delay claim had increased in the Report from that claimed in the latest notice, this was only by 9 days and the causes of the delay were the same. The Report did **not** represent a "***material change***"; it was **merely further evidence** of an already crystallised dispute. The adjudicator had jurisdiction and his decision was valid.
- The expert report served by BBK did not include any novel issues sufficient to re-start the 16 week period.

MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited [2020] EWHC 1413 (TCC)

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Take away: to all parties …makes it clear that the Court will construe contractual terms in a sensible and commercial way and not provide a party which has failed to adhere to the terms with a retrospective and overly technical get out of jail free card.

Although each case will turn on its own facts, Expert's reports are typically introduced in support of delay claims at a late stage, often shortly before adjudication commences.

As long as the report does not substantially digress from the grounds upon which delay has previously been claimed, the report will not in itself give rise to a new and potentially uncrystallised dispute. So:

1. No new law.

2. Respond!

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Dickie & Moore Limited v Trustees of McLeish [2020] CSIH 38

A cut and snip?

Dickie & Moore Limited v Trustees of McLeish [2020] CSIH 38

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Scots case, it is a bit of a sword of Solomon case.

Separating the good from the bad: appeal court guidance on the severability of adjudication decisions (aka the 'cut and the snip')

All about a new build house for a family trust in Armadale. SBC WQ, Scots Scheme applied re Adjudication

Adjudicator dealt with an extension of time and the associated award for loss and expense that had not crystallised but also dealt with quantum dispute that was a legitimate dispute.

The Inner House, Court of Session (Highest Scots civil court) case followed an earlier decision last year critical of the adjudicator.

Dickie & Moore Limited v Trustees of McLeish [2020] CSIH 38

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In the second judgment… D&M successfully argued that the adjudicator's decision was severable; the parts over which the adjudicator *did* have jurisdiction (i.e. quantum) could be enforced.

The court conducted an extensive review of conflicting case law in this area and held that "*the critical question ought not to be whether there is a single dispute or difference, **but** whether it is clear that there is a **core nucleus** of the decision that can safely be enforced.*" Per *Willow Corp SARL v MTD Constructors* [2019] EWHC 1591 (TCC):

Where Pepperall J granted the declaration that the adjudicator had made an error of law in relation to the construction of a PC clause. The dismissal of liquidated damages was incorrect, but the error did not affect the rest of the adjudicator's decision. Since no breach of NJ, the claim for LDs could be severed from the adjudication and the balance could be enforced.

Dickie & Moore Limited v Trustees of McLeish [2020] CSIH 38

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This decision is a **nod to the sanctity of the adjudication process**: reiterating and reinforcing the policy reasons that the court should, where realistically practicable, enforce **any valid parts** of an adjudicator's award.

That policy evident both at first instance and Inner House -- both noted a finding that severance was not possible would serve to encourage parties to resist enforcement on minor grounds in the hope of then invalidating the entire decision.

BUT permitting severance of an award to be enforced may encourage parties to adopt ambush tactics in the knowledge that part of the decision may still be enforced if there is a successful jurisdictional challenge.

Important to note the Inner House's comment that different considerations may apply to the severability of awards depending on the grounds of challenge relied on. In particular, the Inner House noted that *"breach of the principles of natural justice inevitably casts an element of doubt over the whole of the adjudicator's reasoning."*

It remains to be seen whether this decision will be applied by the English courts, although as a decision from Scotland's appeal court it is likely to be persuasive in courts throughout the UK.

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Lane End Developments Construction Limited v Kingstone Civil Engineering [2020] EWHC 2388 (TCC)

Lane End Developments Construction Limited v Kingstone Civil Engineering

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A case of "*Better three hours too soon than a minute too late*" per Shakespeare - The Merry Wives of Windsor, i.e**. appointing an adjudicator before serving notice of intention to refer**.

- The lesson of this case is clear – the smallest slip can have serious, and expensive, consequences in the fast and brutal world of construction adjudication. But a bit of a peculiar case.

The point has been addressed previously in at least 4 cases:

- 1. *Vision Homes Ltd v Lancsville Construction Ltd* [2009] EWHC 2042 (TCC)
- 2. *Lee v Chartered Properties (Building) Ltd* [2010] EWHC 1540 (TCC)
- 3. *Palmac v Park Lane Estates* [2005] EWHC 919 (TCC)
- 4. *Lobo v Corich* [2017] EWHC 1438 (TCC)

- Facts: Dispute under a subcontract to which the **Scheme applied** as no ADR clause. Lane were MC, - housing project in Cheshire and *Kingstone* was its enabling works subcontractor on a housing project in Cheshire. Basic Scheme error not following due process. Quick recap:

Lane End Developments Construction Limited v Kingstone Civil Engineering

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Paragraph 2 (1) of the Scheme

2.—(1) <u>Following the giving of a notice of adjudication</u> and subject to any agreement between the parties to the dispute as to who shall act as adjudicator—

(a) the referring party <u>shall request the person</u> (if any) …to act as adjudicator…

Lane End Developments Construction Limited v Kingstone Civil Engineering

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Serving NOITR after nom application to RICS proved again to be a decisive error.

- **Facts:** *Kingstone* issued interim payment application No.17 in for £356k odd for the period ending on 29 February 2020. Lane End did not serve a pay less notice. Kingstone adjudicated.

In the adjudication:

- Lane End initially contended that the notice of adjudication did not comply with the Scheme because it did not do enough to disclose an intention to refer the dispute to adjudication. Lane End did not specifically take a point about the timing of the notice of adjudication but stated they wished to reserve their position as to the adjudicator's jurisdiction.

- Lane End did not explicitly take a point about the timing of the notice of adjudication but stated they wished to reserve their position as to the adjudicator's jurisdiction.

- The adjudicator reached his decision, he concluded that Kingstone was entitled to the full amount of the interim application.

Lane End Developments Construction Limited v Kingstone Civil Engineering

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An odd case as along the way the adjudicator unilaterally 'ended' the adjudication mid lockdown.

On 8 April 2020, the adjudicator received an computerised "out of office" email from Lane End stating that they were closed for business due to the COVID-19 pandemic. He replied by email to Lane End alone (but not Kingstone) surprisingly stating that "*this effectively terminates the adjudication*", and he ordered Lane End to pay his fees to date, which they duly did!

Days later Kingstone became aware of the termination and, following various emails with the parties, the adjudicator wrote to them saying that it was now apparent that Lane End was "***not closed for business; I have not resigned and I will therefore continue***"! He proceeded to make a decision in Kingstone's favour, finding that no valid payment or pay less notice had been served.

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Post adjudication:

Lane End refused to pay and pursued a Part 8 declaration from the TCC that the adjudicator's decision should be set aside / not enforced, while Kingstone commenced a Part 7 claim to enforce the decision of the adjudicator.

Predictably, Lane End argued that the adjudicator was *functus* when he sent his email referring to the termination of the adjudication.

The judge was content that this email was intended to be a notice of resignation, but he held that the adjudicator had not validly terminated his appointment because **paragraph 9(1) of the Scheme** only allows the adjudicator to resign by giving **notice to both** parties, and the adjudicator had only emailed Lane End, the Responding Party.

Timing is key!

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Did the defective appointment present an opportunity to make an election? No! This flaw cannot be renounced by a responding party.

Were the facts giving rise to right of election known? No, as no person can meaningfully make an election if they are unaware of their opportunity to do so.

Was the defect waived or right of election lost by participating without reservation of rights? HHJ Halliwell decided (referring to Coulson J on jurisdictional reservations in *Cannon Corporate Ltd v Primus Build Ltd*) that Lane End's successfully reserved the right to challenge the adjudicator's appointment.

Timing is everything!

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Held:

- Adjudicator had not been validly appointed
- Responding party could not waive this error even if it wanted to
  - Not a procedural defect
  - Adjudicator was not appointed at all
  - Respondent also had insufficient knowledge to waive the issue

Note: Threshold requirements for a valid adjudication are so fundamental they cannot be waived

Easy lesson: Get your notice in before appointing an adjudicator!

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Engie Fabricom UK Limited v MW High Tech Projects UK Limited

[2020] EWHC 1626 (TCC)

Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd

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- All about adjudicability of a dispute and 'construction operations. Is an energy from waste plant caught by the HGCR Act? Good old s105.

- Whether the ***primary activity*** at an energy from waste plant is power generation or waste treatment. Mrs Justice O'Farrell case.

- Engie was engaged by MW under a subcontract based upon the IChemE Subcontract (the Yellow Book 4th edition 2013) - to construct a fluidised bed gasification power plant (a waste incineration plant) in Kingston upon Hull. *Engie* was subcontracted by *MW* for the main contract works including the design, engineering, manufacture, delivery to site and completion of the gasification plant system. The Yellow Book had been amended to state that *adjudication only applied to the extent the Construction Act applied*.

- Two disputes arose between the parties and were adjudicated. *Engie* was successful in both and sought to enforce the decisions through the courts. In its defence, MW argued that the exclusion in section *105(2)(c)* applied, so the adjudicator had lacked jurisdiction.

Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd

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105(2)(c) re - Meaning of "*construction operations*".

(2) The following operations **are not construction operations** within the meaning of this Part—

(a) drilling for, or extraction of, oil or natural gas;

(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

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- MW contended the adjudicator lacked jurisdiction as the Sub-contract was for the installation of plant on a site where the primary activity is power generation.

- Engie's case was that the Sub-contract was for the installation of plant where the primary activity is the disposal and thermal treatment of waste (by incineration/gasification) and that power generation was merely a secondary activity

If the primary function of a waste from energy site = waste disposal then adjudication is a mandatory for all elements of the works. If the primary purpose = power generation then the assembly, installation and demolition of P&M etc would be outside the Act.

A year earlier Mr Jonathan Acton Davis QC had to deal with s105 and he refused to enforce an adjudicator's decision as the Defendant had *real prospects of success in establishing that the primary activity at site was power generation.*

The project came back to court this time following further adjudications on the project.

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O'Farrell J decided that the primary activity at the Energy Works Hull facility is power generation for the following reasons.

- Firstly, *the EPC Contract is very strong evidence that the primary purpose of the plant is energy generation*, rather than waste treatment. The *general description of the EPC Contract works as a gasification facility* receiving RDF indicates that the RDF is a fuel for the purpose of operation of the plant. The performance of the plant is measured by reference to heat and energy production, rather than waste throughput.

- Secondly, although the Industrial Emissions Directive ("IED") permit was issued by the Environment Agency for a waste incineration plant under the terms of the EPC Contract and R1 "Recovery" status could only be achieved if the principal purpose of the plant was energy recovery rather than waste disposal under R10.

- Thirdly, the factual evidence indicates that the plant was not developed or intended to be operated in furtherance of any particular waste or energy policy.

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- Fourthly, the planning application documents identify the project both as a waste management facility and as a plant for the generation of renewable energy. Therefore, they do not assist in determining the issue.

- Finally, the funding model for the facility estimated that most of the revenue would be generated by electricity exports to the National Grid and subsidies/grants.

So like Acton-Davis QC a year earlier O'Farrell J decided:

i) The primary activity on the site is power generation.

ii) The Sub-contract works **did not** constitute construction operations under the Act and therefore there was no statutory or contractual right to refer the disputes to adjudication.

iii) The adjudicator did not have jurisdiction to determine the disputes the subject of the claims.

iv) The awards made in the first and second adjudications are unenforceable

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Thank you

Questions?

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