

## **Challenges in Adjudication**

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Challenges to enforcement of Adjudicator's awards have been par for the course since the introduction of Adjudication. The Courts, however, remain reluctant to uphold such challenges.

### **Key Points**

- Successful jurisdictional challenges likely to remain few and far between.
- Merits of making specific / general objections to jurisdiction.
- Failure to consider uninvited submissions not necessarily a breach of natural justice.
- Awareness of a without prejudice offer does not automatically result in Adjudicator bias.
- Failure to consider a relevant defence constitutes failure to exhaust Adjudicator's remit therefore rendering decision unenforceable.

Parties must ensure that challenges are made validly to avoid being accused of the approach criticised by the Court of Appeal in *Carillion v Devonport* of "*simply scabbling around to find some argument, however tenuous, to resist payment*". The Court of Appeal set out its stall in that case stating, "*To seek to challenge the adjudicator's decision on the ground that he had exceeded his jurisdiction or breached the rules of natural justice (save in the plainest of cases) is likely to lead to a waste of time and expense*".

*GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC) provides useful guidance on how to make such a challenge.

Ringway's solicitors challenged the Adjudicator's jurisdiction listing a number of specific reasons and adding a general objection: "*There may well be further jurisdiction issues which we have not yet had time or opportunity to investigate. Our clients' position in this respect is reserved and the above list should not be understood to be exhaustive.*"

The Adjudicator continued and made an order finding Ringway liable to GPS. Ringway refused to pay and GPS commenced enforcement proceedings.

Justice Ramsey set out three sets of circumstances a respondent may find themselves in:

- No objection raised to jurisdiction and participating in the Adjudication. In that case, even if there were valid grounds upon which to challenge, the party has conferred jurisdiction and waived its right to object on jurisdictional grounds.
- Raising specific jurisdictional objections. In that case, a party cannot rely on other grounds that were available but not specified during the Adjudication.
- Making a general objection. Whilst that may be valid, it is certainly not desirable as it causes a number of practical difficulties. As Ramsey J

highlighted: "*The Adjudicator cannot investigate any specific objection and, if appropriate, decide not to proceed. The other party cannot decide whether any specific objection has merit.*"

In considering the effect of a general objection, Ramsey J considered the approach taken in arbitration. In *Allied Vision Ltd v VPS Film Entertainment GmbH* [1991] 1 Lloyd's Rep 392, Potter J had held that, "...*what matters is a clear qualification at the time of the appointment of the arbitrator and implicitly, that if that is done then subsequent participation in the arbitration under the umbrella of the original reservation will not, without more, amount to a waiver or ad hoc submission.*"

Applying this reasoning, Ramsey J found that *Ringway's* general objection was in fact effective. The wording *Ringway* had used was sufficient to prevent a waiver of any jurisdictional argument.

Given the weight the Court attached to the specific wording used by *Ringway*, it must remain the case that raising a general, unspecified, objection remains a risky strategy.

Natural justice has been a popular ground for challenge. One of the specific challenges made in *Ringway* was that there had been a breach of natural justice in that the Adjudicator had not taken into account an uninvited (and, it transpired, immaterial) submission *Ringway* had made.

The Court applied Akenhead J 's reasoning in *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250 that,

*"It is only if an Adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that... breach of rules of natural justice ... comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice ..."*

Applying the test to *Ringway*, Ramsey J held that there was nothing "*obviously unfair*" about the Adjudicator's decision not to allow *Ringway's* further submission. Furthermore, "*...in the context of a rapid summary procedure leading to a temporarily binding decision, the Adjudicator was entitled and needed to limit the number of rounds of submissions.*"

This was approved in *AMEC v Thames Water* involving a similar set of circumstances. It was argued that the Adjudicator had not considered a submission made two days before his decision was due. The Court held that,

*"... it is becoming very common for parties in adjudication to believe that they are in some way entitled to respond to every submission put in by the other party. In my view, unless the contract or the relevant adjudication rules expressly permit it, they do not have such an entitlement. Adjudication is not intended to resolve disputes by reference to innumerable rounds of submissions or pleadings."*

This was in line with the Scottish case of *Ardmore Construction Ltd v Taylor Woodrow Construction Ltd* (12<sup>th</sup> January 2006, unreported) in which Lord Clarke held that,

*"It is now settled law that adjudicators have to observe principles of natural justice in reaching their decisions. Nevertheless ... the courts have taken a realistic and pragmatic approach to such questions by emphasising that the nature of the process, and in particular the strict time limits within which adjudicators are constrained to operate, require that insubstantial or technical, breaches of natural justice should not be taken merely to delay or avoid payment and the taking of such points should certainly not be encouraged by the courts."*

Bias of the Adjudicator is another ground of challenge that the courts have ruled on recently.

In *Volker Sevin Limited v Holystone Contracts Limited* (September 2010), Holystone argued that the Adjudicator's decision was unenforceable, amongst other things, because during the adjudication proceedings, Volker had wrongly made the Adjudicator aware of a without prejudice offer of settlement. This, Holystone argued, resulted in the Adjudicator being biased against them.

Justice Coulson rejected this argument. The without prejudice offer had been made at a meeting which both parties had referred to in the Adjudication.

The Court applied the test in the Court of Appeal case of *Re Medicaments and Related Classes of Goods (No 2)* [2001]: Would those circumstances lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, of bias?

The Court found that there was no doubt that a fair-minded and informed observer would not reach such a conclusion and any suggestion to the contrary was considered entirely unrealistic. The Adjudicator made clear in his Decision that he was indifferent to the fact that an offer had been made, and that the bulk of his decision had already completed by the time he was told about it.

In response to alleged unconscious bias, it was held that in any construction dispute it would in fact be expected that negotiations had occurred. This was particularly so where questions of liability had been dealt with and the only remaining question was quantum (as in the Volker case). Reference was also made to old arbitration cases, when the Arbitrator would be made aware of the existence of a sealed envelope containing a without prejudice offer. There was no suggestion there that the Arbitrator was biased due to his knowledge of an offer having been made.

In an earlier case, *Specialist Ceiling Services Northern Limited v ZVI Construction* (2004), not only was liability still in dispute but the Adjudicator had also been made aware of the make up of the offer (although not its amount). In that case also it was found that there was no bias and the decision was enforced.

These cases underline that the Courts' over-riding position remains that, *"It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator"* (*Carillion v Devonport*).

The case of *RBG Limited v SGL Carbon Fibers Limited* (June 2010) is one of the rare instances of the Court refusing to enforce an Adjudicator's decision.

An action for enforcement was defended on the basis that the Adjudicator had failed to exhaust his jurisdiction. It was also argued, as an alternative, that the Adjudicator was in breach of natural justice.

The Notice of Adjudication referred to the dispute as payment of sums set out in invoices and interest. SGL argued that the Adjudicator had to consider their argument that there had been overpayments so that even if the sums in the invoices were due, no further payment required to be made.

The contractual mechanism for payment in the applicable contract – NEC 3 Option C – was considered. This set out how to assess the amount due at each assessment date. The amount due is the Price for Work Done to Date (PWDD) plus other amounts to be paid to the Contractor less amounts to be retained. The assessment involves calculating an accumulating total and allows for corrections in that the assessment includes, as a potential deduction, cost which should not have been paid.

The Adjudicator had regard only to the sums sought in the invoices. He declined to consider disallowed costs or overpayments at an earlier stage of the works. These, he thought, would have to be dealt with in a separate Adjudication.

Lord Menzies considered that the question in the Notice raised the issue of RBG's entitlement to payment of the sums in the invoices. The contractual mechanism which regulated assessment of the entitlement was on an accumulating PWDD. Entitlement to payment depended on the total of the PWDD being accurate. The contract allowed the PWDD to be reviewed and corrected. Given that, the Adjudicator should have revisited the PWDD and considered whether it contained any elements of overpayment.

SGL's defence in the Adjudication was that regardless of whether or not the invoices were correctly vouched, no payment was due because of the earlier overpayments. The judge found that even if that did not fall within the scope of the dispute as defined in the Notice, it would still fall within the scope of the Adjudication. He relied on Lord Macfadyen in *Construction Centre Group v Highland Council (2002)* where he said that whilst the scope of the Adjudication is defined by the Notice, it is also the case that any ground that may be founded upon by the respondent to justify his position also falls within the scope of the Adjudication. If the Notice raises the issue of whether a particular sum is due, the Adjudicator must consider any relevant defence on which the respondent relies in arguing that the sum is not due.

In RBG, the judge considered that the question of the earlier overpayments fell within the Adjudicator's jurisdiction as set out in the Notice. However, even if it did not, on the basis of Lord Macfadyen's views in *Construction Centre Group*, the overpayments were clearly a relevant defence relied upon by SGL which should have been considered by the Adjudicator. It was found that the Adjudicator had failed to exhaust his jurisdiction as a result of misunderstanding his remit.

The judge also considered whether there had been a breach of natural justice. Ultimately, he did not make his decision on the basis that there had been, but he did note that such a breach would have been substantial since it would have amounted to denying SGL a fair opportunity to present its case.

It is clear then that although challenges will be entertained in certain cases, these are likely to remain few and far between.

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