WHEN THE ADJUDICATOR GETS IT HORRIBLY WRONG

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Introduction – the problem

Sometimes adjudicators can make fundamental mistakes: perhaps as a result of adopting an incorrect method of calculation, or because a sum of money was attributed to the wrong party, or because something was left out of account.

It might be said that one of the defects of adjudication is that the law provides limited remedies where obvious mistakes are made. In particular, it is well established that the court will not refuse to enforce an adjudication award simply because the adjudicator made an obvious error.[1]

The slip rule is to correct slips (for example writing 'referring party' instead of 'respondent') not to correct what was done deliberately, but wrongly.

My very first case on taking up my appointment 18 months ago was one in which the adjudicator failed to take into account in his decision sums that had already been paid or allowed under interim certificates. The result was that one party was awarded £500,000 when in fact it owed the other party £400,000.[2]

A possible solution

The decision of an adjudicator is binding unless and until the dispute is finally determined by legal proceedings, arbitration or agreement: see section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) and paragraph 23 of the Scheme for Construction Contracts (the Scheme).[3]

The method of final dispute resolution chosen by the parties is of crucial importance in relation to the correction of an error by an adjudicator. So if there is an arbitration clause, the court cannot determine the dispute finally in any circumstances.

If an award is not paid in accordance with the adjudicator's decision, the successful party will usually enforce it by bringing a claim and seeking

1 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 49, 70 Con LR 41, (2000) 2 TCLR 308 (TCC) and [2000] EWCA Civ 507, [2000] BLR 522, 73 Con LR 135, (2001) 3 TCLR 2 (CA).

2 *Geoffrey Osborne Ltd v Atkins Rail Ltd* [2009] EWHC 2425, [2010] BLR 363 (TCC).

3 Scheme for Construction Contracts (England & Wale) Regulations 1998 No 649 and Scheme for Construction Contracts (Scotland) Regulations 1998 No 687.

summary judgment (in England and Wales) or a summary decree (in Scotland) for the amount awarded.

This raises the question of whether the unsuccessful party can bring some form of cross proceedings in which the court can be asked to resolve finally the issue on which the adjudicator went wrong.

This has been permitted in England and Wales by what is known as a Part 8 claim.[4] The English Part 8 procedure is appropriate where a party wishes to have an issue resolved by the court which involves no significant dispute of fact, for example the construction of a clause in a lease or a commercial contract.

So in England and Wales a party may seek to attack an adjudicator's decision in a case where he has made an obvious error by taking out a Part 8 claim, as well as serving a defence to the claim for summary judgment to enforce the award. In other words, the unsuccessful respondent can invite the court to determine finally the point wrongly decided by the adjudicator, provided that it involves no substantial dispute of fact.

However, I understand that in Scotland there is no equivalent to the English Part 8 procedure.

So is there any other way in which this result can be achieved?

There may be two other ways in which in England and Wales a party may seek to attack an adjudicator's decision in a case where he has made an obvious error.

The first is for the unsuccessful respondent to assert by way of counterclaim that the adjudicator made an obvious error and to ask the court to determine the relevant issue finally in favour of the respondent. So the respondent would seek to meet the claim for summary judgment (or decree) by taking out a separate cross application for summary judgment (or decree) on the ground that there is no defence to the counterclaim (provided, of course, that the relevant issue involves no substantial dispute of fact so that it can be determined summarily).

Another possibility is to take out a cross application for the determination of a preliminary issue, namely the point wrongly decided by adjudicator. Any determination of the issue by the court would be final.

The English cases

Why has not this happened in England and Wales more often?

The answer may be the result of a widespread misunderstanding of the decision, both at first instance and in the Court of Appeal, in the case of *Bouygues v Dahl Jensen*.[5] That was a case where the adjudicator made a

4 Civil Procedure Rules Part 8, Alternative Procedure for Claims.
5 *Bouygues v Dahl-Jensen*: note 1.

simple, but fundamental, error which the court refused to correct. Although the respondent had brought a Part 8 claim the court did not consider it.

Why was this? To understand the answer it is necessary to look at the facts of the case and the precise nature of the applications that were being considered.

Bouygues v Dahl-Jensen

Bouygues (B) was the main contractor under a building contract. Dahl-Jensen (D-J) was the subcontractor. B terminated D-J's employment and D-J went to adjudication claiming damages for delay and disruption for lack of information and the value of additional works. B started a cross adjudication, which was treated as a counterclaim.

The adjudicator had valued the claim and cross claim and, taking into account sums already paid, concluded that D-J was owed about £200,000. However, the adjudicator had made an error. When calculating the sums due to each party he included the 5% retention. But the sums paid, which he deducted, excluded the 5% retention – which was not due.

As a result, the adjudicator over assessed the sums due to D-J by about £350,000: if the adjudicator had taken this into account he would have found that D-J owed B about £140,000, not that B owed money to D-J.

When this was pointed out to the adjudicator he refused to correct his decision.

Each party made applications to the court.

- D-J sought summary judgment to enforce the award;
- B brought Part 8 proceedings for declarations, *inter alia*, that the adjudicator's decision was void and should be set aside and that £140,000 was due to B;
- D-J made an application to stay the Part 8 proceedings pursuant to section 9 of the Arbitration Act 1996.

Of these applications Dyson J said:

> 'It will be convenient to start with [D-J's] application for summary judgment, since if that succeeds, the remaining applications fall away'.[6]

A little earlier in his judgment, Dyson J noted that it was submitted by counsel for B that the adjudicator's decision in effect to award the retention money to D-J was outside his jurisdiction, and was therefore not binding on the parties. Dyson J said that the fundamental issue that he had to decide was whether that submission was correct. Other issues had been raised, but that was the key question.

Dyson J went on to hold that the adjudicator had not exceeded his jurisdiction; he had answered the question put to him but he had answered it in the wrong way. However, since on these findings the adjudicator had not exceeded his

6 *Bouygues v Dahl-Jensen*, note 1, at first instance, paragraph 18.

jurisdiction, albeit that he had made a mistake, the award was upheld and D-J was entitled to summary judgment.

The case is well known as clear authority for the proposition that an adjudicator's decision can be set aside on limited grounds only and that a mistake, however glaring, is not one of them.

But the case is sometimes cited, wrongly, for the proposition that enforcement proceedings *cannot* be met by an application under Part 8 for a declaration that the adjudicator was wrong and his award should be set aside.

Why is this wrong? The answer lies in understanding exactly what was being claimed by B in the Part 8 proceedings. It was seeking a declaration that the adjudicator's decision was void because he had exceeded his jurisdiction, not because it was wrong.

So B was not, as one might have expected, seeking a final determination of the question of whether or not the adjudicator was wrong to take the retention money into account on one side of the equation only.

But why not? The reason is simple, although it is not explained in the judgments (either at first instance or in the Court of Appeal). B could not ask the court for a final determination of the retention issue because the subcontract contained an arbitration clause. Thus any dispute could only be determined finally by arbitration, and not by litigation. That was implicit in D-J's application for a stay under s 9 of the Arbitration Act.

So in its Part 8 proceedings B had to confine itself to attacking the adjudicator's jurisdiction. But it did not need a Part 8 claim to do this – it could have resisted enforcement on the usual grounds.

If there had been no arbitration clause, B would have been entitled to ask the court to determine the issue of D-J's entitlement to retention. This would have been an issue that raised no disputed questions of fact and therefore entirely suitable for Part 8.

That was exactly what was done in *Jarvis Facilities v Alstom Signalling*.[7] In that case HHJ Humphrey LLoyd QC held that the HGCRA did not say when the final determination may take place and that it would be absurd if the court had to enforce the decision and then set it aside later. The judge held that *Alstom* was entitled to have the points that it had raised determined at the same time as Jarvis's application for summary judgment.

7 *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1285 (TCC).

Geoffrey Osborne v Atkins Rail

A similar issue came before me 18 months ago in *Geoffrey Osborne v Atkins Rail*.[8]

Geoffrey Osborne (GOL) had been making applications for interim payments in the usual way and its claims were valued and sums had been included in the interim certificates. After some delay GOL issued a further application but Atkins Rail (ARL) did not issue an interim certificate within 14 days as the contract required. GOL was ready for this and straight away served a notice to adjudicate, confining itself to two significant claims included in its current application.

Subsequently ARL issued a further interim certificate in which it reduced its previous valuations of the two claims.

The adjudicator proceeded to value GOL's two claims and from the total valuation he subtracted the negative amount shown in ARL's previous certificate (that is, it showed an overpayment by ARL). However, what the adjudicator omitted to do was to subtract from the resulting balance the sums already certified in respect of the two claims in ARL's previous certificate.

The effect of this was startling. Although ARL had already included a figure of about £900,000 in respect of the two claims in its previous certificate, GOL was awarded about £500,000. In reality, the outcome of the exercise carried out by the adjudicator should have been that ARL was owed about £400,000 – so the error amounted to almost £1 million.

I held that the adjudicator had not exceeded his jurisdiction – in fact, he had answered the right question but in the wrong way. Since he had declined to vary his decision it would have stood unless and until otherwise determined by the court (there was no arbitration clause in the contract).

However, I also held that ARL was entitled to have the question of whether there was any entitlement to payment otherwise than under a certificate determined, so that the adjudicator would have been bound to take into account any sums already certified and allowed against GOL's claims. This was essentially a point of law that raised no disputed issues of fact: it was common ground that the adjudicator had made a mistake.

The application was resisted relying on *Bouygues*.[9]

I determined the certificate point in ARL's favour, with the result that the adjudicator's award had to be set aside and the correct balance struck in the account between the parties.

ARL also attacked the adjudicator's decision on costs. I declined to interfere with this on two grounds:

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8 *Geoffrey Osborne Ltd v Atkins Rail Ltd* [2009] EWHC 2425, [2010] BLR 363 (TCC).
9 *Bouygues v Dahl-Jensen*: note 1.

- that it was not obviously wrong (the adjudicator's valuation of the two claims was substantially more than the amount contended for by ARL, even though the overall balance of accounts remained in ARL's favour); and
- that there was no way in which the court could sensibly make any other award in its place – it did not have the information.

It is, in my view, an essential requirement that the court is in a position to substitute a decision for the decision of the adjudicator – it is not enough to be able to say that it is wrong.

Could this result have been achieved in Scotland?

The question is whether and, if so how, this might have been done in Scotland.

It seems to me that, as an alternative, ARL might have been able to bring a counterclaim asserting that the adjudicator had made a mistake and seeking declarations that:

- ARL had no entitlement to payment otherwise than under a certificate so that when valuing entitlement to a certificate it was wrong not to take into account sums already paid or credited; and
- the certificate should be set aside.

Perhaps ARL could then take out an application for summary decree on the counterclaim (inviting the court to determine the point finally).

Another possibility is that, having brought a counterclaim asserting that the adjudicator had made a mistake, ARL could apply for the determination of a preliminary issue as to the correctness of the sum awarded by the adjudicator, seeking the same declarations – but I do not know whether or not a similar procedure is available in Scotland.

If that could not be determined at the same time as the original application for summary decree, another possibility might be that the court could be invited to adjourn that application so that both the pursuer's application for summary decree and the preliminary issue could be heard and determined at the same time. If there is jurisdiction to adopt this course, the court would then have to consider whether granting an adjournment in these circumstances would be contrary to the spirit of the HGCRA.

The final question

It was argued in *Geoffrey Osborne v Atkins Rail* that because the Scheme provides that the decision of an adjudicator is binding unless and until *the dispute* is finally determined by legal proceedings, the court must determine all the issues in the dispute if enforcement is to be prevented.[10]

10 *Geoffrey Osborne v Atkins Rail*: note 8.

In English procedure, it is not necessary that all parts of a dispute are resolved together – preliminary issues are often ordered. It will not always be the case that the adjudicator's mistake was on the only question that was referred to him.

My view is that:

- this would not prevent the court form adopting the course taken in *Geoffrey Osborn v Atkins Rail*,[11] and
- if the court determined the particular question against the successful party, it could stay enforcement of the award until the dispute was finally determined.

Mr Justice Edwards Stuart is a judge of the High Court and is a designated judge of the Technology and Construction Court in London.

11 *Geoffrey Osborne v Atkins Rail*: note 8.

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