

Decisions that Shaped 2019

A look at Adjudication

As we enter 2020, Adjudication continues to play a vital role in dispute resolution within the construction industry, and we continue to represent our clients throughout the process, because without familiarity of popular procedural issues, crucial oversights can transpire.

Throughout 2019 the Courts, and most specifically the Technology and Construction Court, provided us with several decisions that are of significant relevance to the adjudication process. This retrospective review serves to highlight judgements that may be worth remembering.

When considering jurisdictional challenges

Jurisdictional challenges can arise from the onset. The case of *Ove Arup & Partners International Ltd v Coleman Bennett International Consultancy plc* [2019] EWHC 413 (TCC) questioned the ability of a party to raise a later jurisdictional challenge if it knowingly failed to do so whilst actively participating in the adjudication.

In this case, Coleman Bennett International (“CBI”) contracted Ove Arup to provide engineering services in relation to a high-speed transportation project. Ove Arup issued a notice of adjudication after CBI failed to pay sums due in relation to Ove Arup’s fee for its services. CBI failed to pay the amount the adjudicator decided was due to Ove Arup.

As a result, Ove Arup commenced proceedings seeking enforcement of the adjudicator’s decision.

CBI argued the decision was not enforceable on the grounds of three jurisdictional challenges:

i) the contract on which the adjudication was brought was not a

construction contract for the purposes of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (“the Construction Act”);

- ii) the referral was concerned with more than one contract or dispute; and
- iii) the adjudicator’s jurisdiction turned on questions of fact that could not be properly determined in the adjudication and cannot now be justly decided on an application for summary judgment (the enforcement proceedings).

Mrs Justice O’Farrell disagreed with CBI’s arguments. Relying on guidelines in an earlier 2019 Court of Appeal judgement, the decision reiterated that general reservations are not sufficient defence in failing to make a jurisdictional challenge clear enough for the adjudicator to address it. She also decided that by participating in the adjudication CBI “*positively admitted*” there was in fact jurisdiction under the Construction Act.

So, vague and general reservations cannot be relied upon in challenging a decision that doesn’t provide the preferred outcome, particularly if the specific objection should have been known during the adjudication!



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True Value Adjudication

In 2019 the common 'true value' adjudication was again in the spotlight. The question of entitlement to commence a true value adjudication was debated in the case of *M Davenport Builders Ltd v Greer and another* [2019] EWHC 318 (TCC) (20 February 2019).

This judgement followed the Court of Appeal's judgement in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448, reconfirming entitlement to refer to adjudication a dispute about the true value, but only after the first adjudicator's decision is paid. Furthermore, the decision assisted the argument that that decision goes against the right to adjudicate at any time, stating:

"In my judgment, 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."

In short, Mr. Justice Stuart-Smith found that, whilst a second 'true value' adjudication can be commenced, the decision cannot be relied upon until the initial payment has been made (where that obligation exists). That is, any second decision would not be enforceable until any amount decided by the first adjudication had been paid!

Some suggest this case may lead to an increase in number of prompt 'true value' adjudications. I would argue it could, on the other hand, deter default payment notice adjudications where a party has submitted an overly inflated application, as they will now realise that it could be a very short term gain.

The Slip Rule & Adjudicator's Mistakes

Finally, what happens when an adjudicator makes a mistake in their decision? After all, they too are only human.

Section 108(3A) of the Construction Act permits the correction of an adjudicator's decision by application of the slip rule, and 2019 saw a judgement passed that 'extended' that rule to include for consequential correction of an error.

The decision of Mr. Roger ter Haar QC in the case of *Axis M&E UK Ltd v Multiplex Construction Europe Ltd* [2019] EWHC 169 (TCC) was the first time a court had been asked to deal with the issue of consequential corrections in relation to the slip rule.

As a result, we should be aware that if the adjudicator (as permitted) decides to or is asked to correct 'a slip', the rectification of one figure could also impact other figures including interest and even a reallocation of the adjudicator's fee.

Inevitably, errors that exceed the scope of the slip rule also occur as demonstrated in the 2019 case of *Willow Corp S.À.R.L. v MTD Contractors Ltd* [2019] EWHC 1591 (TCC).

The decision here provided useful insight into the management of an adjudicator's error, with the application of severance. In this case, the adjudicator made an error in law in relation to the practical completion clause and relating application of liquidated damages. However, that error did not affect the balance of the decision. As such, 'the good' was able to be severed from 'the bad' and Mr. Justice Pepperall enforced the balance of the decision.

Adjudication in 2019

So, it remains that adjudication can dramatically reduce the length and cost of disputes but, as the decisions of the Courts continue to demonstrate, it is not a process without complication entirely.

If you need advice on referring a matter to adjudication, or alternatively you are on the responding end of a notice of adjudication, get in touch with Claire Mc Carry at Claire.McCarry@quigggolden.com

