



TO PARTAKE OF PART 8

AND OTHER CONSIDERATIONS
WHEN AN ADJUDICATOR'S
DECISION IS PLAINLY WRONG

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INTRODUCTION



With an average of 1,500 referrals each year in the UK of what are predominantly payment related disputes to adjudicators who are mainly lawyers (43%)^[1], what are a dissatisfied party's options when an adjudicator's decision is plainly wrong?

Adjudications on large projects can involve complex issues of measurement, valuation, claims and delay analysis alongside technical specification and contract compliance issues; all of which need to be addressed in a challenging timeframe to produce a temporarily binding decision. There exists a lot of scope for mistakes to manifest themselves in such a decision; the effects of which can be financially significant.

20 years on from the introduction of statutory adjudication in the UK, the courts have developed a fast track approach to enforcement of decisions in support of the purpose of the HGCRA-96. In parallel, party's representatives have been creative in seeking to avoid some or all of the effects of an unfavourable decision.

This paper considers some of the approaches adopted by disgruntled parties and the court's responses to the same.

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CHARACTERISTICS OF ADJUDICATION ENFORCEMENT



The Latham Report¹ recommended, “*Adjudication should be the normal method of dispute resolution*”² and that:

- i. “*The award of the adjudicator should be implemented immediately...*”³
- ii. “*Any appeals to arbitration or the courts should ... not be permitted to delay the implementation of the award...*”⁴ and
- iii. “*Resort to the courts should be immediately available if a party refuses to implement the award of an adjudicator.... the courts may wish to support ... adjudication by agreeing to expedited procedures for interim payments.*”⁵

During debate on the proposed Act,⁶ Lord Ackner noted “... *the adjudication process ... a quick, enforceable interim decision which ... if not acceptable... would be the subject matter of arbitration or litigation ... under the rubric of ‘pay now argue later’...*”.

The Scheme distinguished adjudication⁷ from arbitration and provided for a temporarily binding decision that parties had to comply with.⁸

A “*creature of statute ... clothed in contractual form...*”⁹ “[a]djudication is an unusual procedure, distinct from arbitration ...”¹⁰ It is intended to operate as a fast-track form of dispute resolution¹¹ that provides parties with a quick and provisionally binding decision until finally determined by legal proceedings, arbitration or agreement. The decision thus has “*an ephemeral and subordinate character*”.¹²

The adjudicator’s decision does not have the status of a judgment.¹³ To be enforced it must be approved by the court and once homologated becomes enforceable in the same way as any other judgment.

Whilst the oft cited doctrine is “*pay now, argue later*”¹⁴ that expression is not found in the Construction Acts¹⁵ or enabling legislation¹⁶ but is consonant with the policy of the HGCRA-96.

¹ Sir Michael Latham, Constructing the Team, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, Final Report, July 1994.

² Ibid Recommendation 26.

³ Ibid Para. 9.14.2.

⁴ Ibid Para. 9.14.3.

⁵ Ibid Para. 9.14.4.

⁶ Hansard 22/29-Apr-1996, column 990/1463.

⁷ HGCRA-96, Part II, as amended by the LDEDCA-09.

⁸ Ibid, para. 23(2).

⁹ Lord MacFadyen, Homer Burgess Limited v Chirex (Annan) Limited [1999] 71 ConLR 257.

¹⁰ Lanes Group plc v Galliford Try Infrastructure Ltd [2012] BLR 121.

¹¹ “adjudication generally sacrifices fairness in the practical interests of economy and speed” [2015] ICLR 421.

¹² A Cameron Ltd v John Mowlem & Co Plc (1990) 52 BLR 24, CA.

¹³ VHE Construction plc v RBSTB Trust Ltd [2000] BLR 187; Austin Hall Building Ltd v Buckland Securities Ltd [2001] BLR 272; Solland International Ltd v Daraydan Holdings Ltd (2002) 83 Con LR 109; Galliford (UK) Ltd v Markel Capital Ltd [2003] EWHC 1216 (QB).

¹⁴ See RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd [2002] 1 WLR 2344 at 2346-2347; Thomas-Fredric’s (Construction) Ltd v Wilson [2004] BLR 23 at 28; Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd [2004] 1 WLR 2082 at 2087; Mentmore Towers Ltd v Packman Lucas Ltd [2010] BLR 393 at 399.

¹⁵ Housing Grants, Construction and Regeneration Act 1996 (HGCRA-96), Local Democracy, Economic Development and Construction Act (LDEDCA-09).

¹⁶ Scheme.

'PAY NOW, ARGUE LATER'



The court takes into account the 'pay now, argue later' cash flow imperative and adjudication provisions of HG CRA-96 when exercising its discretionary powers.¹⁷

Enforcement of an adjudicator's decision is normally initiated by way of a summary judgment application under Part 24 of the CPR,¹⁸ where there is no issue as to the enforceability, with enforcement being commenced under either Part 7 or Part 8 of the CPR.¹⁹

TCC Guide para. 9.2.1: "... there is neither a practice direction nor a claim form concerned with adjudication business. The enforcement proceedings normally seek a monetary judgment so that CPR Part 7 proceedings are usually appropriate. However, if the enforcement proceedings are known to raise a question which is unlikely to involve a substantial dispute of fact and no monetary judgment is sought, CPR Part 8 proceedings may be used instead."

Given the binding nature of the adjudicator's decision,²⁰ the defendant usually has no real prospect of defending the claim, thereby, summary judgment will be ordered.²¹

¹⁷ See e.g. *Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC).

¹⁸ See e.g. *VHE Construction plc v RBSTB Trust Ltd* [2000] BLR 187; *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522.

¹⁹ TCC Guide para. 9.2.1: "Unlike arbitration business, there is neither a practice direction nor a claim form concerned with adjudication business. The enforcement proceedings normally seek a monetary judgment so that CPR Part 7 proceedings are usually appropriate. However, if the enforcement proceedings are known to raise a question which is unlikely to involve a substantial dispute of fact and no monetary judgment is sought, CPR Part 8 proceedings may be used instead."

²⁰ *A&D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* (1999) 16 ConstLJ 199.

²¹ CPR rule 24.2. See e.g. *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2000) 75 ConLR 71.

Errors of fact, law or procedure do not vitiate the adjudicator's decision

The principles behind Part II, HGCR-96, were considered by the courts in *Macob Civil Engineering Ltd v Morrison Construction Ltd*.²² Morrison argued that the adjudicator's decision must be 'valid and lawful' to be enforced; where challenged it should not be enforced until its validity had been determined. Dyson J rejected that argument:

"... if ... correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament ... was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced, pending the final determination of disputes ... The timetable for adjudication is very tight ... and likely to result in injustice... Parliament has not abolished arbitration or litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

Macob foreshadowed a chain of cases explaining that *"the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties"*.²³

The courts' approach was outlined in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*.²⁴

Dyson J adopted a similar approach to Knox J in *Nikko Hotels (UK) Ltd v MEPC Plc*.²⁵ when considering if the adjudicator's decision was enforceable. Knox J held, notwithstanding an error in law, the expert's decision was not open to review where he had performed the task assigned to him, stating *"If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."*

Dyson J concluded that while the adjudicator had made a mistake he was trying to answer the right question. Buxton LJ dismissed the 'plain injustice of the mistake' argument on Bouygues' appeal, noting Dyson J was correct concerning the potential for error being intrinsic in the summary procedure of adjudication. Both Buxton LJ and Chadwick LJ agreed with and upheld the approach based on *Nikko*. Chadwick LJ stating:

"... [the adjudicator] answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations ... his determination is binding upon the parties."

Bouygues is the seminal early authority on the status and enforceability of an adjudicator's decision. The result itself may have been different had there been no arbitration clause in the contract and the court was invited by a Part 8 Claim to finally decide the issue of the adjudicator's error.²⁶

²² [1999] BLR 93.

²³ *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] BLR 288.

²⁴ [2000] BLR 49. Court of Appeal at [2000] BLR 522.

²⁵ [1991] 2 EGLR 103.

²⁶ See Geoffrey Osborne.

Other early cases include:

- i. *In Sherwood & Casson Ltd v MacKenzie*,²⁷ the validity of an adjudicator's decision challenged on its factual or legal conclusions remains enforceable, and should be enforced; the court will not hold that a mistaken answer to an issue within the adjudicator's jurisdiction is an excess of jurisdiction.
- ii. *Northern Developments v J&J Nichol*²⁸ expressly followed *Sherwood & Casson*,²⁹ approving the statement in *VHE Construction plc v RBSTB Trust Ltd* [2000] BLR 187 that the courts had no general appellate jurisdiction over adjudicators.
- iii. *C&B Scene v Isobars*³⁰ approved the *Sherwood* principles where the adjudicator could have been described as having addressed his mind to the wrong question in failing to recognise that the Scheme superseded the contract payment provisions. The Court of Appeal held that the adjudicator had decided the disputes referred to him and, notwithstanding errors of law, his decision was binding and enforceable until corrected in the final determination of the dispute.

C&B Scene's application for summary judgment was refused and *Isobars* granted permission to defend on the basis that the points raised as to the adjudicator's errors were at least arguable. *C&B Scene* appealed: Sir Murray Stuart-Smith said that

the question was whether the adjudicator's errors went to his jurisdiction, or was merely a wrong decision on a matter within his jurisdiction. If it went to jurisdiction, summary judgment should not be entered; otherwise, the claimant was entitled to summary judgment.

The early judgments represent a robust approach in support of the principles behind Part II, HGCRA-96, and the prescribed effect of decisions under para. 23(2) of the Scheme.

If an adjudicator makes a wrong finding, determination of fact or law, or does not conduct the adjudication according to agreed procedure, whilst acting within his jurisdiction, that alone does not necessarily provide grounds for challenging enforcement.³¹

An adjudicator's decision takes effect as a matter of contract between the parties³² who are then obligated to give effect to a valid decision,³³ even where that decision is challenged by the unsuccessful party as in *Macob*.³⁴

Chadwick LJ, in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*,³⁵ emphasised that the adjudicator's task was to find an interim solution that met the needs of the case, and that the requirement to have the 'right' answer had been subordinated to the need for a quick answer; adjudication under HGCRA-96 was not intended to provide definitive answers to complex questions.

²⁷ [2000] 2 TCLR 418.

²⁸ [2000] BLR 158.

²⁹ In addition, Judge Bowsler cited with approval the statement by HHJ Hicks QC in *VHE Construction plc v RBSTB Trust Ltd* [2000] BLR 187 that the courts had no general appellate jurisdiction over adjudicators.

³⁰ [2002] BLR 93.

³¹ See e.g. *ABB Ltd v BAM Nuttall Ltd* [2013] EWHC 1983 (TCC); *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] BLR 288; *Barr Ltd v Law Mining Ltd* (2001) 80 ConLR 134; *Bouygues-v-Dahl-Jensen*.

³² *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC); *WH Malcolm Ltd for Judicial Review* [2010] CSOH 152.

³³ *Ballast plc v The Burrell Company (Construction Management) Ltd* [2001] BLR 529 [CSOH] (affirmed 2003 SLT 137).

³⁴ See also *SG South Ltd v Swan Yard (Cirencester) Ltd* [2010] EWHC 376 (TCC); *William Verry Ltd v Camden LBC* [2006] EWHC 761 (TCC).

³⁵ [2005] EWCA Civ 1358.

If the adjudicator had the jurisdiction to reach the decision he did, and if he arrived at that conclusion in a way that was not obviously unfair, it will be enforced, no matter how wrong it may prove to be.

The law in relation to errors made by adjudicators may be summarised as:

- i. Where the adjudicator answers the right question but arrives at the wrong answer and declines to recognise and correct that error, his decision will be binding.³⁶ The decision will be enforced even if obviously wrong.³⁷
- ii. Where an error of fact, law or procedure is such that the adjudicator has gone beyond deciding the matter referred to him (thereby exceeding his jurisdiction) his decision will be of no effect. An adjudicator might act in excess of jurisdiction if he goes off on *“a frolic of his own”* and decides an issue using a method of assessment which has not been proposed by either party³⁸ and the adjudicator has not given the parties the opportunity to address that alternative basis.³⁹
- iii. Procedural errors will not vitiate the decision unless they amount to a material breach of natural justice.
- iv. A finding of fact unsupported by any evidence may be one made in excess of jurisdiction.⁴⁰

By enforcing adjudicators' decisions, even where they are wrong, the courts give effect to the 'pay now, argue later' purpose of Part II, HGCRA-96, to secure cash flow.

With less than 2.3% of adjudication decisions being referred to the courts, that appears to have been a successful approach.

Avoiding the Effect of the Adjudicator's Decision

The purpose behind the HGCA-96 is given effect by the receptive approach adopted by the courts to summary judgment applications to enforce adjudicators' decisions, notwithstanding that Part II, HGCRA-96, is silent as to the circumstances in which an adjudicator's decision will, or will not, be enforced.⁴¹

Whether, and to what extent, decisions could be challenged had to be determined by the courts whilst faced with an express requirement in the Scheme⁴² that a decision is binding until the dispute is finally determined.

In the face of that requirement *“[o]ver the years, a sense of impatience can be felt, particularly in the Court of Appeal, with regard to attempts to avoid the enforcement of adjudicators' decisions”*.⁴³

³⁶ See e.g. *FW Cook Ltd v Shimizu (UK) Ltd* [2000] BLR 199; *CJP Builders Ltd v William Verry Ltd* [2008] BLR 545. The English courts have in this regard transposed the jurisprudence of expert determination in their approach to the enforceability of adjudicators' decisions. See *Nikko per Knox J.*

³⁷ See, e.g. *Bouygues-v-Dahl-Jensen*. In *Geoffrey Osborne a Pt 8 claim* was used to correct a manifest error.

³⁸ *Herbosch-Kiere-Marine Contractors Ltd v Dover Harbour Board* [2012] BLR 177.

³⁹ See e.g. *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) [70]-[76].

⁴⁰ See *Redwing Construction Ltd v Wishart* [2010] EWHC 3366 (TCC).

⁴¹ Lord Dyson, *Time to call it a day*; *PC Harrington Contractors Ltd v Systech International Ltd* [2013] BLR 1.

⁴² Para. 23(2).

⁴³ *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250. “[T]he ingenuity deployed to avoid enforcement of adjudication decisions has been considerable over the years”: *STFC-v-MWHTP*.

Set-off or counterclaim⁴⁴

It is not uncommon for contracts to permit the exercise of a right of set-off or deduction against moneys otherwise owing to a contractor.⁴⁵ In the absence of any express provision to the contrary, an owner will be entitled to exercise a right of set-off or abatement against amounts stated to be owing in a certificate.

However, the existence of a right of set-off or counterclaim does not, in general, afford an unsuccessful party to an adjudication a basis for resisting the enforcement of an adjudicator's decision and from paying the amount determined to be owing and payable.⁴⁶

The usual course is for the court to allow the summary judgment application, and for the set-off or counterclaim to be determined in subsequent proceedings. If the unsuccessful party in an adjudication brings court proceedings to prosecute a counterclaim, but it has not paid the amount decided by the adjudicator, the prosecution of the counterclaim may be stayed.⁴⁷ A payer will therefore not be able to rely upon a subsequent "withholding" or "pay less" notice as a basis for refusing to pay the amount the adjudicator decided was payable.⁴⁸

Insolvency of Decision Creditor

Where the adjudication decision creditor is in liquidation that is grounds to refuse summary judgment, or to stay execution. In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*⁴⁹ the Court of Appeal upheld Dyson J's decision saying that whilst the decision contained an error, it was an error that the adjudicator made whilst acting within his jurisdiction, and thus his decision was enforceable. However, Chadwick LJ went on to say Dahl-Jensen's liquidation meant that payment of the sums identified by the adjudicator would lead to injustice:

"In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires."

The various approaches to addressing issues of insolvency, depending on the timing of the event etc., is beyond the scope of this paper, generally, following the above finding, insolvency is a compelling reason to refuse summary judgment as reconfirmed by Coulson J in *Bresco Electrical Services Limited (in liquidation) v Michael J. Lonsdale (Electrical) Limited*.⁵⁰

⁴⁴ See Set-off in adjudication (2014) 30 ConstLJ 103.

⁴⁵ See, e.g., *Pillar PG Ltd v DJ Higgins Construction Ltd* (1986) 34 BLR 43 (CA).

⁴⁶ See e.g. *VHE Construction v RBSTB Trust Co* [2000] BLR 107; *Bovis Lend Lease Ltd v Triangle Development Ltd* [2003] BLR 31; *Harlow & Milner Ltd v Teasdale* [2006] EWHC 54 (TCC).

⁴⁷ *Anglo Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC).

⁴⁸ See *Squibb Group Ltd v Vertase FLI Ltd* [2012] BLR 408.

⁴⁹ [2000] BLR 522.

⁵⁰ [2019] EWCA Civ 27, CA, 24 January 2019.

Stay for Arbitration

The losing party to an adjudication may argue that there is a dispute over whether the sum claimed is due and enforcement should be stayed for arbitration. The purpose of the HGCRA-96 is to ensure that the decision is binding until finally settled in arbitration or in court. As such, the sum awarded by an adjudicator must, generally, be paid and should not be avoided by staying enforcement proceedings pending arbitration.⁵¹

An area in search of authoritative direction

In *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd*⁵² a Contractor's claim included EOT and loss and expense. The Employer issues a certificate matching the adjudicator's decision but simultaneously notified the Contractor of their claim for LD's and their intention to deduct the same. That cross-claim had not been presented or, therefore, decided by the adjudicator. The Contractor sought summary judgment on the full sum found due to them and the Employer counterclaimed for LD's. The Contractor argued that the LD's counterclaim should be stayed for arbitration. That application was dismissed by HHJ Lloyd QC

reasoning that the Contractor had taken 'steps in the action' by seeking the court's assistance in enforcing an adjudicator's decision which was intimately connected with the subject matter of the counterclaim, and having sought to have the counterclaim struck out.

That appears to go against the underlying obligation to honour the adjudicator's decision⁵³ but is an area that appears to have split decisions with some judgments allowing such defences to have effect,⁵⁴ including *David McLean Housing*.

Where an adjudicator's decision addresses an issue of principle and leaves the contractual payment mechanism to be operated thereafter, the service of an effective withholding-notice remains competent.⁵⁵ However, where the losing party seeks to rely on a matter that the adjudicator has not considered, the question of whether, or in what circumstances, the obligation to honour the adjudicator's decision overrides other obligations in force between the parties, does not appear to be entirely settled.

In *Construction Centre Group Ltd v Highland Council*⁵⁶ there was a question whether the employer could rely on a right to deduct liquidated

⁵¹ See e.g. *Shaw v Massey Foundation & Pillings Ltd* [2009] EWHC 493 (TCC).

⁵² [2002] BLR 125.

⁵³ See *VHE Construction plc v RBSTB Trust Ltd* [2000] BLR 187. Similarly, in *Edmund Nuttall Ltd v Sevenoaks DC* (14 April 2000, unreported), TCC, an employer who had not given the requisite notices for deduction of liquidated damages could not rely on a claim for liquidated damages as a reason for not paying the amount decided by the adjudicator. *Northern Developments v J&J Nichol* [2000] BLR 158.

⁵⁴ *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2000) 75 ConLR 71. *Bovis Lend Lease Ltd v Triangle Development Ltd* [2003] BLR 31 (doubted in *Ferson Contractors Ltd v Levolux AT Ltd* [2003] EWCA Civ 11, and *Levolux AT Ltd v Ferson Contractors Ltd* (2003) 86 ConLR 98).

⁵⁵ *Shimizu Europe Ltd v LBJ Fabrications Ltd* [2003] BLR 381; *Conor Engineering Ltd v Les Constructions Industrielle de la Méditerranée* [2004] BLR 212.

⁵⁶ [2003] ScotsCS 114 (IH).

damages, having not raised that contention in the adjudication proceedings. The court stated that, where the Employer had chosen not to rely on the LD's claim as a defence in the adjudication, it could not, consistent with its contractual obligations to give effect forthwith to the adjudicator's decision, rely on it as a defence to enforcement of the adjudicator's award. To allow it would be to fail to recognise:

- i. The nature of the adjudicator's order as being a resolution, albeit provisional, of a dispute between the parties; and
- ii. The nature of the court proceedings as being an enforcement mechanism for that order rather than proceedings concerned with any underlying question of the true and ultimate indebtedness (if any) of the employer to the contractor.

Subsequent decisions lean towards insisting on payment of amounts awarded by the adjudicator on the basis that any contract provisions that may give rise to defences should be construed in a manner compatible with the intent of HGCRA-96, s108(3), requiring the adjudicator's decision be provisionally binding: see *David McLean Contractors Ltd v The Albany Building Ltd*,⁵⁷ the court refused to allow a claim for liquidated damages to be set off against the amount awarded by the adjudicator; *William Verry Ltd v Camden London Borough Council*,⁵⁸ where neither a subsequent certificate nor a cross-claim for damages was sufficient to prevent enforcement of the adjudicator's decision. The

reasoning in *William Verry* was further endorsed in *Straw Realisations (No 1) Ltd v Shaftsbury House (Developments) Ltd*.⁵⁹

HHJ Langan QC, in *MBE Electrical Contractors v Honeywell Control Systems Ltd*,⁶⁰ refused to stay enforcement proceedings for arbitration, concluding that the enforcement of an adjudicator's decision was a matter for the courts. It can hardly be 'pay now, argue later' if the winner has to argue both in front of the adjudicator, and all over again in front of an arbitrator, before he gets his money.

*In Harlow & Milner Ltd v Linda Teasdale*⁶¹ the judge said that Mrs Teasdale was not entitled to ignore the judgment of the court and to delay her payment to the claimant. The suggestion that the charging order should be suspended until the result of the arbitration is known, would wholly undermine the adjudication process. It was precisely to avoid such delaying tactics that the statutory adjudication process had been created in the first place.

The judge stated that the authorities were clear: a party who was ordered to make payment pursuant to an adjudicator's decision could not seek to avoid making such payment by setting off other claims that it had or might have had.⁶² He pointed out that, since the law was that a party with a cross-claim which had accrued after the adjudicator's decision could not set that off against the sum awarded by the adjudicator, a losing party, who simply had the hope that an arbitrator's award somewhere down the line would

⁵⁷ [2005] EWHC B5 (TCC).

⁵⁸ [2006] EWHC 761 (TCC).

⁵⁹ [2010] EWHC 2597.

⁶⁰ [2010] BLR 561.

⁶¹ (No.1)-[2006] EWHC 54 (TCC); (No.2)-[2006] EWHC 535 (TCC); and (No.3)-[2006] EWHC 1708 (TCC).

⁶² See, for example, *Interserve Industrial Services Ltd v Cleveland Bridge (UK) Ltd* [2006] EWHC 741 (TCC) and *Hillview Industrial Developments (UK) Ltd v Botes Building Ltd* [2006] EWHC 1365 (TCC).

overturn the adjudicator's original decision, could not be entitled to set off that hope against the sum due pursuant to that decision. The judge went on to say that if the defendant was right, it would mean that any unsuccessful party in adjudication would know that, if they refused to pay up for long enough, and started their own arbitration, they could effectively render the adjudicator's decision of no effect. It would be condoning, in clear terms, a decision debtor's persistent default, and its complete refusal to comply with the earlier judgments of the court.⁶³

Packman Lucas obtained a decision in their favour. The defendants did not pay. Packman Lucas enforced the adjudicator's decision by obtaining interim and then final charging orders. The defendants started their own proceedings against Packman Lucas. Packman Lucas sought to stay those proceedings until the defendant companies paid what was due under the original adjudication decisions.

Akenhead J.⁶⁴ granted the stay on the basis that the defendant companies were simply ignoring the contractual and statutory requirements that they should honour the adjudicator's decisions and were avoiding the 'pay now argue later' approach represented by the HGCRA-96. The defendant

companies' response was to commence their own adjudication proceedings; Packman Lucas sought a stay of those adjudication proceedings until the sums due under the original decision were paid. That application was dealt with by Edwards-Stuart J and, for similar reasons, he granted the stay sought.⁶⁵

It is a principle of adjudication enforcement that a defendant is not entitled to a stay of execution on the basis that it has its own adjudication,⁶⁶ or arbitration,⁶⁷ claim that is to be resolved in the relatively near future. In *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd*⁶⁸ Jackson J concluded that there was no entitlement to a stay on such a ground.

If a court grants a stay because of a possible result in a forthcoming adjudication, the whole principal of 'pay now argue later' would be fatally undermined. HHJ Kirkham came to the same conclusion in *Avoncroft Construction Ltd v Sharba Homes (CN) Ltd*⁶⁹ where the defendant argued that there should be a stay because it had its own claim in a second adjudication and the decision was due in two weeks' time. The judge rejected that submission, relying on the judgment in *Interserve*.⁷⁰

⁶³ [2006] EWHC 1708 (TCC).

⁶⁴ *Anglo Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC).

⁶⁵ *Mentmore Towers Ltd v Packman Lucas Ltd* [2010] BLR 393.

⁶⁶ *Ibid.*

⁶⁷ See the *Harlow & Milner Ltd v Linda Teasdale* debacle.

⁶⁸ [2006] EWHC 741 (TCC).

⁶⁹ [2008] EWHC 933 (TCC).

⁷⁰ *Fn* 67.

Declaratory Relief and CPR Part 8 Claims – Changing Court Practice

An adjudicator's decision is binding until finally determined;⁷¹ there is no right of appeal. However, a body of case law developed where parties increasingly sought to avoid the consequences of a decision by starting Part 8 proceedings for declaratory relief aimed at the validity or enforceability of the adjudicator's decision, which in effect rendered the adjudicator's decision irrelevant.

In appropriate cases the court can decide that the dispute itself be finally determined by the court prior to, or at the same time as, an application for enforcement of the adjudicator's decision.⁷²

That is not inconsistent with the policy of the HGCR-96 as the adjudicator's decision is only binding until the dispute is determined by litigation or arbitration, therefore, this can be a potent means of avoiding enforcement.

The argument in favour of Part 8 claims

Securing finality avoids unnecessary cost and duplication of proceedings and in some cases there is party consensus that that is desirable.

Determination of the dispute by the court at the time of the application for enforcement of the adjudicator's decision is a practical course where a dispute, not involving any substantial dispute of fact,⁷³ falls within the relatively narrow confines of the Part 8 procedure. The general matters affecting whether a Part 8 procedure is appropriate are set out in *FHDG-v-ISG*.

It is thought that a successful Part 8 claim, of the kind in *Geoffrey Osborne*, will be the exception rather than the rule.

⁷¹ s108(3), HGCR-96.

⁷² *Alstom Signalling Ltd v Jarvis Facilities Ltd (No 2)* [2004] EWHC 1285 (TCC).

⁷³ See e.g. *Geoffrey Osborne*; cf *Walter Lilly*.

Part 8 Claims following Jarvis-v-Alstom

Under *Jarvis-v-Alstom*, Alstom forestalled Jarvis's enforcement of an adjudicator's decision by issuing Part 8 proceedings seeking declarations that Jarvis was not entitled to payment of the sums awarded.

The court's final determination has the effect of superseding the decision of an adjudicator.⁷⁴

HHJ Lloyd QC confirmed that, as a matter of principle, the court could be asked to finally determine an issue that arose in the adjudication that could have the consequence that the enforcement application would fail.

Subsequent cases confirmed this was a legitimate use of the court's powers:

- i. In *Walter Lilly*, Coulson J referred to *Jarvis* and confirmed that, subject to the nature and scope of the point in issue, and the amount of evidence or argument required to deal with it, the TCC endeavoured to deal promptly with any dispute arising out of an adjudicator's decision. Part 8 offered the means by which a dispute could be finally determined in a quick and cost effective way. Coulson J also confirmed that the party wishing to use Part 8 for this purpose had to be able to demonstrate that the dispute in question fell within relatively narrow confines.
- ii. Coulson J in *Dalkia Energy* again confirmed the use of Part 8 in the appropriate circumstances.⁷⁵

Correcting adjudicator's recognised errors through part 8 proceedings

The case of *Geoffrey Osborne* concerned the (accepted) mistake of an adjudicator who omitted to deduct amounts already paid resulting in the award of over £500,000 to Osborne when they had actually been overpaid by £400,000. Edwards-Stuart J, adopting the approach in *Jarvis*, concluded that there was no reason why the court could not make a final determination of the issue raised by the Part 8 proceeding, there being no arbitration provision.

⁷⁴ GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd [2010] BLR 377.

⁷⁵ See also *Vitpol Building Services v Samen* [2008] EWHC 2283 (TCC).

Not applicable where arbitration is the final recourse

Contrast that with *Pilon-v-Breyer* - where the matter raised by the losing party was considered not to be suitable for Part 8 because it was not a simple, straightforward issue, and there was an arbitration clause - an arbitrator, not the court, had to make the final determination.

Part 8 proceedings are only available where the contract provides for court proceedings for final disposal of the issue: the court lacks jurisdiction otherwise.⁷⁶

Part 8 declaration, an exception rather than the rule

In *Fenice Investments* the judge said that a losing party who makes a challenge to the decision using Part 8 must, in the meantime, pay the sum found to be due.

In *FHDC-v-ISG* the council sought declaration under Part 8 to obtain final determination of an issue that had previously been determined by the adjudicator. Ramsey J concluded that the dispute was unsuitable for Part 8 as the matters were not capable of being resolved under that procedure or even by means of a hybrid Part 8 involving a short hearing.⁷⁷

WW Gear reinforced the point that this type of declaration will be the exception rather than the rule. Gear sought declarations on contract interpretation, issues then currently before an adjudicator. Edwards-Stuart J acknowledged, as a matter of principle, that a declaration was appropriate, but that it would only be appropriate to intervene in an ongoing adjudication in rare cases.

Declaration was granted after conclusion of the adjudication in *TSG-v-SAH*. Whilst Akenhead J held that SAH were entitled to the declaration as to the legitimacy of their action in terminating the contract, which meant that the adjudicator was wrong to order them to pay sums to TSG, he noted the adjudicator had the jurisdiction to decide what he did and, notwithstanding he was wrong, SAH had to pay his fees.

In *Hillcrest Homes* HHJ Raynor QC not only refused the declarations sought but had already refused all the other relief Hillcrest sought in trying to avoid the consequences of the adjudicator's decision.

⁷⁶ *Laker Vent Engineering Ltd v Jacobs E&C Ltd* [2014] EWHC 1058 (TCC); *Pilon-v-Breyer* Group.

⁷⁷ *Vitpol Building Services v Samen* [2008] EWHC 2283 (TCC).

Expansion of Part 8 applications

Since the decision in *Jarvis* in 2004, it has become more common for a losing party to issue Part 8 proceedings seeking final determination of issues dealt with by the adjudicator at the same time as the enforcement application. This manifested itself in two ways:

- i. Parallel sets of proceedings (enforcement and Part 8) which gave rise to an unacceptable 'race' between the two.⁷⁸
- ii. A potentially distorted and complicated hearing with the judge having to address both the enforcement issues and the attempt by the losing party to obtain a final determination of some or all of the issues decided in the adjudication.

The epitome of this practice was *Kersfield Developments*. In addition to the enforcement points there were issues over: the validity of the interim application; estoppel by convention; payment notice validity, including approbation and reprobation; validity of a pay less notice;

procedural unfairness; whether further valuation adjudication was permissible; and application for a stay of execution.

Part 8 claims had grown significantly since *Jarvis-v-Alstom*, becoming a mechanism for losing parties to challenge parts of the adjudicator's decision. That was clearly contrary to the intent of the HGCRA-96 and placed a significant burden on the TCC in accommodating the same.

⁷⁸ See e.g. *Henia Investments Ltd v Beck Interiors Ltd* [2015] EWHC 2433 (TCC).

Court practice realignment in the face of Part 8 expansion

A change in sentiment to Part 8 claims was foreshadowed by the TCC in *RMC Building* when Edwards-Stuart J refused to adjourn enforcement so that it could be heard with the Part 8 claim; in *Structure Consulting Ltd*, O'Farrell J set a timetable for the Part 8 proceedings but made it clear that it was appropriate to give summary judgment on the enforcement of the adjudicator's decision.

In *Hutton-v-Wilson* Coulson J gave clear warning against disgruntled parties in adjudication seeking to oppose enforcement through misuse of Part 8, stating that, unless the point(s) raised were straightforward and self-contained, and parties were agreed that it could be dealt with at the enforcement application without adding to the time estimate, the Part 8 claim would not be dealt with at the same time. He stated that any defendant who seeks to re-run significant elements of the adjudication at a disputed enforcement hearing is committing an abuse of the court process and should expect to be penalised with indemnity costs.

In reviewing the case law, Coulson J referred to the practical difficulties facing both the parties and the court. The court needs to be aware of the requirement to combine competing processes early so that directions can be modified to address the requirements of the Part 8 claim and to allow the necessary time for hearing and deciding the issues.

Other TCC judges reached the same conclusion: in *Merit Holdings* Jefford J said there was risk that the Part 8 procedure was now being used too liberally and inappropriately in adjudication enforcement cases and that, as a result, this could prejudice parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions; in

Victory House Ms Joanna Smith QC, reached the same view.

Cases where a short point and the consent of the parties was met, such that the point could be addressed on the enforcement application, include:

- i. *Geoffrey Osborne* involved an admitted error where there was no arbitration clause, therefore the court had jurisdiction to make a final decision on the point.
- ii. *Leeds CC-v-Waco*, the Council was given leave to defend but only on the basis that the sums awarded by the adjudicator were paid. The Part 8 proceedings followed thereafter.
- iii. *Manor Asset* concerned the proper construction of one part of the contract.
- iv. *Bouygues-v-Febrey*, Bouygues abandoned all the points raised in answer to the enforcement application and proceeded only on the specific issue raised by their Part 8 claim.
- v. *S&SH-v-Logan*, parties agreed the short, self-contained matters of construction questions raised were amenable to consideration by the court. It was also agreed that there was no need for any separate enforcement proceedings.

TCC change in practice

Coulson J made it clear in *Hutton-v-Wilson* that para. 9.4.3 of the TCC Guide is now superseded by the guidance in *Hutton*, as confirmed by *Merit Holdings* and *Victory House*.

The TCC does not have the resources to turn every adjudication enforcement hearing into a wide-ranging final determination of the parties' underlying rights and obligations, nor was that the intent of the underlying objective of the HGCRA-96.

There had been the potential for a disgruntled party to, in effect, negate the intention behind Part II, HGCRA-96, and the process by which an interim-binding decision entitled the successful party to payment.

The court will enforce an adjudicator's decision despite a Part 8 claim having been brought, unless it is demonstrably clear at the outset of the enforcement hearing that the adjudicator exceeded his jurisdiction. The court will not allow (unless the claimant consents) a re-run of issues in the adjudication, even if those issues are confined to short points of law.

Where a party seeks a final decision from a court by way of a declaration, the court may refuse to make a declaration if:

- i. It is unable to do so simply on the evidence before it;
- ii. The declaration sought would not serve a useful purpose, because it would not resolve the outstanding issues between the parties;⁷⁹ or
- iii. The contract in question leaves disputed issues between the parties to be resolved on a final basis by an arbitral tribunal, not by a court.⁸⁰

Even if it is possible for a court to render a decision that will resolve the underlying issues between the parties, it may refuse to do so where an adjudication is ongoing and the adjudicator's decision is imminent.⁸¹

⁷⁹ *Forest Heath District Council v ISG Jackson Ltd* [2010] EWHC 322 (TCC); *Lidl UK GmbH v RG Carter Colchester Ltd* [2012] EWHC 3138 (TCC).

⁸⁰ *Pilon Ltd v Breyer Group Plc* [2010] BLR 452. In such a case, it will be appropriate to stay the proceedings to allow an arbitration to proceed to decide the relevant issue on a final basis. See also *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] BLR 561.

⁸¹ *WW Gear Construction Ltd v McGee Group Ltd* [2012] BLR 355.

CONCLUSIONS



Current Case Law. The preponderant trend in the decisions is towards insisting on actual payment of amounts awarded by the adjudicator's decision, compatible with the intent of HGCRA-96, s 108(3), which requires that the adjudicator's decision be provisionally binding.

Even where the court is satisfied that the adjudicator's decision is wrong, absent a material breach of natural justice and issues of insolvency, enforcement will still be ordered as long as the adjudicator has addressed the question put to him. Therefore, the '*pay now, argue later*' principle is supported even where the adjudicator's decision is declared to be wrong.

Current Court Practice. Courts recognise attempts to use the Part 8 process as 'an appeal' and have reverted to the restrictions specified in CPR rule 8.1(2) as expanded by the guidance given in *Hutton-v-Wilson*.

The burden will be on those issuing Part 8 proceedings to demonstrate they are appropriate or to face an indemnity costs order. *Hutton-v-Wilson* realigns the general approach of the courts to support of the '*pay now, argue later*' philosophy of HGCRA-96 reflected by the statement:

"The use of a Part 8 claim for a declaration that an adjudicator's decision is wrong runs counter to the 'pay now and argue later' principle that underpins adjudication. It should, therefore, be confined to truly exceptional circumstances".

Such 'truly exceptional circumstances' are likely to be similar to those exhibited in the *Geoffrey Osborne* case, i.e. an admitted error where there was no arbitration clause, therefore the court has jurisdiction to make a final decision on the point.

Table of Abbreviations

Abbreviation	Term
Bouygues-v-Dahl-Jensen	Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 49; BLR 522 [CA]
Bouygues-v-Febrey	Bouygues (UK) Ltd v Febrey Structures Ltd [2016] EWHC 1333 (TCC)
C&B Scene	C&B Scene v Isobars [2002] BLR 93
Carillion-v-Devonport	Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358
CPR	Ministry of Justice, England and Wales, Civil Procedure Rules
Dalkia Energy	Dalkia Energy and Technical Services Ltd v Bell Group UK Ltd [2009] EWHC 73 (TCC)
Fenice Investments	Fenice Investments Inc v Jerram Falkus Construction Ltd [2009] EWHC 3272 (TCC)
FHDC-V-ISG	Forest Heath District Council v ISG Jackson Ltd [2010] EWHC 322 (TCC)
Galliford Try	Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)
Geoffrey Osborne	Geoffrey Osborne v Atkins Rail Limited [2010] BLR 363
Hillcrest Homes	Hillcrest Homes Ltd v Berisford and Curbishley Ltd [2014] EWHC 280 (TCC)
Homer Burgess	Homer Burgess Limited v Chirex (Annan) Limited [1999] 71 ConLR 257
Hutton-v-Wilson	Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC)
Jarvis-v-Alstom	Jarvis Facilities Ltd v Alstom Signalling Ltd [2004] EWHC 1285 (TCC)
Kersfield Developments	Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15 (TCC)
Leeds CC-v-Waco	Leeds City Council v Waco UK Ltd [2015] EWHC 1400 (TCC)
LD	Liquidated Damages
Macob	Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93
Manor Asset	Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC)
Merit Holdings	Merit Holdings Ltd v Michael J Lonsdale Ltd [2017] EWHC 2450 (TCC)
Nikko	Nikko Hotels (UK) Ltd v MEPC Plc. [1991] 2 EGLR 103
Northern Developments	Northern Developments v J&J Nichol [2000] BLR 158
Part 8	Civil Procedure Rules, Part 8 - Alternative Procedure for Claim
Pilon-v-Breyer	Pilon Ltd v Breyer Group Plc [2010] BLR 452
RMC Building	RMC Building and Civil Engineering Ltd v UK Construction Ltd [2016] EWHC 241 (TCC)
S&SH-v-Logan	Surrey and Sussex Healthcare NHS Trust v Logan Construction (Southeast) Ltd [2017] EWHC 17 (TCC)
Scheme	Scheme for Construction Contracts (England and Wales) Regulations 1998 and (Amendment) (England) Regulations 2011
Sherwood	Sherwood & Casson Ltd v MacKenzie [2000] 2 TCLR 418
STFC-v-MWHTP	Science and Technology Facilities Council v MW High Tech Projects UK Ltd [2015] EWHC 2889 (TCC)
Structure Consulting	Structure Consulting Ltd v Maroush Food Production Ltd [2017] EWHC 962 (TCC)
TCC	The Technology and Construction Court
TCC Guide	The Technology and Construction Court Guide, 2nd Edition, Issued 3rd October 2005, third revision with effect from 3 March 2014
TSG-v-SAH	TSG Building Services PLC v South Anglia Housing Ltd [2013] EWHC 1151 (TCC)
VHE Construction	VHE Construction plc v RBSTB Trust Ltd [2000] BLR 187
Victory House	Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 102 (TCC)
Walter Lilly	Walter Lilly & Co Ltd v DMW Developments Ltd [2008] EWHC 3139 (TCC)
WW Gear	WW Gear Construction Ltd v McGee Group Ltd [2012] BLR 355

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Ferson Contractors Ltd v Levolux AT Ltd [2003] EWCA Civ 11
Forest Heath District Council v ISG Jackson Ltd [2010] EWHC 322 (TCC)
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