

## Judicial Review of Statutory Adjudication Determinations – The International Experience

Gerard Meehan B.L.<sup>1</sup>

### Introduction – Construction Industry Payment Legislation

1. Several Common Law jurisdictions have introduced construction industry payment legislation over the last 15 years. The various Acts all have the common objective of improving cash flow within the construction industry. The first jurisdiction to enact statutory adjudication was England and Wales in the form of Part II of the Housing Grants, Construction and Regeneration Act (the “UK Act”) enacted in 1996.<sup>2</sup> Legislation very closely modelled on that Act commenced approximately one year later in Northern Ireland<sup>3</sup>. In this jurisdiction, the Construction Contracts Act 2013 (hereinafter referred to as “the Act”) was enacted on the 29<sup>th</sup> of July 2013. The Act will apply to all “construction contracts” entered into after a date to be announced by the Minister for Public Expenditure and Reform.
2. The common objectives of the various international Acts have been considered by Coggins and Donohoe<sup>4</sup> who write that:

*“A common objective of all of the legislation has been the eradication of unfair contractual provisions and practices with regard to payment. The aim is to get cash flowing in as fair a manner as possible down the hierarchical contractual chains that exist on most commercial construction projects. In order to achieve this objective, all the legislation has included, in one form or another, core provisions which...establish a right to refer a dispute arising under the contract for adjudication.”*

---

<sup>1</sup> Thanks to Peter Aeberli QC and Dr Jeremy Coggins for their input and assistance with this paper. Obviously any inaccuracies are completely my own responsibility.

<sup>2</sup> The Act has been amended by the Local Democracy, Economic Development and Construction Act 2009.

<sup>3</sup> The Construction Contracts (Northern Ireland) Order 1997

<sup>4</sup> Jeremy Coggins and Steve Donohue, *A Comparative Review of International Construction Industry Payment Legislation and Observations From the Australian Experience*, International Construction Law Review [2012] ICLR 195

3. All the Acts provide for a payment system and an adjudication scheme. Despite these common provisions, there are key differences between the Acts, for example, key differences arise in the scope of the disputes covered.

### **Disputes Covered by the Legislation**

4. In New South Wales, the Building and Construction Industry Security of Payment Act 1999 came into force on the 26<sup>th</sup> of March 2000. The structure provided for in this Act has become known as the “Australian East Coast Model” because subsequent legislation in Victoria and Queensland was extensively modelled on it<sup>5</sup>. The Australian East Coast Model provides for recovery of purely progress payment claims under the contract only, i.e., for construction work undertaken or goods and services supplied under the contract. These Acts are not intended to accommodate more complex claims for moneys due under the contract such as a delay damages claim by a contractor or liquidated damages claims which the principal may set off against a progress claim. Thus by definition, the Australian East Coast Model only allow for contractors or suppliers to recover payment from their principals, i.e., “upstream claims”.
5. The role of the Adjudicator in such regimes can be compared to the role of the certifier under construction contracts as they currently operate in Ireland. Certification is the system typically used to quantify the amount of a progress payment under a construction contract. The certifier is typically an Architect or an Engineer.
6. In respect of contracts that already have a certification process, this mechanism provides a remedy where the contract certifier fails to certify on time or fails to certify independently and fairly or, for other reasons, the certification process breaks down. Secondly, for those contracts which do not have a certification process, it provides a statutory certification process.

---

<sup>5</sup> In 2002 Victoria enacted the *Building and Construction Industry Security of Payment Act 2002* and in Queensland the *Building and Construction Industry Payments Act 2004*. The Australian East Coast Model has also been adopted substantively by the *Building and Construction Industry Security of Payment Act 2004* in Singapore.

7. The scope of the Australian West Coast Model (i.e. Western Australia and Northern Territory<sup>6</sup>) Acts is wider, providing the right for either party to make an adjudication application in relation to any payment disputes falling within the scope of the building contract. This includes ex-contractual claims<sup>7</sup> in addition to purely progress payment claims. However, the Australian West Coast model provides that an adjudicator may dismiss an adjudication application where he or she feels it is impossible to make a fair determination due to the complexity of the matter in dispute or having insufficient time to do so under the Act.
8. The scope of the UK Acts and the New Zealand Construction Contracts Act 2002 is wider still, allowing either party to a construction contract the right to refer any difference arising under the contract for adjudication. This includes both disputes about payment claims and non-payment claims regarding the rights and obligations of the parties under the construction contract. Just as either party could traditionally sue in the courts for a debt or damages, either party can refer a claim for debt or damages to adjudication.
9. The Irish legislation is slightly narrower in scope. Section 6 (1) of the Act provides that:

*6.—(1) A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a “payment dispute”).*

10. Like the UK and West Coast Model Acts therefore, the Act allows either party to a construction contract to refer a dispute to adjudication. There has been much discussion in the construction and legal sectors in Ireland as to how the phrase “*any dispute relating to payment*” will be interpreted<sup>8</sup>. It is clearly a

---

<sup>6</sup> In Western Australia, the Construction Contracts Act 2004 had a date of commencement of the 1 January 2005 and in the Northern Territory, the Construction Contracts (Security of Payments) Act 2004 commenced on the 1<sup>st</sup> of July 2005.

<sup>7</sup> The term “ex-contractual claims” was used by P Davenport, “A Proposal for a Dual Process of Adjudication” (2007) 115 *Australian Construction Law Newsletter* 15.

<sup>8</sup> See e.g. *The Construction Contracts Act, 2013: Improving Cash Flow Within the Construction Industry and the Introduction of Statutory Adjudication*, Jennifer O’Connell BL, paper presented at the Construction Bar Association of Ireland Conference, 23<sup>rd</sup> November 2013.

narrower scope than the UK Acts which allow any difference arising under the contract to be referred to adjudication. It is also obviously broader than the Australian East Coast Model which limits referrals to purely progress payment claims. The closest international comparators are the Australian West Coast Model enactments which provide a right for either party to make an adjudication application in relation to any payment disputes falling within the scope of the building contract.

11. It is proposed, therefore, to consider the standard of review applied in NSW to the Australian East Coast Model<sup>9</sup> and in England and Wales, and to consider whether the principles articulated in those jurisdictions might be applied by the Irish courts in reviewing adjudications under the Act.

### **Standard of Review in New South Wales**

12. Coggins and Donohoe<sup>10</sup> have written that: *“For the first four years after commencement of the legislation, under its supervisory jurisdiction, the NSW Supreme Court viewed adjudicators’ determinations to be susceptible to judicial review by way of relief in the nature of prerogative writs...judicial review was available in relation to error of law on the face of the record. This position changed in the NSW Court of Appeal’s 2004 decision in **Brodyn Pty Ltd v Davenport**<sup>11</sup>, where the court held that prerogative relief was not available under the NSW legislation, but instead an adjudicator’s determination would be held void if it did not comply with certain specified “basic and essential requirements”<sup>12</sup>”.*

---

<sup>9</sup> *A Comparative Review of International Construction Industry Payment Legislation, and Observations from the Australian Experience*, Jeremy Coggins and Steve Donohoe [2012] ICLR 195 contains the following statement: “It is, thur perhaps due to its procedural justice deficiencies that the NSW Act has generated a plethora of litigation. Since 2001, there have been in excess of 300 judgments emanation from the NSW Supreme Court and Court of Appeal in relation to the NSW Act...This compares with less than a total of 10 judgments from the WA Supreme Court and WA Court of Appeal in relation to issues concerning the WA Act since its commencement in 2005.

<sup>10</sup> *The Validity of Adjudicators’ Determinations Containing Errors of Law – A comparison of the judicial approach in England and New South Wales*; Jeremy K. Coggins (University of Adelaide) and Steve Donohoe (University of Plymouth), IJLBE [2012] 4(2) 116-125

<sup>11</sup> [2004] NSWCA 394

<sup>12</sup> Hodgson J laid down five basic and essential requirements of the Act for the existence of a valid adjudicator’s determination: (1) The existence of a construction

13. *“If any of these “basic and essential requirements” was not satisfied” the authors continue; “the purported determination will be void as it will not in truth be an adjudicator’s determination within the meaning of the Act. Thus, relief will be available by way of declaration or injunction, without the need to quash the determination by means of an order in the nature of certiorari.”*
14. In 2010, the grounds upon which determinations of an adjudicator under the NSW Act could be challenged, were considered by the New South Wales Court of Appeal in **Chase Oyster Bar v Hamo Industries**<sup>13</sup>. The Court held that in an appropriate case, the NSW Supreme Court can set aside a determination because of jurisdictional error. In that case, the adjudicator had erroneously found that the claimant had given notice of intention to apply for adjudication within the strict time limit set out in s. 17(2)(a) of the NSW Act<sup>14</sup>.
15. The Court found that the Supreme Court of NSW does have the power to grant an order of certiorari to quash an adjudicator’s determination where there is a jurisdictional error. In his judgement, McDougell J considered in detail the nature of the jurisdiction afforded to the Adjudicator by the NSW Act:

*“207 The Security of Payment Act operates to alter, in a fundamental way, the incidence of the risk of insolvency during the life of a construction contract. As Keane JA said, of the not dissimilar Queensland statute, the Building and Construction Industry Payments Act 2004 (Qld), in **RJ Neller Building P/L v Ainsworth** [2008] QCA 397 at [40], the statute “seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder’s... inability to repay could be expected to eventuate”. It followed, his Honour said, that the*

---

contract between the claimant and the respondent, to which the Act applies (ss.7 and 8). (2) The service by the claimant on the respondent of a payment claim (s.13). (3) The making of an adjudication application by the claimant to an authorised nominating authority (s.17). (4) The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19). (5) The determination by the adjudicator of this application (ss. 19(2) and 21(5), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (s.22(3)(a)).

<sup>13</sup> [2010] NSW CA 190

<sup>14</sup> This provision of the NSW Act requires the claimant to give the respondent notice within 20 business days of the due date for payment

*risk of inability to repay, in the event of successful action by the other party, must be regarded as one that the legislature has assigned to that other party. The same is true of the regime established by the Security of Payment Act.*

*208 Further, the Security of Payment Act operates in a way that has been described as “rough and ready” or, less kindly, as “Draconian”. It imposes a mandatory regime regardless of the parties’ contract: s 34. It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents (see, for example, my decision **in Laing O’Rourke Australia Construction v H&M Engineering and Construction** [2010] NSWSC 818 at [8]).*

*209 The Security of Payment Act gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the Security of Payment Act lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.*

*210 Further, not only are adjudication determinations capable of transmutation into judgments of a court of competent jurisdiction (s 25), they create issue estoppels (**Dualcorp Pty Ltd v Remo Constructions Pty Ltd** [2009] NSWCA 69 ; (2009) 74 NSWLR 190). Why should a respondent to a payment claim be put at risk of suffering a judgment, and of being estopped from contesting that judgment in relation to later payment claims or adjudication applications, where the claimant has not complied with a temporal limitation for the making of the adjudication application on which the determination that gives rise to the judgment and the estoppel is founded?*

*211 The language of s 17(2) is clear. Where there has been no payment schedule and no payment, an adjudication application “cannot be made unless” the requisite notice is given within the specified time. The words “cannot be made” suggest strongly that, in the absence of notice, there is no*

*right to make an application. On the submissions for Hamo, that statutory prohibition may be disregarded: “an adjudication application... cannot be made... but, if made, can be considered and dealt with”. That is an unusual construction, particularly taking into account the mandatory provisions of s 17(6), to which I refer in the next paragraph.*

16. McDougall JA considered a number of other factors before stating:

*218 To my mind, the weight of those factors favours the conclusion that the requirement of s 17(2)(a) are jurisdictional, in the sense that the giving of notice within the requisite period is a condition that must be satisfied for a valid application to be made pursuant to s 17(1)...*

17. At paragraph 219 the Judge stated:

*As I have said, one of the consequences of the regime established by the Security of Payment Act is to reallocate, at least on an interim basis, the risk of insolvency as between principal and contractor (or as between contractor and subcontractor). That is a serious matter, as is the attendant overriding of contractual rights, and infringement on freedom of contract. In my view, where there is a statutory condition laid down for initiation of a fundamental part of that process, attention to those consequences suggests that the condition should be regarded as jurisdictional.*

18. At paragraph 285 the Judge concludes *inter alia* that determinations by adjudicators are in principle amenable to orders in the nature of certiorari for jurisdictional error.

*285 I have concluded that...the Court may, and in an appropriate case should, grant certiorari to quash a determination that is vitiated by jurisdictional error; and the decisions of adjudicators are amenable to relief in the nature of certiorari for jurisdictional error of law.*

19. The Court therefore reinstated jurisdictional error as the basis for judicial review of adjudicator’s determination. **Chase** identified three categories of jurisdictional error. These were: 1) the mistaken denial or assertion of jurisdiction (disregard of the nature and limits on functions and powers); 2)

entertaining a matter or making a decision of a kind that lies, wholly or partly, outside the limits on functions and powers; and 3) proceeding in the absence of a jurisdictional fact, i.e. disregarding something that the relevant statute requires to be considered. However, the Court stressed that the three categories were not a “rigid taxonomy of jurisdictional error” nor should they mark the boundaries of jurisdictional error.

20. It is clear however from the judgement of Spiegelman CJ in **Chase** that the Court of Appeal in that case did not expect a flood of successful challenges to adjudication decisions:

*“As Hodgson JA recognised in **Brodyn**, the purpose of the legislative scheme is best served by restricting the scope of intervention by the Courts. I do not believe that there will be frequent occasion for such interference – perhaps after a transitional period – once it is established in the building industry that punctilious compliance with each specific time limit is required if a builder is to have the benefit of the scheme established by the Act.”<sup>15</sup>*

21. The standard of review considered in the **Chase** decision on first glance appears to open widely the door to judicial review of adjudicators determinations in NSW. This has not actually occurred and that the grounds for review are still very limited is apparent from the decision in **Clyde Bergemann v Varley Power**<sup>16</sup>.

22. In that case, the adjudicator had allegedly calculated the amount of a progress payment in excess of the amount properly calculated in accordance with the terms of the contract. Section 9 of the Act expressly states that the amount of a progress payment is to be the amount calculated in accordance with the terms of the contract. McDougall J held that the requirements of section 9 are not conditions of jurisdiction (breach of which leads to a jurisdictional error), but a description of the mechanical aspects of the task to be performed in the exercise of jurisdiction. The Court unequivocally held that an adjudicator does not fall into jurisdictional error if and to the extent he or she misconstrues or misapplies the relevant provisions of the contract.

---

<sup>15</sup> *Ibid.* at para. 55

<sup>16</sup> [2011] NSWSC 1039

## Standard of Review in England and Wales

23. Since the enactment of the UK legislation, the courts have applied the purposive approach to the issue of enforcement. This has resulted in only very narrow grounds of review being considered by the Courts. This can be seen for example in the early decision of Dyson J in the TCC in **Macob Civil Engineering Limited v Morrison Construction Ltd**<sup>17</sup>:

*“The intention of Parliament in enacting the Act was plain. It 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 by arbitration, litigation or agreement ... But Parliament has not abolished arbitration and 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.”*

24. The principles behind the UK Courts’ approach to the enforcement of adjudicators’ decisions was comprehensively considered more recently by the Honourable Mr Justice Akenhead in **Balfour Beatty Engineering Services (HY) Limited v Shepherd Construction Limited**<sup>18</sup>:

*“39 Jurisdictional challenges on adjudication decision enforcement proceedings can be many and various. The Court of Appeal has expressed some concern that judges should be astute to discern inappropriate challenges. For instance in **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2006] BLR 15, the Court of Appeal stated the following in relation to both jurisdictional and natural justice challenges:*

*“85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the Adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the*

---

<sup>17</sup> [1999] B.L.R. 93

<sup>18</sup> [2009] EWHC 2218 (TCC)

*decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions...) may, indeed aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".*

*86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an Adjudicator to comb through the Adjudicator's reasons and identify points upon which to present a challenge under the label of 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of Adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the Adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the Adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to recognise that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The Scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated the dispute in evolving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the Scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in the case like the present.*

*87. In short, in the overwhelming majority of cases, the proper course to the party who is unsuccessful in an adjudication under the Scheme must be to pay the amount that he has been ordered to pay by the Adjudicator. If he does not accept the adjudicator's decision is correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the Adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and*

*expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.”*

*40 In **C&B Scene Concept Design Ltd v Isobars Ltd** [2002] EWCA Civ 46, Sir Murray Stuart Smith stated:*

*“26. Errors of procedure, fact or law are not sufficient to prevent enforcement of an adjudicator's decision by summary judgment. The case of **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522 is a striking example of this. The Adjudicator had made an obvious and fundamental error, accepted by both sides to be such, which resulted in a balance being owed to the contractor, whereas in truth it had been overpaid. The Court of Appeal held that the Adjudicator had not exceeded his jurisdiction, he had merely given a wrong answer to the question which was referred to him. And, were it not for the special circumstances that the claimant in that case was in liquidation, so that there could be no fair assessment on the final determination between the parties, summary judgment without a stay of execution would have been ordered.*

*29. But the Adjudicator's jurisdiction is determined by and derives from the dispute that is referred to him. If he determines matters over and beyond the dispute, he has no jurisdiction. But the scope of the dispute was agreed, namely as to the Employer's obligation to make payment and the Contractor's entitlement to receive payment following receipt by the Employer of the Contractor's Applications for interim payment Nos 4, 5 and 6 (see paragraph 12 above). In order to determine this dispute the Adjudicator had to resolve as a matter of law whether Clauses 30.3.3-6 applied or not, and if they did, what was the effect of failure to serve a timeous notice by the Employer. Even if he was wrong on both these points that did not affect his jurisdiction.*

*30. It is important that the enforcement of an adjudicator's decision by summary judgment should not be prevented by arguments that the adjudicator has made errors of law in reaching his decision, unless the adjudicator has purported to decide matters that are not referred to him. He must decide as a matter of construction of the referral, and therefore as a matter of law, what the dispute is that he has to decide. If he erroneously decides that the dispute referred to him is wider than it is, then, in so far as he*

*has exceeded his jurisdiction, his decision cannot be enforced. But in the present case there was entire agreement as to the scope of the dispute, and the Adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination."*

25. Considering breaches of the rules of Natural Justice, the Judge stated:

*43 So far as breaches of natural justice are concerned, again the law is well established. In **Cantillon Ltd v Urvasco Ltd** , the following was said:*

*"56. So far as failures to comply with the rules of natural justice are concerned, there have been a number of cases in which the TCC (particularly) has considered the conduct of Adjudicators. These include **Discairn Project Services Ltd -v- Opecprime Development Company Ltd** [2001] BLR 285 and **Balfour Beatty Construction Company Ltd -v- The London Borough of Lambeth** [2002] BLR 288 . In the latter case, HHJ Lloyd, QC, had to deal with the case where a contractor considered it was entitled to extensions of time and claimed in respect of 31 different Relevant Events. Liquidated damages had been deducted. The contractor commenced an adjudication seeking the return of the liquidated damages. Each side put in expert programming evidence. The adjudicator had done his own expert analysis of where the critical delay path lay, awarded the Contractor the bulk of the extension of time claimed and ordered the repayment of most of the liquidated damages. Materially the judge said:*

*"27. It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties. In **Macob Civil Engineering Limited v Morrison Construction Limited** [1999] BLR 93 Dyson J made it clear that a mere procedural error should not invalidate an Adjudicator's decision. Adjudication under the HGCRA is necessarily crude in its resolution of disputes. Errors of fact and law do not vitiate the decision which has to be complied with, unless of course it was not authorised and thus made without jurisdiction. On the other hand adjudication under the JCT conditions (which are typical of other forms) envisage that some basic procedural principles have to be applied in order that each party is treated fairly..."*

28. *Is the Adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the Adjudicator should act impartially...*

29. *Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an Adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one... which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant..."*

30. *Because in the Balfour Beatty case the adjudicator did not inform the parties of his methodology and seek their observations on its suitability and because if the losing party had had the opportunity to comment it might well have made a difference, he refused to enforce the decision.*

57. *From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:*

*(a) It must first be established that the Adjudicator failed to apply the rules of natural justice;*

*(b) Any breach of the rules must be more than peripheral; they must be material breaches;*

*(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.*

*(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.*

*(e) It is only if the 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 the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd -v- The London Borough of Lambeth was concerned 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 in relation thereto.”*

26. The 2010 case of **Geoffrey Osborne Ltd v Atkins Rail Ltd**<sup>19</sup> may indicate a change of emphasis by the UK Courts in relation to enforcement. In that case, by the time of the enforcement hearing, the parties agreed that the adjudicator had made a mistake in not taking into account amounts already certified and paid in ordering immediate payment of the sums found due. The contractor opposed the summary judgment enforcement application seeking Part 8<sup>20</sup> declarations as to the status of the decision. *Inter alia*, the contractor sought a declaration that the adjudicator lacked jurisdiction and that the decision was wrong as a matter of fact and/or law and therefore ought not to be enforced.

27. The court first referred to **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd**<sup>21</sup> as authority that the courts will enforce a decision even if the adjudicator makes a mistake and even where that mistake causes an injustice, however the court then declined to enforce a key part of the award. Mr Justice Edwards-Stuart held that the adjudicator was wrong in law to order immediate payment, when he had not taken into account the certification process of the sub-contract and the fact that the subcontractor had been paid or allowed some of the sums awarded. Thus, under the applicable adjudication rules, the adjudicator's decision did not reflect the “legal entitlement of the parties...”

---

<sup>19</sup> [2009] EWHC 2425 (TCC)

<sup>20</sup> Part 8 of the Civil Procedure Rules (UK) – Alternative Procedure for Claims

<sup>21</sup> [2000] BLR 522

under the contract”. Accordingly, the court granted a CPR Part 8 declaration and refused summary judgment for immediate payment of a sum that was found to be the wrong amount, severing that part of the decision from the remainder.

28. Some commentators have described Mr Justice Edwards-Stuart’s decision as “*novel, surprising and worrying in effect*”<sup>22</sup>. It appears to represent a departure from the conventional position that the adjudicator's decision is temporarily binding, right or wrong, provided he determines the dispute referred to him (i.e. he answers the right question). Salmon writes that; “*It is indeed a radical shift if it means that the court can and should, when invited to do so, make a final determination as to one part of decision. This ability to “amend” or “revise” a decision in one or more respects but leave the rest standing could be open to abuse*”.

29. Despite these concerns, there does not appear to have been an avalanche of decisions where the UK Courts have declined to enforce adjudicators’ decisions on the grounds that they are based on a mistake of law. The subsequent case of *Fenice Investments Inc v Jeram Falkus Construction Ltd*<sup>23</sup> provides an example.

30. In *Fenice*, the Plaintiff lost an adjudication on a point of law concerning the effect of bespoke amendments to the payment provisions of a standard form contract. As a result it was obliged to make a payment without any withholding. The Plaintiff refused to make the payment and instead sought the point of law to be finally determined by the Court. The Defendant made a cross application for Summary Judgment of the adjudicator’s award. The court took the opportunity to reiterate that the proper course for a party in the Plaintiff’s position is to comply with the decision before coming to court to challenge the decision.

---

<sup>22</sup> *The Enforcement of Adjudicators’ Awards under the Housing Grants, Construction and Regeneration Act 1996*; Kenneth T Salmon, *Arbitration* 2010, 76(2), 312-333. See also generally, *The Validity of Adjudicators’ Determinations Containing Errors of Law – A comparison of the judicial approach in England and New South Wales*; Jeremy K. Coggins (University of Adelaide) and Steve Donohoe (University of Plymouth), *IJLBE* [2012] 4(2) 116-125

<sup>23</sup> [2009] EWHC 3272 (TCC), Coulson J.

## Conclusion

31. The nature of adjudication and the mechanisms and standards for review and enforcement thereof are not immediately apparent from the Act. It remains to be seen whether the Courts in this jurisdiction will apply the purposive approach to the interpretation of the Act as the TCC has generally done since **Macob Civil Engineering Limited v Morrison Construction Ltd**<sup>24</sup> and more recently in **Balfour Beatty Engineering Services (HY) Limited v Shepherd Construction Limited**. The English courts have been reluctant to review adjudicators' determinations.
32. On the other hand, the Courts may treat adjudication as the activity of a public body attracting judicial review as the Court of Appeal in NSW has done in **Chase Oyster Bar v Hamo Industries**<sup>25</sup>. The Act itself offers no guidance as to the applicable standard of review. An initial period of challenge and interpretation seems likely before any definitive conclusions can be drawn on its impact on the construction dispute resolution landscape.

---

<sup>24</sup> [1999] B.L.R. 93

<sup>25</sup> [2010] NSW CA 190