Adjudication Society

Newsletter

Autumn / Winter 2021-22

Contributions

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Chairman's Notes

Hamish Lal, Akin Gump Strauss Hauer & Feld

Q3 has been good for The Society. On 23 September, Lindy Patterson QC and Claire King delivered an excellent Adjudication Case Law Update No 2.

This looked at five key cases: ***Toppan Holdings / Abbey Healthcare v Simply Construct*** [2021] EWHC 2110 (TCC); ***Davis Construction (South East) Limited v Sanzen Investments Limited*** [2021] EWHC 2216 (TCC); ***Global Switch Estates Ltd v Sudlow Ltd*** [2020] EWHC 3314; ***Downs Road Development LLP v Laxmanbhai Construction (UK) Limited*** [2021] EWHC 2441 (TCC); and ***CC Construction Limited v Raffaele Mincione*** [2021] EWHC 2502 (TCC). For those who missed the Update please go to https://www.adjudication.org/resources/webinar-recordings/adjudication-case-law-update-no2

On 18 November, The Society hosted the Annual Conference 2021. There was, for obvious reasons, no Annual Conference in 2020 and it appears that we were fortunate that omicron had not seeded in the United Kingdom in early November. Sadly, a number of Members were unable to attend the Conference due to the Pandemic and I apologise that the Conference was not a hybrid-event. The Conference Committee had looked into this but sadly, it was simply not feasible. The Conference Papers are on the website but of course, they do not replace the live discussions and learning. I must congratulate and thank Theresa Mohammed, Richard Booth and Arran Dowling-Hussey who curated and managed the Annual Conference.

We have an excellent Committee: There is tangible energy and determination. In 2022, we will work hard to re-connect with Members and continue the work started in 2021. May I please wish all Members my very best wishes for the New Year.

Hamish Lal

Editorial

Daniel Churcher, 4 Pump Court

Welcome everyone to the Autumn 2021 issue of the Adjudication Society Newsletter. We have a bumper edition with some excellent articles.

Adjudication case law continues to develop at a breakneck pace and Fenwick Elliott provide readers with the usual crop of comprehensive case notes. Andrew Smith reflects on his (so far, positive) experiences as a new adjudicator. David Sawtell considers recent case law concerning when a party will be found to have referred multiple disputes, thus depriving an adjudicator of jurisdiction. Dean Sayers considers the oft-forgotten question of costs in adjudication.

Arran Dowling Hussey of 4-5 Gray's Inn Square provides a well-timed follow-up to Niav O'Higgins' article in the last issue concerning the development of adjudication in Ireland. As Niamh predicted, the jurisdictions continue to diverge in some respects but remain aligned in others. It is to be hoped that good ideas will continue to be exchanged across the Irish sea, to the benefit of adjudicators and parties everywhere.

Finally, John Riches continues his series of articles, henceforth to be known as Payment Watch, addressing what he

considers to be the next battlefront in payment disputes: when is a payment application or payment notice not a "genuine" reflection of the sum considered due?

Many thanks to contributors and I hope readers enjoy their contributions. Any articles for the next issue gratefully received by end of February 2022 please. All that leaves is for me to wish everyone a Happy New Year!

Adjudication Society Newsletter- Case Note Corner

Contributors: Nicholas Gould, Laura Bowler, Ruth Leake, Catherine Simpson, Stuart Duffy, Aurelia Russo and Jake Wright

Transport for Greater Manchester v Kier Construction Limited

Reference: [2021] EHWC 804 (TCC)

Date: 31 March 2021

Judge: Mrs Justice O'Farrell DBE

Link: https://www.bailii.org/ew/cases/EWHC/TCC/2021/804.html

Keywords: Jurisdiction; Notice; Service; NEC; Dissatisfaction; Part 8 Claim; Liquidated Damages.

Case Note

Transport for Great Manchester (**"TfGM"**), the Claimant in these Part 8 proceedings, sought reversal of an adjudicator's decision against the Defendant, Kier Construction Limited ("Kier"). The Claimant brought this action on the basis of its purported Notice of Dissatisfaction issued under the contract, which disputed the adjudicator's award in favour of Kier. It alleged that the adjudicator had erred in law and contract interpretation. The Defendant sought to stifle the Part 8 claim by arguing that TfGM had failed to serve a valid Notice of Dissatisfaction in accordance with the contract, and that therefore the court had no jurisdiction as the adjudicator's decision was final and binding.

The parties entered into an amended NEC3 Engineering and Construction contract, with bespoke amendments, for the design and build by Kier of a bus interchange in Bolton (**"the Contract"**). Significant delays occurred during the project. TfGM alleged fault on the part of Kier, and consequently deducted liquidated damages from its account. Kier sought to defend its position by commencing an adjudication against TfGM seeking an extension of time, and restitution of the liquidated damages. The adjudicator decided that Kier was entitled to a substantial award of circa £600,000 plus an extension of time.

Clause W2.4 of Contract provided that unless a party serves a valid Notice of Dissatisfaction within four weeks of an adjudicator's decision, it would be deemed final and binding. The Claimant purported to serve such a Notice on the Defendant within this timeframe by email and post, following which it commenced Part 8 proceedings to challenge the outcome of the adjudication.

The Defendant argued that the court had no jurisdiction in this case because no valid Notice of Dissatisfaction had in fact been served under the Contract. This meant that the adjudicator's decision was final and binding on both parties. Particularly, Kier argued that the purported Notice had been sent to the wrong postal address; covered other irrelevant topics; and was not adequately precise nor clear. The Defendant criticised the Claimant for failing to comply with the notice and service provisions of the Contract.

Finding in favour of the Claimant, the court declared that the Notice of Dissatisfaction was valid, and thus the court did have jurisdiction to determine the Part 8 claim. The Notice was deemed valid on the basis that the correct last notified address had been used; it did not cover irrelevant topics; and it was in fact adequately precise – the Contract did not require a description of the grounds of dispute.

This judgment provides useful guidance on how service of a Notice of Dissatisfaction under an NEC contract or similar will be assessed and appraised by the court. Notably, such a Notice should be clear and unambiguous. Sensibly, Court determined that it was not necessary for a notice to set out detailed submissions and grounds of dissatisfaction: provided the recipient is left on notice that the adjudicator's decision is disputed, the Notice of Dissatisfaction will probably be effective.

Lewisham Homes Ltd v Breyer Group PLC

Reference: [2021] EWHC 1290 (TCC)

Date: 14 April 2021

Judge: Mr Justice Waksman

Link: https://www.bailii.org/ew/cases/EWHC/TCC/2021/1290.html

Keywords: Jurisdiction; Successive Adjudications; Interim Payment; Rectification; Defects; requests for time to pay

Case Note

Lewisham Homes Ltd (**"LH"**), the Claimant in the proceedings, sought enforcement of an adjudicator's decision against the Defendant, Breyer Group PLC (**"Breyer"**) for the payment of £2.7 million (plus VAT) awarded in respect of defective fire doors. The Claimant brought this action on the basis of successive adjudications on the matter, which dealt with liability and quantum issues. The Defendant sought to stifle the claim by arguing that the adjudicator in the sixth adjudication did not have jurisdiction, because he had already decided the issue of potential damages in an earlier decision (decision number 2).

The parties entered into a contract for the installation of 7,000 new fire doors and other improvement works at social housing developments. The new doors failed to meet the required safety standards and were deemed defective. Subsequent adjudications arose in relation to liability and recovery of remediation costs. LH alleged that Breyer had failed to discharge its obligations under the contract in selecting the non-compliant fire doors, and sought £3.75 million in damages. In the second adjudication, the adjudicator stated that LH was not entitled to a payment on account of the damages sought, because Breyer's obligation to rectify at no cost had not yet been triggered by the contract. Breyer later failed to propose a remedial scheme to the approval of LH's fire expert, which led LH to instruct an alternative contractor to replace the doors. Further to this, in the sixth adjudication the adjudicator decided that Breyer must pay £2.7 million (plus VAT) for the rectification costs.

The Defendant argued that the adjudicator had no jurisdiction to decide the sixth adjudication because the dispute was the same, or substantially the same, as the second adjudication. It was submitted that the adjudicator had already determined the quantum issue in his earlier decision where he rejected LH's payment on account claim, and consequently, the adjudicator's award should be set aside. The Defendant also noted that the circumstances of the two adjudications were the same, alleging that nothing had changed in the factual matrix to warrant a new decision being made.

Finding in favour of the Claimant, the Judge ruled that the two adjudications were neither the same, nor substantially the same, and so the adjudicator did have jurisdiction to decide the dispute and make the award. Critically, the Judge distinguished the disputes on the basis that the core issues were different, because the second adjudication related to Breyer's liability for breach of contract, which was not considered in the sixth adjudication. The Judge also contrasted the initial quantum issue regarding the payment on account, stating that this claim for an interim sum was altogether conceptually different to the matter of a final award for damages dealt with in the sixth decision. The argument that the factual matrix had not changed was also rejected firmly. The court ordered that the adjudicator's award should be paid

to LH within 14 days.

This judgment gives a helpful steer on how the court may analyse whether or not two disputes are the same, or substantially the same. Notably, the court will take into account a comparison between the core issues; any differences in the facts and evidence put forward for each dispute; and finally, the distinction between interim payment decisions and final award decisions.

Delta Fabrication & Glazing Limited v Watkin Jones & Son Limited

Reference: [2021] EWHC 1034 (TCC)

Date: 30 April 2021

Judge: Her Honour Judge Sarah Watson

Link: Delta Fabrication & Glazing Ltd v Watkin Jones & Son Ltd [2021] EWHC 1034 (TCC) (30 April 2021) (bailii.org)

Keywords: Adjudicators' decisions; Estoppel; Jurisdiction; Merger

Case Note

Delta Fabrication & Glazing Limited **("Delta")** sought summary enforcement of an adjudicator's decision. Watkin Jones & Son Limited **("Watkin")** alleged that the adjudicator did not have jurisdiction as Delta had referred disputes under two separate contracts to the adjudicator in the same adjudication. It was agreed that, if the referral did concern disputes under two separate contracts, the adjudicator did not have jurisdiction and the decision should not be enforced.

The parties entered into two sub-contracts for works at a student accommodation project. One sub-contract related to cladding, the other related to roofing works. From February 2020, the parties began administering payment for both contracts together, which included the final account procedure.

A dispute arose over the final account and Delta referred the dispute to adjudication. Delta sought to enforce the adjudicator's decision, alleging that the award was valid because the parties had agreed, by their conduct, to combine the agreements into one contract.

The Judge noted that, in order to decide in Delta's favour, she would have to be satisfied that the parties' conduct was unequivocal and consistent only with the parties having agreed to vary the contracts so that a single contract came into existence. In this instance, the contracts were separate written documents and the Judge would need to be satisfied that the parties had agreed that the contracts would be amalgamated.

In this case, the evidence suggested that Delta wanted the payment applications to be combined but not the contracts. The payment notices, by way of example, contained references to the subcontract orders and the supporting documentation did not confuse or amalgamate the contracts but rather dealt with them separately and combined the total. The Judge noted that combining payment applications was not the same thing as combining contracts into one.

Delta further argued that Watkins were estopped from denying that there was a single amalgamated contract, alleging that Watkin's conduct amounted to a representation that the contracts were to be treated as one agreement. The Judge also rejected this argument, holding that the essential elements of estoppel were not present in this case. The application for summary judgment was dismissed.

Davies & Davies Associates Limited v Steve Ward Services (UK) Limited

Reference: [2021] EWHC 1337 (TCC)

Date: 19 May 2021

Judge: Mr Roger ter Haar QC

Link: https://www.bailii.org/ew/cases/EWHC/TCC/2021/1337.html

Keywords: Adjudication; Adjudicators' powers and duties; Bad faith; Design and build contracts; Fees; Jurisdiction; Resignation; Terms and conditions; Unfair contract terms

Case Note

Steve Ward Services (UK) Limited **(SWS)** was employed to carry out construction operations at "Funky Brownz" restaurant. The premises are owned by BIL, Ms Vaishali Patel was a director and the majority shareholder of BIL. The works were carried out under an unsigned contract between SWS and Ms Patel, however all invoices were addressed to and paid by BIL.

As at completion of the works, SWS claimed an unpaid balance of £35,974.29. A dispute arose as to whether the works were complete, as well as issues relating to defects and snags.

In September 2020, SWS began adjudication proceedings against BIL for the unpaid sums. However, the request for nomination of an adjudicator was made before the Notice of Adjudication had been issued to BIL. The Adjudicator resigned. A second Notice of Adjudication was issued to BIL and following this, the same adjudicator, Mr Davies, was nominated. Mr Davies found that the contract was between SWS and Ms Patel and that BILL was not a party to or identified in the Contract. As a result of this, Mr Davies concluded that he lacked jurisdiction and resigned again. Mr Davies stated he "could not issue a Decision in relation to the contractual rights of one of the contracting parties… where the other contracting party was not a party to the process." Mr Davies then issued an invoice for £5,148, providing a breakdown of his time charged. SWS refused to pay the invoice because it claimed that Mr Davies had committed a repudiatory breach of his appointment.

The issues before the Court were (i) whether there was a threshold jurisdictional issue and (ii) the effect of the Adjudicator's Terms and Conditions. In respect of the first issue, Mr Roger ter Haar stated that it would have been wiser for Mr Davies to make inquiries into the parties' position as to who the contracting parties were and to ascertain whether both parties accepted that he had jurisdiction. There was no dispute as to the identity of the contracting parties or his jurisdiction and therefore resigning on this basis was erroneous. Mr ter Haar, considering whether the Adjudicator was nevertheless entitled to his fees, concluded that the Adjudicator "acted in accordance with what he regarded as being his duty" and this was not a "deliberate and impermissible refusal to provide a Decision." In addition to this, paragraph 9(1) of the Scheme permits the Adjudicator to resign at any time on giving notice to the parties; therefore the resignation itself was not a breach of Mr Davies' terms of engagement.

The second issue was the Adjudicator's Terms and Conditions. Mr ter Haar looked at Clause 1 of the Adjudicator's T&C's in relation to fees payable and found that this should be interpreted as meaning that the Adjudicator is not entitled to be paid where there was bad faith. Mr ter Haar did not find that the Adjudicator had acted in bad faith.

The final topic that Mr ter Haar considered was reasonableness under UCTA. As Clause 1 is concerned with payment of fees, and does not refer to contractual performance, it seems unlikely that it would be caught by Section 3 of UCTA. In any event, paragraph 9(1) of the Scheme

gives the Adjudicator an unfettered right to resign which is relevant to the contractual performance the Adjudicator is expected to perform. In the event he is mistaken as to Section 3, Mr ter Haar had "no hesitation" in finding that Clause 1 satisfied the reasonableness requirement in UCTA.

The first takeaway from this case is that an adjudicator should take care to make full enquiries regarding jurisdiction before resigning. However, the case also provides comfort to adjudicators: notwithstanding that the resignation in this case was "erroneous", the adjudicator got paid, and the judgment suggests that it will only be in the most egregious cases that an adjudicator will be deprived of their fees.

Toppan Holdings Limited, Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2021]

Reference: [2021] EWHC 2110 (TCC)

Date: 27th July 2021

Judge: Martin Bowdery QC

Link: https://www.bailii.org/ew/cases/EWHC/TCC/2021/2110.html

Keywords: Adjudicators' decisions; Collateral warranties; Construction contracts; Enforcement; Jurisdiction; Stay of execution

Case Note

This is an application for summary judgment by Toppan Holdings Limited **("Toppan")**, against Simply Construct (UK) LLP **("Simply Construct")**, to enforce two adjudication decisions for Mr Peter Vinden dated 30 April 2021. In short, Toppan (and its occupational tenant and operator of a care home – Abbey Healthcare (Mill Hill) Limited ("Abbey")) entered into a construction contractor with Sapphire Building Services Limited who engaged Simply Construct by a JCT Design and Build Contract 2011 with amendments June 2015 (the "Building Contract") with a contract sum of c.£4.7 million.

The works commenced on 11 May 2015 with practical completion on 10 October 2016. In or around August 2018, Toppan discovered fire-safety defects in the Care Home that would eventually be rectified by another contractor. In October 2020 the parties entered into a collateral warranty by which Simply Construct warranted amongst other things that it had performed and would continue to perform diligently its obligations under the Building Contract.

Toppan and Abbey served separate notices of adjudication on Simply Construct in December 2020. Mr Vinden was nominated as adjudicator for both disputes, which proceeded in parallel. In the Abbey adjudication, Simply Construct challenged the adjudicator's jurisdiction on the basis that the collateral warranty was not a construction contract. On 26th February 2021, the adjudicator gave a non-binding ruling in favour of both claimants in each adjudication.

Simply Construct resisted enforcement of the decisions chiefly on that basis that the collateral warranty was not a construction contract for the purposes of the 1996 Act;

After considering the case law and in particular Mr Justice Akenheads's decision in Parkwood v Laing O'Rourke [2013] B.L.R. 589,. Deputy Judge Bowdery QC decided that the warranty was not a construction contract and but was instead a *"a warranty of a state of affairs past or future akin to a manufacturer's product warranty."* The key factor was that at the time the warranty was executed, Simply Construct no longer had any construction works to carry out, and as a result the warranty was not a contract for "the carrying out of construction operations" within the meaning of the Act.

This case is an important consideration as to whether collateral warranties can be considered to be a "construction contract" for the purposes the Construction Act.

Downs Road Development LLP v Laxmanbhai Construction (UK) Limited

Reference: [2021] EWHC 2441 (TCC)

Date: 7 September 2021

Judge: HH Judge Eyre QC

Link: https://www.bailii.org/ew/cases/EWHC/TCC/2021/2441.html

Keywords: Adjudicators' decisions; Adjudicators' powers and duties; Defences; Design and Build Contract; Interim payments; Natural justice; Notices; Severability; Validity

Case Note

Downs Road Development LLP **("the Employer")** engaged Laxmanbhai Construction Limited **("the Contractor")** to undertake construction works in connection with the development of land at Downs Road, London **("the Contract")**.

On 26 February 2021, the Contractor sent Interim Application 34 stating the sum due as £1,888,660.70. On 3 March, the Employer sent Payment Notice 34 with the net amount for payment being £0.97. The covering email stated *"we confirm that a further Payment Notice will be issued to you in due course"*. The Employer had adopted a practice of sending payment notices valued at £1 or £0.97 to gain time in order to make an assessment of the sum it actually believed to be due. On 9 March, the Employer sent Payment Notice 34a and a valuation assessment, which provided for a net payment amount of £657,218.50. This was paid by the Employer on 26 March.

The Contractor then gave Notice of Adjudication for the amount of Interim Application No 34. The dispute was as to *"the true value of the sum due pursuant to Interim Payment No 34 as at the Due Date of 26th February 2021"*. The Employer raised a defence in its Response of the Contractor's alleged breach of contract in respect of the capping beam. The Adjudicator concluded that his task was limited *"exclusively to the proper valuation of [Payment Application 34]"* and that the net sum due at the time of Interim Application 34 was £771,045.48. Less £657,218.50 which had been accepted in Payment Notice 34a and the deduction of £10,000 as a consequence of the non-provision of warranties, the Contractor was due £103,826.98 **("the Decision").**

On 24 June 2021, the Contractor threatened to suspend performance of the works if payment was not made pursuant to the Decision. This led to the commencement of Part 8 Claim proceedings by the Employer. The Employer sought a declaration that the Decision was unenforceable because the Adjudicator had not addressed their capping beam defence.

The first issue before HHJ Eyre QC was the validity of Payment Notice 34. Mr Eyre referred to the covering email as evidence that the sum in Payment Notice 34 cannot be interpreted as being the sum the Employer considered due at the payment due date under Section 110A (2)(a) of the HGCRA. In concluding the payment notice was invalid, Mr Eyre highlighted that Payment Notice 34 failed to set out the basis of the calculation, and does not show how the Employer had arrived at the figure of the gross valuation. More fundamentally, a payment notice which was no more than a holding position did not accurately state the sum which the Employer believed was due, which is a requirement of the 1996 Act and most standard form contracts.

The second issue that HHJ Eyre QC considered was whether the Adjudicator's failure to address the capping beam cross-claim constituted a breach of natural justice and therefore left the Decision unenforceable. The Adjudicator concluded that this was outside of his jurisdiction because it was not part of the dispute between the parties *"at the relevant time"*, this date being 26 February 2021. The Adjudicator viewed his jurisdiction as confined to determining the correct sum due in respect of Interim Application 34. The capping beam defence was being put forward as a matter which the Employer said reduced the amount which was due in that cycle. Mr Eyre found that the Adjudicator deliberately decided not to address a defence which the Employer was *"entitled to advance and entitled to have considered"*. This was a material failure and therefore the Decision was, as a consequence of that breach of natural justice, unenforceable.

HHJ Eyre QC lastly considered whether any part of the Decision was severable, namely the sum due in payment cycle 34 less the capping beam cross-claim. The Adjudicator had reached a single decision and set out his findings and conclusions in respect of reaching that single decision. My Eyre said it would be *"artificial and inappropriate"* for the court to stop at any particular point and conclude that the decision was binding up to that stage but not as to the stages which followed. Mr Eyre decided that it therefore follows that no part of the Decision can be severed.

It is unsurprising that the court concluded in this case that the Employer's tactic of serving payment notices as a holding position pending proper assessment was not effective in law: is the notice did not meet the formal requirements (as to setting out the basis of the calculation) and to all intents and purposes it was a sham, in that it failed to set out the Employer's actual belief as to the sum due. The Employer though was saved by the principles of natural justice in this instance, and this case illustrates that in a "true value" dispute, the Adjudicator has the right and indeed the duty to consider all of the issues that might impact on the true value of the contractor's account.

CC Construction Limited v Raffaele Mincione

Reference: [2021] EWHC 2502 (TCC)

Date: 15 September 2021

Judge: HH Judge Eyre QC

Link: http://www.bailii.org/ew/cases/EWHC/TCC/2021/2502.html

Keywords: Adjudication; Completion; Contract terms; Dates; Design and build contracts; Enforcement; Final payments; Interpretation; Notices

Case Note

Mr Raffaele Mincione **("the Employer")** had engaged CC Construction Limited **("the Contractor")** to design and build the shell and core of a new house in London under a JCT Design and Build Contract (2011 Edition) with amendments. In October 2018, the Employer issued a non-completion notice and gave notice of its intention to levy LADs. Between February 2020 and February 2021, the parties exchanged correspondence in relation to the final account and the making good of defects. On 5 October 2020, and again on 1 December 2020, the Contractor issued a copy of its Final Statement, which stated that the Contractor was entitled to a final payment of just under £480,000. Clause 4.12.5 of the contract provided that the due date for the final payment was one month after the latest of the end of the Rectification Period, the date stated in the Notice of Completion of Making Good **("NCMG")**, or the date of submission of the Final Statement.

The following issues were argued at adjudication:

1) **The Due Date** – With reference to clause 4.12.5, the Contractor argued that the due date was 4 January 2021 (being one month after the Employer received the Contractor's Final Statement sent 1 December 2020). The Employer argued that the due date was 13 February 2021 (being one month from a NCMG issued on 13 January 2021). The Contractor contended that the NCMG of 13 January 2021 had no effect on the due date, because it did not relate to defects to be made good.

2) **Conclusivity of the Final Statement** – Under clause 4.12.6, the sum in the Final Statement would become conclusive upon the due date, unless disputed by the Employer. The Employer argued that the Final Statement had not become conclusive, because he had served a letter on 18 December 2020 disputing it. The Contractor argued that the Employer's letter would not prevent conclusivity, because it referred to the letter sent by the Contractor on 5 October 2020, not the one sent on 1 December 2020.

3) **LADs claim** – The Employer argued in the alternative that he was entitled to set off around £340,000 in respect of LADs from the sum due under the Final Statement. The Contractor contended that the LADs claim was not part of the dispute referred to adjudication, and therefore it was beyond the adjudicator's jurisdiction.

The adjudicator decided that the due date was 4 January 2021 and the Employer's letter of 18 December 2020 was ineffective to prevent the Final Statement from becoming conclusive. The adjudicator agreed that they had no jurisdiction to consider the LADs claim and, accordingly, the Contractor was entitled to payment of the sum in its Final Statement.

The parties both subsequently raised court claims, which were heard together. The Employer sought declarations as to the due date, whether the Final Statement was conclusive, and the enforceability of the adjudicator's decision. The Employer also argued that the adjudicator had deliberately declined to consider his claim to LADs as a set off, and by doing so had committed a material breach of the rules of natural justice. The Contractor argued that the letter dated 18 December 2020 was not to be read as disputing the Final Statement, and in any event was ineffective to prevent conclusivity in the absence of proceedings having been commenced before the due date.

The Due Date

The judge held that the correct interpretation of clause 4.12.5.2 is that where there is scope for a NCMG to be issued under clause 2.36 then the due date will be one month from the issue of that NCMG, provided that date is or could be later than one month from the expiry of the Rectification Period or the date of submission of the Final Statement. However, where there is no scope for the issue of a NCMG, clause 4.12.5.2 cannot come into operation. This will be the case where the Employer has not issued a schedule of defects or instructions for making good defects within the timescales required (i.e. within 14 days after the expiry of the Rectification Period). This was the case in this matter. As a result, the purported NCMG issued on 13 January 2021 was not a NCMG under clause 2.36 and was irrelevant for the purposes of determining the due date. The judge said that the due date appeared to be 4 January 2021, being one month from when the Employer received the Contractor's most recent letter enclosing the Final Statement.

Conclusivity of the Final Statement

The judge held that the Employer's letter of 18 December 2018 was effective and operated for the purposes of clause 4.12.6 to prevent the Final Statement from becoming conclusive. A reasonable recipient of the 18 December 2018 letter would be in no doubt that the Employer was disputing the Final Statement, which the Contractor had re-sent on 1 December 2020.

Jurisdiction and LADs claim

The judge considered whether the adjudicator had had jurisdiction to determine the conclusivity of the Final Statement. The judge was satisfied that on a realistic analysis of the parties' exchanges it was clear that there was a dispute as to its conclusivity, and the adjudicator had been right to proceed on the basis that he had jurisdiction.

The judge also considered whether there had been a material breach of the rules of natural justice in the adjudicator not addressing the Employer's LADs claim. The judge held that there had been, as the adjudicator had deliberately declined to consider the set off defence when they decided it was not part of the dispute before them.

This case gives guidance on the calculation of the due date for the final payment following issue of the Final Statement (in particular, the due date set out in the Final Statement is not calculated from the date of the issue of a NCMG if there are no defects to be made good), and what is required to prevent the Final Statement becoming conclusive under the JCT Design and Build Contract (2011 Edition).

Experiences as a new adjudicator

Andrew Smith, Andrew D Smith Ltd

As most adjudicators will know, the road to getting your first appointment can be long and winding. I have had a keen interest in the adjudication process since the implementation of the statutory regime in 1998, and as a recently qualified Chartered Quantity Surveyor it was then that my ambition to become an adjudicator began.

It took me a further 15 years to really set about starting that journey properly, which began with undertaking an MSc in Construction Law and Dispute Resolution at Kings College, London. This was an excellent step, recommended to me at the time by Nicholas Gould, and I really enjoyed the programme. I even managed to pass with a distinction!

It was at this time that I decided to leave corporate employment, and to set up my own practice specialising in dispute avoidance and dispute resolution. Initially I focused on expert witness work, and then decided to complete the Diploma in Adjudication in the Construction Industry offered by RICS. The decision to undertake this further course of study was twofold. In the short term it would support my growing involvement in adjudication, acting either as party representative or expert witness, but it was also a gateway to eventual selection to join the RICS Panel.

One of the useful outputs from the Diploma is that candidates are required to prepare a Decision based on a set of submissions, which is then assessed. An obvious challenge for any aspiring adjudicator is that they cannot show experience in preparing a Decision. It's the old adage of having no experience but then not being able to get any experience because you have no experience! Some of today's leading adjudicators are being proactive in this area, and are offering pupillage in order to let prospective adjudicators gain experience.

I completed the RICS Diploma in 2020, and had resigned myself to a 5-10 year wait to be invited forward for apply for panel assessment. However, it was at this time that RICS was putting in place a selection process for formulating a new Low Value Disputes (LVD) Panel. I grasped this opportunity and, after a rigorous selection process, I was invited to join the Panel in the Summer of 2020.

An adjudicator waiting for their first panel nomination can be forgiven for drawing comparisons with waiting for a bus. There is no certainty as to when, or even if, it will arrive and then two come along at once!

This was my experience after having been appointed to the LVD panel. The feeling of euphoria having passed the various stages of the selection process soon gave way to a feeling of just wanting to get started.

RICS LVD nominations have begun to increase, with over 100 appointments having now been made, however the Low Value Disputes process is still gaining awareness and like many things there is a natural caution with anything new.

It was with much relief, excitement, and a touch of trepidation, that I received two nominations to act as adjudicator in the summer of 2021.

I have heard seasoned adjudicators share their experiences of being involved with the LVD procedure, and the panel selection process involved demonstrating an appreciation of the complexities that can be associated with what might at first glance seem to be simpler disputes, and a commitment to deal with this complexity despite capped fees.

Most adjudicators would no doubt agree that value is no measure of the complexity of a dispute. Issues of contractual analysis, measurement and valuation, delay analysis, defective works, completion criteria, and other frequently

argued sources of dispute apply just as readily to a smaller value dispute and can be just as challenging to resolve.

An added challenge with Low Value Disputes is that the parties are less likely to be legally or professionally represented, for cost efficiency reasons. This style of adjudication, where parties represent themselves, is more akin to how things were in the early stages after the statutory regime was first introduced, and at first glance would seem a simpler and less testing for the adjudicator, however that was not my experience.

The first thing to recognise as an adjudicator dealing with un-represented parties is that they need organising and managing, given that they do not have an experienced party representative to perform that function. Directions need to be clear, simple, and prescriptive. A good discipline even with more experienced parties.

A legal representative should know that they need to copy the other side, and not to phone the adjudicator for a chat, however these things should not be taken for granted with an un-represented party. A back to basics approach by the adjudicator is therefore of paramount importance.

Another challenge for the adjudicator in an LVD adjudication is that submissions may be less articulate and require the adjudicator to be more inquisitive in ascertaining the facts and the law, which was certainly my experience. For example, I had to ask to be provided with a copy of the Contract, which was being referred to in submissions, and to be addressed on the operation of certain provisions.

The added complexity with my dual nomination was that both adjudications involved the same parties, but under different written contracts. I expected to find either a contractual amendment that permitted this to occur, ousting the need for responding party consent pursuant to paragraph 8(2) if the Scheme, or for the responding party to ask me to resign for lack of jurisdiction. Neither occurred, and the parties were content to proceed and have their arguments resolved.

I was also expecting some challenge as to the use of the LVD procedure. In the Summer 2021 newsletter, Martin Burns set out his experience of the lengths that some party representatives are prepared to go in order to try and get the adjudicator to resign, or even not to be appointed to begin with. Thankfully I had none of that. It was quite refreshing to see the parties apply their resources and energies to the dispute itself, and not having a dispute about the dispute with the normal plethora of jurisdictional points.

I found the process of conducting these adjudications, and reaching my decisions, to be professionally rewarding. It was a great achievement to finally reach my goal of sitting as an adjudicator, over 20 years after having first seen the process of statutory adjudication as a recently Chartered QS, although it was mixed with a big sense of responsibility towards these two parties who had entrusted me with their dispute.

RICS has put in place a mentoring scheme for new LVD panel adjudicators, which I have found very helpful and useful to date. I have heard experienced adjudicators say that the process of reaching a decision is a lonely one. I can see that and a mentor can assist in reinforcing confidence or pointing out issues of approach before they become engrained, although they play no part in reaching the Decision.

Unfortunately, and despite good behaviour during the process, the losing party elected not to pay my fees in respect of either Decision, which is disappointing as a first experience. Despite this I am still keen to get my next appointment, and continue further down that long and winding road.

One or more disputes?

David Sawtell, 39 Essex Chambers

A pair of recent decisions in the High Court this year have again turned on the question of whether only one dispute was referred to adjudication. Once again, Akenhead J's decision in Witney Town Council v Beam Construction (Cheltenham) Limited [2011] EWHC 2332 (TCC); 139 ConLR 1 ('Witney Town') has been re-visited. In both decisions, the question of whether there was a single dispute referred, or more than one dispute, was answered broadly. In many ways, this is to be welcomed: as confirmed by Coulson J (as he then was) in Deluxe Art & Theme Limited v Beck Interiors Limited [2016] EWHC 238 (TCC); 164 ConLR 218, it is normally only possible to refer a single dispute to adjudication: if the adjudicator deals with more than one dispute, it will not be enforced unless it can be saved by way of severance.

Prater Ltd v John Sisk & Son (Holdings) Ltd [2021] EWHC 1113 (TCC) and Quandro Services Ltd v Creagh Concrete Products Ltd [2021] EWHC 2637 (TCC) are classic examples of the approach that, if there is a dispute as to how much money is owed from one party to the other, the court will be slow to allow technical arguments to prevent a successful enforcement. The question is raised, however, as to when the Court of Appeal will impose limits on this expansive interpretation.

The single dispute issue

The relevant guidance for determining what is a single dispute was set out by Akenhead J at [38] in Witney Town, where he set out seven factors. Both of the decisions considered in this article refer to it. It is items (iii) and (vii) which are most important for the purpose of this discussion.

(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so."

"(vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one

> dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."

This analysis was also approved by Lord Briggs at [45] in the Supreme Court decision in Bresco Electrical Services (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25; [2021] 1 All ER 697. Lord Briggs was correct to describe it at [46] as a *"useful rule of thumb"*: it was a summation of the relevant authorities up to that point, and is not a statutory test. Akenhead J began his analysis of the case law by referring to the much-cited decision of Jackson J (as he then was) in Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC). Akenhead J borrowed the language of this decision at [32] in Witney Town, stating that, *"the circumstances in and by which a dispute may arise are 'protean'. It is almost impossible to give a definition which will work in every case as to what a dispute is."* It is not intended to be, and should not be read as, the final word on the subject.

As Sir Peter Coulson, writing extra-judicially, notes in *Coulson on Construction Adjudication* (4th edition) at 2-87, this is a perennial area of debate under the Housing Grants, Construction and Regeneration Act 1996 that has yet to be considered by the Court of Appeal. He observes, however, that the first instance decisions (as now saluted by Lord Briggs) have adopted a *"relatively broad interpretation of the expression 'a dispute'"*. The two decisions referred to below can, on one view, push the envelope of that 'broad interpretation'.

Prater Ltd v John Sisk & Son (Holdings) Ltd

The first case in time was Prater Ltd v John Sisk & Son (Holdings) Ltd [2021] EWHC 1113 (TCC), a decision of Veronique Buehrlen QC sitting as a deputy High Court judge. The Claimant, Prater, sought to enforce a decision of Matthew Molloy, which made the Defendant, Sisk, liable to pay £1,757,821.35 plus VAT. The adjudication had proceeded under Option W2 of the NEC3 Conditions of Subcontract, option A. There had been three earlier adjudications. Sisk argued that the second decision was unenforceable, hence impacting on the enforceability of the fourth decision. They contended that the referral in the second adjudication included multiple disputes: consequently, it was a nullity, so that the adjudicator did not have jurisdiction to reach the decision that he did in adjudication four.

The case, therefore, raised two separate strands of argument. Prater's primary submission was that Sisk could not challenge the fourth decision on the basis of the validity of the second decision: the second decision was binding on the parties unless and until revised, while Mr Molloy was in any case acting within his jurisdiction to make a mistake of law by treating the second decision as binding even if it was not. Secondly, Prater argued that the second decision was a single dispute, albeit one that included a number of issues arising out of a single payment certificate.

As for the first argument, Veronique Buehrlen QC accepted that it was *"self-evident"* that if, upon an application for enforcement or other challenge of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction his decision will not be binding or enforceable and will fall to be described as a nullity. This did not mean that it was a nullity where it had yet to be challenged: Clause W2.3(11) of the NEC3 form makes it clear that, *"The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties … ."* Until it had been successfully challenged, the second decision remained binding on the parties. She also accepted that, if Mr Molloy had fallen into error in understanding the impact on the fourth adjudication, it was an error of law as to the meaning and effect of clause W3.2(11).

At [26], Veronique Buehrlen QC observed that: *"Serial adjudications are common. Yet I have not seen any authority to support the proposition that a lack of jurisdiction in relation to an earlier adjudication is a recognised ground for challenging an adjudicator's jurisdiction in a subsequent adjudication that relies on the findings of the challenged adjudication prior to any such challenge being made good."* There is an apparent lacuna in the authorities which will no doubt require filling. If, for example, Sisk had issued a Part 8 claim in respect of the second decision following the promulgation of the fourth decision and obtained a different answer, would this have made the fourth decision necessarily unenforceable? Would all of the adjudications based on the second adjudication have to be re-disputed? Arguably, the adjudicator in the fourth decision would not have not made a mistake of law, and was certainly acting within his jurisdiction, in considering himself bound by the (now quashed, in this scenario) second decision. No doubt, in many instances, the parties can resolve the matter by agreement. It is, however, an issue that does arise fairly frequently in practice. It is surprising that we do not have a clear authority on this point.

Strictly, therefore, what the deputy High Court judge said about the second decision is therefore obiter. They are still, however, an illustration of that 'broad interpretation'. In the second decision, Mr Molloy was asked to consider the following points:

(1) The correct Subcontract Completion Date;

(2) The status of provisional sums within the Subcontract; and

(3) Sisk's entitlement to deduct certain indirect losses from any sums due to Prater.

Prater argued that these matters were part of a larger dispute as to Sisk's 20 December 2019 assessment. Sisk contended that there were obviously three different disputes (one involving an extension of time), without a clear link between the three. It is relatively common for a party to seek an extension of time as part of a broader claim for money: the guidance given in this case, therefore, has practical importance.

The deputy High Court judge agreed that each of the matters could have been decided independently; *"However, I do not read Akenhead J's guidance in the Witney case as meaning that unless each claim cannot be decided without deciding all or part of the other claims, each claim constitutes a separate dispute."* ([33]) She held that the matters referred by Prater were part of a larger dispute between the parties: the *"real dispute"* was Sisk's assessment of Preter's account, and the ensuing payment certificate ([37]). This had been advertised in the Referral itself, which stated that the whole of the dispute had not been referred as it was to unwieldy to be dealt with in a single adjudication. As a result, only one dispute (or, more accurately, aspects of that dispute) had been referred.

Finally, the deputy High Court judge considered a submission as to whether NEC3 Option W2 allowed more than one dispute to be referred. This was dealt with

briefly. Clause W2.1 states that, "*A party may refer a dispute to the Adjudicator at any time*" (emphasis underlined here emphasised in italics in the judgment). The words 'a dispute' are given in the singular, as in other parts of Option W2. It was held (again, obiter) that the proper interpretation of clause W2.1(1) was that a single dispute could be referred to the adjudicator at any one time, and not multiple disputes. This is orthodox, but it provides a useful confirmation.

Quandro Services Ltd v Creagh Concrete Products Ltd

In Quandro Services Ltd v Creagh Concrete Products Ltd [2021] EWHC 2637 (TCC), HHJ Sarah Watson sitting in the TCC as part of the Business and Property Courts in Birmingham heard an argument that three disputes were referred to adjudication. The contract itself was oral. The case concerned three separate invoices which had gone unpaid, in respect of the third, fourth and sixth applications. Each application was for a modest sum, with a total of £40,026 inclusive of VAT; importantly for the purpose of the adjudication, each claim was for an amount less the previous application, leaving a net claim. As HHJ Watson noted at [15], *"It is clear from the documentation that the payment applications were cumulative, with each payment application being for the full value of the work done, less the previous payment applications."*

No pay less notices were issued, but the sums went unpaid. The claimant's solicitor wrote to the defendant, seeking the entire sum due. The defendant did not respond. The Notice of Intention to Refer a Dispute to Adjudication framed the dispute by reference to the non-payment of the invoices, listing them by date, number and amount. The Referral confirmed that the sum sought was the total of the three invoices.

The Defendant challenged jurisdiction on the basis that the Claimant had, in fact, referred three separate disputes to adjudication under one notice and referral. The Claimant responded by submitting that the failure to pay the sum of £40,026 was the dispute: the sums agreed and the rendering of the invoices were said to be sub-issues in respect of that one dispute. It was also argued that the three interim applications were for cumulative amounts. The Adjudicator concluded that he had jurisdiction, and that the dispute referred was about the amount owed in the sum of £40,026.

At the enforcement hearing before HHJ Watson, the Defendant submitted that, if claims could be individually decided, it was a strong indicator that there were multiple disputes. The claims in the case could be decided without reference to each other.

The Judge agreed with the Claimant that the dispute referred to adjudication was the entitlement to payment of £40,026. She held that, while it was necessary to determine the validity of the three interim applications, this did not mean that each was the subject of a separate dispute. She referred to the example given by Akenhead J in Witney Town of the 50 variations in a payment application: while the adjudicator would have to consider the validity of each variation separately, this did not mean that there were fifty separate disputes.

Furthermore, the payment applications were cumulative; each application was for the full value of the works, less a deduction for the value of work already invoiced: *"Each payment claim built on the previous one."*

HHJ Watson therefore granted summary judgment enforcing the award.

The most obvious point that can be made about the decision before any questions of law are considered is the limited size of the claim. For some time now, the TCC sitting in London has transferred smaller adjudication enforcement claims to the TCC specialist list in the County Court at Central London. One obvious result of this policy is that the number of adjudication enforcement decisions being heard by the High Court, and hence generating a growing body of case law, has shrunk. It might well be the case that the decisions of the TCC outside of London will become more influential in the absence of available judgments.

How far can this go?

Each invoice in Quandro Services v Creagh Concrete Products was a separate issue: while they can be seen as cumulative, this was not expressed to be part of a broader, final account, exercise (although this may well have been what the effect of bundling the invoices together was). The danger with pushing this argument too far is that a contractor can identify a larger meta-dispute, then pluck individual points that could potentially curtail the employer's defences to them. This was not part of the motivation in Prater v Sisk, but it is still a little surprising to see three apparently disparate issues being run together as a package.

Witney Town celebrated its tenth birthday this year. It has stood the test of time. The Court of Appeal will be slow to give any encouragement to technical arguments on enforcement. The temptation for parties will be to continue to push the envelope. The clearest motivation will involve cases with insolvent parties, such as the recent decision of the Court of Appeal in John Doyle Construction Ltd (In Liquidation) v Erith Contractors [2021] EWCA Civ 1452, so as to avoid potential arguments on enforcement as to insolvency set off. As the Defendant in Quandro Services v Creagh Concrete Products argued, save for the (somewhat thin) 'cumulative amount' argument, save for the fact that the three invoices arise from the same contract, it is difficult to see why they are part of the same dispute, unless the term 'dispute' is given a highly expansive meaning.

We shall wait and see if 2022 brings more disputes (or a single dispute) over what and how much can be referred to an adjudicator.

Which Costs Are Actually Prohibitive to Adjudication?

Dean Sayers, Sayers Commercial Ltd

I was very recently part of a panel discussing the topic of 'Controlling Costs By Capping Fees of Tribunal Members' at the UK Adjudicators Annual London Conference 2021. I thought I would write and share a very brief article on some of the points I raised during my presentation.

In my experience in adjudication (as advocate on more than 100 occasions and adjudicator on more than 10 occasions), adjudicator's fees are not actually the most prohibitive aspect of adjudication at all. This is so, in my opinion, for the following reasons:

- If a party has a good/strong case (which presumably it does if referring a dispute to adjudication) then the adjudicator's fees should not be a significant concern as other side is likely to have to pay them when it 'loses'.
- Adjudicator's fees are, in my experience at least, generally reasonable even where hourly rates are high.
- I would suggest that in most cases the adjudicator's fees in disputes which would otherwise fall within one of the various 'low value' schemes presently in use in the marketplace would, in any event, be below the caps/fixed fees contained in such schemes (and if they are not then should that not be a matter for the ANB to review and address?). Certainly, all of my Decisions have been reached outside of such 'low value' schemes but my fees have in any event often been much lower than the caps/fixed fees which would have applied if my Decisions had been reached under such schemes (even where the disputes were more complex and/or in sums greater than those contemplated by such schemes).
- Party costs (mainly for party representatives) are, in my view, the most prohibitive aspect of adjudication – probably because the process has morphed from something which was perhaps supposed to be relatively simple and straightforward (and was, in the beginning, so I'm told by those who were practicing in the late 90s and early 00s) to a fast track but complex legal process with irrecoverable costs (unless, of course, cost recovery is agreed by the parties post Notice of Adjudication - something which rarely, if ever, happens in practice).

Perhaps there should, therefore, also be some considerable focus on addressing the issue of party costs (mainly representation) in adjudication. Some ideas for this could include the following:

- Could we perhaps look at some way of making party costs recoverable for time wasted on unfounded jurisdictional challenges?
- Could we look at repealing the part of the Housing Grants Construction and Regeneration Act 1996 (as amended by the Local Democracy Economic Development and Construction Act 2009) which essentially prohibits all party costs from being recovered, and perhaps revise it to prohibit only contract clauses which attempt to pre-apportion party costs (so a prohibition only on so-called Tolent clauses, or mutations thereof)?
- If party costs were to again be recoverable then, so to avoid returning to a situation of an imbalance of power/money and large companies possibly using a sledgehammer to crack a nut so to intimidate smaller companies into not using adjudication (by way of making smaller companies nervous about facing a completely disproportionate costs bill for the larger companies' costs should they 'lose' in the adjudication proceedings), perhaps adjudicators could take a balanced view on what costs would have been reasonable in the circumstances and only award those costs? Most adjudicators are experienced practitioners themselves so would have a very good idea of what would be reasonable costs when taking into account the facts of the dispute and the parties involved.
- In my experience, the possibility of recovering party costs in the event of a successful adjudication would be of significant interest to the users of adjudication provided that they are also protected from a completely disproportionate costs bill from the other side should they 'lose' in the adjudication proceedings.

For the avoidance of doubt, I am not advocating discarding the existing 'low value' schemes; merely suggesting that we should perhaps be placing more focus on the bigger issue (in my opinion) of party costs.

I hope the above proves of interest to some of you and promotes further discussion and debate.

Similar but increasingly different ?

Arran Dowling-Hussey, 4-5 Gray's Inn Square

Some but not all adjudicators, party representatives and parties may be involved in adjudications both in the United Kingdom and the Republic of Ireland. Those who primarily do U.K work of this type may find it helpful to note that the assigned adjudication judge in Dublin, Mr. Justice Garrett Simons, has recently cautioned that case law from England and Wales can be of assistance when interpreting the Irish legislation (2013 Construction Contracts Act which commenced as of July 25, 2016) but cannot be 'read across.' This approach no doubt recognises that whilst there are some broad general similarities in the UK and Irish legislation it does differ in a number of significant respects. This was a point that was reiterated in a webinar, held on October 7, 2021, jointly organised by the *Adjudication Society, Chartered Institute of Arbitrators and Society of Construction Law* where Horner J (the adjudication judge in Belfast) and Simons J gave a ' view from the bench.' Those who did not attend that event, which was recorded and can be watched/re-watched, can instead read the following cautionary words (from Simons J's recent decision of Aakon Construction Services Ltd v Pure Fitout Associated Ltd (2021 IEHC 562)):

'There is an understandable temptation for practitioners and judges in this jurisdiction to borrow from this extensive learning when interpreting and applying the Construction Contracts Act 2013. The case law from England and Wales must, however, be approached with a degree of caution. This is because there are significant differences between the legislative approaches adopted in the two jurisdictions. There are also significant differences in the procedure governing the enforcement of an adjudicator's decision. These distinctions are all too easy to miss in that many of the concepts underlying the UK legislation seem familiar to us.'

Simons J's judgment saw him identify several key differences between the respective legislation including:

1. Adjudicators' decisions in the Republic of Ireland are enforced as if they were orders of court. By contrast adjudicators' decisions are normally enforced in the United Kingdom by way of an application for summary judgment.
2. The Republic of Ireland's adjudication process is statutory in nature. By contrast the United Kingdom legislation gives effect to a right to adjudication by implying terms into construction contracts and any adjudication exists as a creature of the contract which it concerns. A practical consequence of the distinction between the two jurisdictions is that an adjudicator's decision in Ireland might, in principle, be amenable to judicial review.
3. The provisions in respect of payment claim notices under Ireland's Construction Contracts Act 2013 are materially different to those under the United Kingdom legislation. There is no express statutory provision under the 2013 Act which stipulates what the consequences of a failure to respond to a payment claim notice are to be. The 2013 Act does not state that, in the absence of a response, the amount claimed in the payment claim notice is payable by default.
4. The status of a notice of intention to refer under the 2013 Act is different to that of a notice of intention to refer a dispute to adjudication under the United Kingdom legislation.
5. There may be a potential difference in the role of the Courts in each country. In the United Kingdom an adjudicator's decision is binding until the dispute is finally determined whether that is by legal proceedings, arbitration or by agreement. However, the 2013 Act refers to court proceedings initiated 'in relation to' the adjudicator's decision. This might be taken as suggesting that it is necessary to challenge an adjudicator's decision head on - rather than simply initiate independent proceedings seeking declaratory relief de nova as to the rights of the parties - and that some weight may have to be given to the adjudicator's decision.

Aakon Construction Services Ltd v Pure Fitout Associated Ltd (2021 IEHC 562) was a very comprehensive decision dealing with a range of issues such as enforcement arising out of the factual background of a 'smash and grab adjudication.' A dispute had arisen under a sub-contract between the applicant as sub-contractor and the respondent as main contractor. A payment claim notice was delivered by the applicant which the respondent failed to respond to within the statutory period allowed for in the 2013 Act. The applicant referred the claim to adjudication and the respondent could not approach the issue on a 'true value' basis but was faced with a payment direction because of their failure to respond in the required time and manner. It now seems that the comparatively modest body of Irish adjudication case law is likely to be added to considerably in the next 12 to 24 months. Simons J is likely to continue to outline that the Irish model has broad similarities to other common law jurisdictions who use statutory construction adjudication but that there are also particular local issues that need to be considered.

For now, those who are primarily involved in adjudication outside the Republic of Ireland, but sometimes find themselves doing Irish work of this type, should take cognisance of the approach which was set out by Simons J in Aakon Construction Services Ltd v Pure Fitout Associated Ltd (2021 IEHC 562) and wait for more of the same. The first five years of Irish adjudication perhaps over promised and under delivered with a much discussed and anticipated process taking quite some time to 'bed-in.' It now seems that there will be a good deal more activity in the short to medium term. In as far as can be seen as we approach the end of 2021 the Irish adjudication process is working and generally working well. However, where the roots of the legislation date back to June 2010 (when a private members' bill was introduced by the late Senator Fergal Quin) it may be that some of the court judgments that are now to be expected might underscore some areas where the legislation may benefit from amendment. Time will tell.

The Minefield

John Riches, Henry Cooper Consultants Ltd

Soon you will walk across this field.

I will educate you to step here and step there,

to avoid the hidden dangers beneath the grassy slopes and native flowers.

Walking Through Minefields (William A Poppen January 2013)

Maybe an unfortunate analogy, the minefields in this poem versus the minefields that us construction folk face with the broken payment legislation that we need to negotiate with every day of the week.

The latest trap is 'genuine'.

Let's wind the clock back a bit before we look at the latest trap.

In the early days of the legislation nobody really bothered much about notices in connection with payment. They became more prominent when the 1996 Act was amended via the Local Democracy, Economic Development and Construction Act 2009. That became operative on 1 October 2011. That was ten years ago.

All of a sudden notices became interesting in respect of payment. They were by far the largest part of the amendments to the legislation.

Notices from a mere Application for Payment throughout the payment system had teeth. Failure to participate in the game of 'snap' meant you might lose the game by default.

Probably the most significant case on losing the game was ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC) (03 December 2014). Seevic missed the boat on a Payment Notice and/or a Pay Less Notice and had to pay the sum in ISG's Application for Payment. This reflects what the legislation says and many of the commentators quickly gave birth to the expression 'smash and grab' adjudications, as if some crime had been committed.

There were some early assaults on the 'Seevic Principle', but it survived those early skirmishes. What was not raised for some time was what a 'notice' actually was.

The first case to really grapple with this question in the context of the 1996 Act was Henia Investments Limited v Beck Interiors Limited [2015] EWHC 2433 (TCC) (Henia). It had taken four years of what might have been unknown bad habits in respect of notices to question the notice itself.

A notice is to be construed in a similar way to the underlying contract. The construction of such notices must be approached objectively, because the issue is how a reasonable recipient would have understood the notice (adopting the broad principle set out in Mannai Investment Co Ltd v Eagle Star Life Insurance [1997] 1 AC 749). In addition, when construing the notice, the court must take into account the relevant 'objective contextual scene'.

The fundamental question laid down in Henia, which was concerned with an interim payment: did the issued document amount to an interim application in substance, form and intent? The same question can be asked of any other form of payment document, such as a payment or payless notice.

Substance, form and intent are not new concepts at all. They are referred to in Token Construction v Charlton Estates [1973] BLR 48). Even that Court of Appeal judgment borrowed from another case, Minster Trust Ltd v Traps Tractors Ltd and Others [1954] 1WLR 963.

One of the tests for all three requirements, in broad terms, is whether the notice provides an adequate agenda for an adjudication.

In simple terms does the notice do all that it should do in terms of the contract (substance) is there sufficient clarity as to what the notice is (form) it should be clear on its face, and Intent must be derived from the manner in which a document would inform a reasonable recipient.

The industry did not take well to meeting these three requirements, very much a case of carry on as we always have. There were eight subsequent cases that explored substance, form and intent as parties explored the boundaries of what would and would not count as a valid notice. .

In Henia the Application for Payment was late and therefore did not count as an Interim Application.

In Severfield (UK) Ltd v Duro Felguera UK Ltd [2015] EWHC 3352 (TCC) (24 November 2015) a new claim failed simply because it was revised and was therefore out of kilter with the payment provisions.

In Jawaby Property Investment Ltd v The Interiors Group Ltd & Anor [2016] EWHC 557 (TCC) the Application for Payment failed because it did not state the sum Interiors considered due to it. The court made it clear in that case that notices would be construed strictly: *'Whether or not this conclusion can be said to lead to a harsh result for Interiors, this is an area where, as the authorities make clear, there is little scope for latitude' indicates the strictness of form, substance and intent."*

In Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC) the rules on form, substance and intent apply to both Interim Applications and Pay Less Notices. In this case an email and attachment had the requisite intention of being a Pay Less Notice.

In Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15 (TCC) there was an important and practical distinction between the validity of an Application overall and the validity of claims within the application.

In Systems Pipework Ltd v Rotary Building Services Ltd [2017] EWHC 3235 (TCC) a payment application failed as a result of what has been described as an overly strict interpretation of the Sub-Contract: the relevant application showed what the contractor thought was the value of its work, but it had not completed the next step of stating what further payment was now due.

Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC) a Pay Less Notice was held to be valid notwithstanding that the detailed calculation of the relevant sums was not contained in the notice itself, but rather incorporated by reference to an earlier document.

In C Spencer Ltd v MW High Tech Projects UK Ltd [2019] EWHC 2547 (TCC) there is a bit more guidance on form, substance and intent:

> *'It is necessary to construe each payment notice against the relevant contractual and statutory background to determine its validity. A payment notice must be sufficiently clear and unambiguous in form, substance and intent so that the parties have proper notice of the sum assessed as due and the basis of calculation.'*

In this instance it was found MW issued a valid Payment Notice and that it operated to allow the set-off that MW had claimed.

In RGB Plastering Ltd v TAWE Drylining and Plastering Ltd [2020] EWHC 3028 (TCC) RGB issued its Application by email. Email was permitted by the contract but not to the address that RGB had chosen to use. The Application was also submitted late. It was held not to be a valid Application.

So, form, substance and intent have been analysed in the nine cases above and you could be forgiven for thinking they are here to stay.

The latest case had other problems. Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC) brought in consideration of whether the notice was what the author genuinely believed at the time . Based on the reaction of other industry commentators 'genuine' has caused a bit of a stir.

The parties had contracted under a JCT Design and Build Contract, 2011 edition with amendments. This particular contract is unusual because JCT has adopted a payment system which is initiated by the payee, rather than the payer. That structure is not widely used in the industry and not used in any of the other JCT Suites of contract.

The payee-led procedure follows s110A (1) (b) of the Construction Act (the Act) and it says;

> "(1) A construction contract shall, in relation to every payment provided for by the contract—
>
> (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date."

What the payee led system does is replace the Payment Notice that a payer would ordinarily issue. So, we miss out the nonsense of a Default Notice where there has been no Payment Notice from the payer.

This system cuts out the Payment Notice. The payer then only has one shot to avoid paying the sum applied for in the Application for Payment, which is the Payee's Payment Notice, becoming the sum due. The payee only has a Pay Less Notice to rely upon.

This is clear tracking through the Act.

The Payee notice complies with the Act if it satisfies with s 110A (3);

> "(3)A notice complies with this subsection if it specifies—
>
> (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
>
> (b) the basis on which that sum is calculated."

The sum in that notice becomes the sum due which must be paid because s111 (2) (b) says so;

> "(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—
>
> (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;"

All of this is reflected in the contract in clauses 4.8.1, the Application and 4.10.2, the Pay Less Notice.

The judgment does not tell us in any detail what bespoke amendments were made to the contract but what is clear is the payment mechanisms were not interfered with.

The Employer adopted its own method of dealing with what were Pay Less Notices. The Employer sent two payment notices each month. A typical process is described in Paragraph 12 of the judgment.

> "The Employer adopted an approach of sending two payment notices (or purported payment notices) in each payment cycle. Thus in cycle 31 a payment notice was sent stating that the net amount for payment was £1. That figure resulted from the gross valuation less retention being put at a sum £1 greater than the total amounts previously certified. That notice had been sent under cover of an email dated 5th December 2020 stating "we confirm that a further Payment Notice will be issued to you in due course, most likely on Monday, 8th December 2020, and this will not affect your payment date." In due course a payment notice in a larger amount was sent. That approach was repeated in payment cycles 32 and 33 save that in those cases the net amount for payment stated to be £0.97 as a result of applying the retention of 3% to the figure of £1.

The contractor reached the point of having enough. An adjudication was commenced and completed in respect of payment 34."

Pick the story up at Paragraph 15 of the judgment;

> *"On 3rd March 2021 the Employer's Agent sent Payment Notice 34. The covering email said "we confirm that a further Payment Notice will be issued to you in due course and will not affect your payment date." The email went on to say that assessment of the Contractor's applications over the preceding four months had been taking longer than anticipated. It attributed this to the way in which the applications were set out and the consequent difficulty of reviewing the figures to ascertain what was properly due in respect of variations. The email also noted that in the past the Contractor had provided the application several days before the due date which had given time for the Employer's Agent to review the*

figures but it said that in the preceding months the application had been issued "late in the afternoon of the due date". That combined with the volume of information being provided and the form in which it was provided "[made] it a lot more difficult to get the valuations assessed in a timely manner to ensure the valuations are fairly assessed."

In any analysis of form, substance and intent, the process devised by the Employer would not comply, for the simple reason that the original payment notice did not reflect what the Employer thought was genuinely due to the Contractor.

But the veracity of any notice in the payment chain only bites when you are playing 'smash and grab'. This is because, and the cases emphasised this, of the draconian effect of failing to respond to a valid notice. The same analysis does not really apply where what is being dealt with is the 'true value'.

Laxmanbhai made it clear in the adjudication that its position was that no valid Payment Notice had been issued by Downs.

What Laxmanbhai said in the Reply to the Response and the question before the Adjudication was;

"We would state that the reason why this Adjudication was required to be initiated and why a true valuation is being sought (rather than a `smash & grab' approach which, for the avoidance of doubt, [the Contractor] considers it could have commenced) is in part to establish a way forward for the proper administration of the Contract so as to enable [the Contractor] to receive fair cash flow for work undertaken until such time as the works are completed. Had a `smash & grab' adjudication been sought this would have permitted [the Employer] to continue to unfairly devalue sums due in the following interim payments."

The question before the adjudicator went to what the account was worth, the 'true value' rather than a technical knockout on veracity of notices.

This opened up the opportunity for Downs to submit any defence that it so chose to the claim made by Laxmanbhai. It had a defence, and the adjudicator did not admit it or deal with it.

The Court's view was that the adjudicator should have dealt with it, the parts of the decision that followed the correct path could not be severed and the whole decision was not therefore enforced.

The whole of the rules on severability in the judgment are worth a detailed study but that part is not on our theme on the payment rigmarole.

What was raised was whether the two-part payment notice system devised by the Employer could give rise to a valid Pay Less Notice--- Mr. Mort said that Payment Notice 34 was not valid. It did not set out the sum which the Employer genuinely considered to be due and nor did it set out a proper basis of the calculation. Instead, it was a place holding exercise to gain the Employer time in which to make a fuller assessment and to present a fuller case in response to Interim Application 34 and to avoid the consequences of having failed to serve a payment notice while it was taking those steps.

What is the consideration of genuine versus what makes a counterfeit notice?

It is belief! Where does that come from? S110A (2) of the Act says;

"2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated;"

The twist is in the considers to be, to consider a sum to be due you have got to believe it.

There had been a Pay Less Notice which had said that the sum due was £0.97. The context is in Paragraph 47 of the judgment;

It may well be that at the date of Payment Notice 34 the Employer had not formed a view as to the precise amount which it believed was due but it clearly did not believe that the figure was just £0.97 and it is not credible to suggest that the Employer did not realise that a substantially greater sum was due. In that regard it is to be noted that in Payment Notice 34a which was sent only six days later the Employer said that it considered the sum due to be £657,218.50.

Objectively the Employer could not have <u>believed</u> that £0.97 was due. If there are no grounds for the belief it cannot be genuine.

Are the floodgates now open, Applications for Payment, Payment Notices, Default Notices and Pay Less Notices must all be vulnerable to attack on the basis they are not a statement of genuine belief.

There is much mischief to come from this. The 'payment watch' articles await the next 'genuine' attack.