Severability of adjudicators' decisions, and genuine belief in sum stated as due in payment notices

Construction analysis: In *Downs Road v Laxmanbhai*, the Technology and Construction Court provided important guidance on when an adjudicator's decision may and may not be severed, so as to preserve the enforceable parts of an award which has been found to be unenforceable in part.

The case also provides an example of an adjudicator's decision being found unenforceable for a breach of natural justice, and sets out a test that the employer must have a 'genuine belief' in the sums stated in a payment notice.

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

What are the practical implications of this case?

The decision is quite a surprising one. Rather than upholding the safe and logically anterior findings of the adjudicator, the court refused to sever the decision, finding that these conclusions were reasons for reaching a single decision and that the court should not sever a single decision like this when to do so would be to *"treat the matters which the adjudicator chose to set as the reasons why he reached the ultimate conclusion as if they were separate findings"*.

Practically speaking, this decision makes clear that the range of circumstances in which the court will let an adjudicator's decision fail entirely, rather than sever the unenforceable parts from those parts which are safely enforceable, are wider than might have been previously understood. It will have to be seen if this decision is followed, or if it stands out as an 'outlier' in the future.

The second part of the decision, that there must be a "genuine belief" in the sums which are stated on a payment notice, is likely to result in disputes where employers are questioned about the bona fide nature of the sums they say are due.

What was the background?

The employer engaged the contractor under the standard JCT Design and Build Contract (2011 edition) for construction works, being the demolition of the existing buildings and the construction of four buildings containing a total of seventy-nine residential units and associated works.

A dispute arose as to the operation of the payment regime for the works and this led to a reference to adjudication in respect of payment cycle 34.

As with some of the previous payment cycles, following the interim application by the contractor, the employer sent two payment notices: the first for a nominal sum of 0.97p and the second for a larger sum (in payment cycle 34 that was £657,218.50).

On 13 April 2021 the contractor gave Notice of Adjudication. This stated that the dispute was as to "*the correct sum due to*

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the Referring Party in Interim Payment Nr 34".

A set-off defence was raised in the adjudication by the employer. It said that it had suffered a loss of £149,692.30 as a result of a breach of contract by the contractor relating to a failure to design or build the capping beam in accordance with the contract documents, installing it higher than provided for in the contract. This defence was addressed by the contractor in some detail in its Reply.

The adjudicator concluded that his task was limited "*exclusively to the proper valuation of [Payment Application 34]*", finding in his decision that the net sum due at the time of Interim Application 34 was £771,045.48. on a gross valuation of £21,246,002.09.

Given a deduction for the £657,218.50 which had been accepted as due in Payment Notice 34a and a further £10,000 for an unrelated issue, the sum due to the contractor was held to be £103,826.98.

The adjudicator decided that he did not have jurisdiction to rule on the capping beam set-off defence.

In challenging the enforceability of the adjudicator's decision, the employer argued that the decision was to be seen as involving decisions on two separate issues: first, that of the sum due in respect of Interim Application 34 and, second, the extent of the set-off available to the employer against that sum. It said that although the adjudicator's conclusion as to the latter of those issues was not enforceable (for breach of natural justice in deliberately not considering the defence) the decision was binding as to the former.

The contractor contended that the decision was enforceable in its entirety, but that if it was not enforceable in its entirety then it was not enforceable in part.

What did the court decide?

Breach of Natural Justice

The TCC set out the test to be applied in relation to the natural justice issue raised by the employer, drawing on Coulson J's analysis in *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC). It said that:

> The test to be applied is that a deliberate failure to address a material issue which was before the adjudicator on a proper view of his jurisdiction will be a breach of natural justice. An issue will be material for these purposes if it is shown to have had the potential to make a significant impact on the overall outcome of the adjudication.

Reaffirming the proposition that an adjudicator has jurisdiction to consider any defence which would entitle a party to avoid or reduce its liability to pay a sum said by the other side to be due, the court held that in refusing to consider the capping beam set-off defence, the adjudicator had taken an unduly narrow view of his jurisdiction.

This was, the court found, a material failure, and amounted to a breach of natural justice, because it was *"far from a trivial part"* of the employer's case. The court found that materiality was demonstrated by the fact that, had the employer succeeded in its set-off defence, it would have made the difference to whether there was a balance due to the contractor or not.

The court therefore found that the adjudicator's decision that the sum of £103,826.98 remained outstanding in relation

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to Interim Application 34 was unenforceable.

Severability and Enforceability

The employer contended that even though the adjudicator's decision that £103,826.98 was payable to the contractor was not enforceable the decision was nonetheless binding on the parties as to the sum due in payment cycle 34, absent the cross-claim.

The logic behind this submission is clear: the adjudicator's finding that the gross valuation for payment cycle 34 was £21,246,002, and that after deduction of the retention and the sums previously certified the amount due was £771,045.48, are logically distinct from and not touched by the question of set-off for the cross-claim.

The contractor's position on this question was that there was a single decision and *"It was impermissible for the Employer to say that the Decision was not binding or enforceable as to the final conclusion reached but was binding as to part of the process of reaching that conclusion."*

The court surveyed the authorities. It noted that the decision of the Scottish Court of Session in *Dickie & Moore Ltd v McLeish* [2020] CSIH 38 was *"highly persuasive"* and *"sets out the approach which is normally to be taken to determine whether the relevant part of an adjudicator's decision can be safely enforced notwithstanding the invalidity of other parts"*.

The court, however, refused to sever the decision in the manner sought by the employer. It held that there was a distinction between the earlier cases on severance where *"the effect of the severance where it occurred was that the award in favour of that party was upheld but in a lesser amount than would have been the position if the adjudicator's decision had stood unchallenged"* and the present case where this was not the state of affairs.

Nevertheless, the court considered that there was no reason in principle to not allow severance where *"this will enable the party which lost overall to enforce a part of the decision which went in its favour"*. However, the court also considered that it should *"guard against creating an artificial outcome which could not have been the result of a proper decision by the adjudicator"* and that the risk of an artificial result is greater where it will enable such a result.

Distinguishing between adjudications which contain a series of decisions independent from each other and those which are a single decision resulting from a connected chain of reasoning, the court found that:

> "Where there is such a single decision severance is unlikely to be appropriate even where the stages in the chain of reasoning leading to the adjudicator's conclusion are set out and can be said to be logically distinct. Severance in those circumstances is unlikely to be appropriate because it would involve an artificial division of a continuous chain of reasoning and would create the risk of imposing on the parties an outcome which could not have resulted from the adjudication."

The court placed weight on the fact that the Notice of Adjudication identified a single dispute *"over the correct sum due to the Referring Party in Interim Payment Nr 34"* and understood himself to be addressing that narrow question on an interim basis.

Accordingly, despite recognising that the error in not addressing the capping beam claim was unrelated to and had not tainted the earlier reasoning on the sum due in payment cycle 34, and that a finding on that sum due would have still been of utility, the court refused to sever the decision, holding that doing so would *"turn a single decision with an accompanying explanation of reasoning into a series of separate decisions"* which would *"amount to turning the Decision into something of a different nature"*.

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Belief in sums due

A further question arose as to whether or not the first payment notice sent by the employer in payment cycle 34 was valid or not (it being common ground at the hearing that the pay less notice was out of time).

The first payment notice (for 0.97p) was accompanied by an email which said that a further payment notice would be issued in due course. The pay less notice (for £657,218.50) was accompanied by detailed calculations.

The employer submitted that, following *Henia Investments v Beck Interiors Ltd* [2015] EWHC 2433 (TCC) and *Surrey & Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EWHC 17 (TCC), since the first payment notice provided an agenda for adjudication then the payment notice complied with Section 110A(2)(a) of the HGCRA, which specifies that a payment notice is compliant if it specifies:

> "(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."

However, the court did not accept this, distinguishing the cases as being concerned with the adequacy of documents for the purpose of the statutory test and whether or not the basis on which the figures being contended for in the notices had been adequately identified (rather than with the matter of whether the notices set out a figure the employer genuinely considered was due).

Instead, the court, placing reliance on the fact that the first payment notice was provided with a view to providing a further payment notice, held (variously) that a payment notice must *"accurately"* state the sum which the employer *"genuinely"* considered to be *"actually"* due at the payment due date. Whether the three adverbials amount to the same test or are to be considered individually is not clear from the decision, but on their face they do not amount to the same thing, and each go beyond the black letter of the statutory language.

Case details

Court: Queen's Bench Division, Technology and Construction Court, High Court of Justice

Judge: HH Judge Eyre QC

Date of judgment: 11 August 2021

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