

JURISDICTION: RESERVATION OF RIGHTS

By Peter Sheridan

Introduction

The principle that a sound jurisdictional objection will defeat an application to enforce an adjudicator's decision was established in the *Project Consultancy* case,¹ by Dyson J (as he then was), who pointed out that an adjudicator could not make a valid decision which he was not empowered by the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act) to make. The case was cited with approval in the Court of Appeal when the issue of jurisdiction first came to be considered in the Court of Appeal and the principle has been applied in countless cases since.

This article is concerned with the issues that arise in connection with a reservation of the right to challenge the validity of an adjudicator's decision by reason of a lack of jurisdiction. The point is usually taken by a responding party who does not accept that an adjudicator has jurisdiction over all or part of the dispute purportedly referred to adjudication by the other party.

Kompetenz kompetenz

An adjudicator does not normally have jurisdiction to determine his own jurisdiction.² This principle, sometimes Germanically expressed as *kompetenz kompetenz*, is familiar from the law on arbitration. An adjudicator will, however, less usually, have jurisdiction to determine his own jurisdiction, where the parties have so agreed.

In *Fastrack*, His Honour Judge Thornton, Q.C. stated:

"...unless the parties have vested the jurisdictional dispute in the hands of the adjudicator in addition to the underlying dispute, the adjudicator cannot determine his own jurisdiction and the challenging party may seek to avoid enforcement proceedings by showing that the sum claimed was decided upon without jurisdiction.."³

Similarly, in *Grovedeck*, His Honour Judge Bowsher Q.C. stated:

"An adjudicator does not have jurisdiction to decide his own jurisdiction... A party who protests the jurisdiction of an adjudicator may invite him to inquire into his jurisdiction, but not to decide it..."⁴

¹ *Project Consultancy Group v The Trustees of the Gray Trust* [1999] B.L.R. 377; (1999) 65 Con. L.R. 146; [1999] C.I.L.L. 1531; [2000] 2 T.C.L.R. 72 QBD (TCC).

² *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] B.L.R. 296, CA.

³ *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] B.L.R. 168; (2000) 16 Const. L.J. 273.

⁴ *Grovedeck Ltd v Capital Demolition Ltd* [2000] B.L.R. 181; [2000] 2 T.C.L.R. 689; [2000] C.I.L.L. 1604 QBD (TCC).

There is some judicial guidance as to how an adjudicator should proceed where there is a challenge as to his jurisdiction which he is not empowered to determine. In *Christiani & Shand*, His Honour Judge Thornton, Q.C. said:

“..the parties to an adjudication can always agree to vest in the adjudicator ad hoc jurisdiction to determine his own jurisdiction...”

[Where no such ad hoc jurisdiction has been granted] an adjudicator, faced with a challenge to his own jurisdiction, has a choice as to how to proceed. The adjudicator has three options:

1. He can ignore the challenge and proceed as if he had jurisdiction, leaving it to the court to determine that question if and when his decision is the subject of enforcement proceedings.
2. Alternatively, the adjudicator can investigate the question of his own jurisdiction and can reach his own conclusion as to it. If he was to conclude that he had jurisdiction, he could then proceed to decide the dispute that had been referred to him. That decision on the merits could then be challengeable by the aggrieved party on the grounds that it was made without jurisdiction if the adjudicator’s decision on the merits was the subject of enforcement proceedings.
3. Having investigated the question, the adjudicator might conclude that he had no jurisdiction. The adjudicator would then decline to act further and the disappointed party could test that conclusion by seeking from the court a speedy trial to determine its right to an adjudication and the validity of the appointment of the adjudicator.

It is clearly prudent, indeed desirable, for an adjudicator faced with a jurisdictional challenge which is not a frivolous one to investigate his own jurisdiction and to reach his own non-binding conclusion as to that challenge.”⁵

Conferring power to determine jurisdiction

The *JW Hughes* case⁶ is an example of the parties expressly agreeing to confer on an adjudicator jurisdiction to determine his own jurisdiction. This power was included in the terms of the appointment of the adjudicator, which Forbes J found that the parties had agreed by conduct.

Another example is the *Nordot* case,⁷ in which the defendant made a statement to the adjudicator that it would abide by his decision on jurisdiction. Judge Gilliland held that there was a clear and unequivocal submission to the jurisdiction of the adjudicator to decide his own jurisdiction. This was an ad hoc agreement to be bound by the adjudicator’s decision on jurisdiction.

⁵ *Christiani & Shand Ltd v The Lowry Centre Development Co Ltd* Unreported 2000, HT 00–159 QBD (TCC).

⁶ *J W Hughes Building Contractors Ltd v GB Metalwork Ltd* [2003] EWHC 2421 (TCC).

⁷ *Nordot Engineering Services Ltd v Siemens Plc* [2001] C.I.L.L. 1778; TCC No.SF 00901 TCC 16/00.

Another way in which this type of agreement is made is by institutional rules, for example if the parties agree to conduct their adjudication in accordance with the Technology and Construction Solicitors' Association (TeCSA) Adjudication Rules, they thereby agree that the adjudicator will have the power to decide his own substantive jurisdiction.⁸

Where an adjudicator is given the power to decide his own jurisdiction, the decision has the same status as his decision on the substantive dispute: the parties are bound by the decision until the issue is finally determined by court proceedings, arbitration or agreement.⁹ (The parties may agree that the adjudicator's decision is final as well as binding, but this is exceptional and is not the position under any standard forms of contract or institutional rules.)

In the standard situation, where the adjudicator does not have the power to decide his own jurisdiction, a responding party who wishes to make a jurisdictional objection must decide not only how to formulate that objection but also whether it wishes to be bound by the adjudicator's decision on jurisdiction. Frequently, the responding party does not wish to be bound as it wishes to have the opportunity to resist enforcement where a substantive decision is purportedly made against it, but the decision was made without jurisdiction. Hence the significance of the responding party's ability to reserve the right to challenge the adjudicator's decision at an enforcement application.

Losing the right to object

A party may lose the right to make a jurisdictional objection. In *Cowlin Construction v CFW Architects*,¹⁰ CFW initially acceded to the jurisdiction of an adjudicator and then made a jurisdictional objection, purporting also to reserve its position on jurisdiction. It was held by Judge Kirkham that by acceding to the jurisdiction of an adjudicator at the outset CFW had made its election and waived the right to make a jurisdictional objection. The judge seems to have regarded it as being of some significance that CFW had solicitors acting for it at the material times. The case is a warning to parties and their advisers to consider making a general reservation of rights at the outset, if there is any possibility of wishing to make a jurisdictional objection, even if the nature of it has not yet been formulated, for example because all the relevant circumstances have not yet been investigated and analysed, which can often be the case for the responding party.

In *CJP Builders*,¹¹ the judge found that there was no reservation of rights in relation to jurisdiction. An adjudicator was appointed under the DOM/2 provisions. The responding party, Verry, belatedly during the adjudication process raised the possible engagement of the TeCSA Rules, but this was not as a jurisdictional objection; Verry's point was that the TeCSA Rules permitted the adjudicator a wider discretion to set the timetable. However, Verry had previously positively encouraged the nomination of the adjudicator by the RICS. This was inconsistent with contending for the application of the TeCSA Rules, which provide for nomination by the chairman of TeCSA. This is accordingly an example of both a lack of a reservation as to jurisdiction and of waiver of the right to assert that an adjudicator nominated by the RICS did not have jurisdiction.

⁸ See the writer's analysis of the TeCSA Rules at (2009) 25 Const.L.J. No 3 220.

⁹ *Thomas Frederic's Construction Ltd v Keith Wilson* [2003] EWCA Civ 1494, CA; [2004] B.L.R. 23; 91 Con. L.R. 161; and s.108(3) of the HGCR Act. See also the Scheme para 23(2).

¹⁰ *Cowlin Construction Ltd v CFW Architects* [2003] C.I.L.L. 1961.

¹¹ *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC); [2008] B.L.R. 545; [2008] T.C.L.R. 10; [2008] C.I.L.L. 2609.

It is accordingly important for a responding party to raise its jurisdictional objection at the outset and to make an effective reservation of its rights. This allows that party to participate in the adjudication while retaining the right to challenge its validity on an enforcement application by the claimant. An objection not made at the outset, but two days later was considered by Akenhead J, *obiter*, to be probably adequate in the *All Metal Roofing* case¹² because of the very short period and because the other party had not acted to its detriment in relation to the defence served just before the jurisdictional objection was made. In the event the matter was of no consequence because the judge held that the adjudicator had jurisdiction.

While the normal time to make a jurisdictional objection, or at least a reservation of the right to do so, is as the responding party's first action, that is always feasible as the issue giving rise to the objection may occur later. In *Pilon v Breyer Group*,¹³ Breyer made it clear that if one of its defences was not considered, it would be a breach of natural justice. The adjudicator did not consider that defence, as he was persuaded by Pilon, wrongly, that consideration of the defence was outside his jurisdiction. As soon as the adjudicator's decision was given, Breyer made the point that it was not valid. This was an example of it not becoming clear until the time of the decision that the adjudicator had made a jurisdictional error.

Effective reservation

In *Air Design v Deerglen*,¹⁴ Air Design referred claims to adjudication. Deerglen's position was that there were four contracts between the parties, there was no adjudication clause in two, or possibly three, of them and the adjudicator had no jurisdiction over disputes which arose out of those contracts. Air Design's position was there was one contract with an adjudication provision and further agreements which varied the one contract.

The parties made various submissions on jurisdiction. Deerglen prefaced its submissions as follows:

"These submissions and the Responding Party's continued participation in this adjudication are served without prejudice to the Responding Party's contention that the Notice and Referral are deficient and/or that the Adjudicator in any event had no jurisdiction as is set out below. For the avoidance of doubt, the Responding Party reserves the right to expand on these arguments in any enforcement proceedings in due course should the necessity arise and/or to take any and all points on jurisdiction which are available to it."

The adjudicator decided there was only one contract and that a sum was due from Deerglen to Air Design. Deerglen did not pay and Air Design brought enforcement proceedings, in which it argued, among other things, that the parties had given the adjudicator jurisdiction to decide the issue of jurisdiction. Air Design did not succeed on this point, as Akenhead J found that Deerglen had made "the clearest possible reservation on jurisdiction". This was at the beginning of their written submissions on jurisdiction. When requests were made later in those submissions to the adjudicator to "find" or "determine" this or that, the requests were

¹² *All Metal Roofing v Kamm Properties Ltd* [2010] EWHC 2670 (TCC).

¹³ *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC).

¹⁴ *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC); [2009] C.I.L.L. 2657.

clearly subject to the reservation. In any case, the adjudicator did not purport to reach a decision as such on jurisdiction; he arrived at and reported his non-binding view.

In *Euro Construction*,¹⁵ Akenhead J pointed out that whether an adjudicator has been given jurisdiction to decide his own jurisdiction can be considered by considering whether an adequate reservation on jurisdiction has been made. This case is an example on the facts of an adequate reservation.

In *Aedifice v Shah*,¹⁶ the responding party in an adjudication, Mr Shah, took the point by letter to the adjudicator that he was not a contracting party, he had had no dealings with Aedifice and the adjudicator accordingly had no jurisdiction. Mr Shah did not expressly reserve his position on jurisdiction. Often a responding party will not only make a jurisdictional objection but will also go on to reserve its position expressly. Mr Shah did not do so in this letter, possibly because his intention at that time, as stated in the letter, was to decline to take any part in the adjudication. Often a responding party will participate in an adjudication, having first reserved the right to argue in court on an enforcement application that the adjudicator did not have jurisdiction. In this case, Mr Shah changed his approach and did participate in the adjudication. The judge treated Mr Shah's making his jurisdictional objection as a reservation of his position.¹⁷ The question then arose whether Mr Shah had maintained his objection or waived it; on the facts it was found that he had maintained it. That question does not arise where there is a clear, express reservation; its purpose is to ensure that a jurisdictional objection is maintained and is not waived by any subsequent participation in the adjudication.

General reservation

In *Bothma v Mayhaven*,¹⁸ a contractor sought in adjudication the resolution of four matters, one of which was purely a valuation issue; the others were time-related. The adjudication was subject to the Scheme, under clause 8(1) of which an adjudicator has no jurisdiction to determine more than one dispute, other than with the consent of the parties. The employer (Mayhaven) had taken a number of specific points as to jurisdiction, but not the point that it ultimately took in court, which was that the adjudicator had adjudicated on more than one dispute. Mayhaven had, however, also made a general reservation of its right to take any other point as to the adjudicator's jurisdiction. The Court of Appeal took the view, on an application for leave to appeal, that the general reservation entitled Mayhaven to take the "more than one dispute" point, without having to decide the point. Bothma had argued that Mayhaven had waived the right to take the point, but did not pursue the argument with the Court of Appeal. Waller LJ stated:

"No point was expressly taken by the employer as to the adjudicator's jurisdiction to deal with more than one point, but unfortunately the employer made it clear that he reserved his position in relation to jurisdiction in very wide terms; so wide indeed that Mr Newman has very properly not pursued an argument that, in some way, the employer had consented to more than one point being argued or consented, or waived any question of jurisdiction on that basis."¹⁹

¹⁵ *Euro Construction Scaffolding Ltd v SLLB Construction Ltd* [2008] EWHC 3160 (TCC); [2008] Adj. L.R. 12/19.

¹⁶ *Aedifice Partnership Ltd v Shah* [2010] EWHC 2106 (TCC).

¹⁷ See [23] and [25].

¹⁸ *Bothma v Mayhaven Healthcare Ltd* [2007] EWCA Civ 527 (CA); 114 Con. L.R. 131.

¹⁹ At [14].

Ramsey J considered the *Bothma* case to provide “strong support for the effectiveness of a general reservation” in the *GPS Marine* case,²⁰ as did a consideration of the authorities in relation to arbitration.²¹

An example of a general reservation not being maintained is provided in the *Durham County Council* case,²² in which the defendant made a number of specific reservations and one general one. Akenhead J considered on the facts that the defendant had later waived the general reservation, though this was not part of the *ratio* as the judge found that the adjudicator did have jurisdiction.

Where reservation is not explicit

There are *dicta* in some cases to the effect that it is essential, to make an effective jurisdictional objection, to reserve the right to do so. For example, Akenhead J stated in the *Euro Construction* case that “so far as jurisdiction challenge is concerned, it is necessary for the party objecting to the adjudicator’s jurisdiction to make a clear and full reservation.”²³ However, the position is not straightforward because a reservation need not be explicit; it is enough to make a clear jurisdictional objection and then not to resile from it. The courts treat that as one and the same as reserving the right to make the jurisdictional challenge.

In *Thomas-Frederic’s*,²⁴ the responding party in an adjudication did not accept that he was the developer in the construction contract and contended that the developer was a company called Gowersand Limited. The contention was not accepted by the adjudicator, who continued the adjudication and found in favour of the builder. The builder succeeded at first instance in enforcing the adjudicator’s decision before Judge MacKay.

Judge Mackay’s analysis was that in this case, unlike many cases relating to jurisdiction, the adjudicator was asked to, and did, make a decision on jurisdiction (in this case, deciding on the identity of the contracting party). The adjudicator having made his decision, the court should follow it on the enforcement application. The judge further stated that if he were wrong on that, he considered the evidence all pointed one way, *i.e.* to Thomas Frederic’s being the contracting party.

The Court of Appeal had “the greatest difficulty”, on the facts, with the judge’s conclusion that the evidence all pointed one way. That left the other issue, which was that the adjudicator’s decision on jurisdiction would be binding and enforceable, provided that Thomas Frederic’s had agreed to accept his ruling. The Court of Appeal found on the facts here, contrary to the first instance ruling, that Thomas Frederic’s had not agreed to accept the adjudicator’s ruling. The facts were that Thomas Frederic’s had made a clear jurisdictional objection that it was not the contracting party but had not expressly reserved its position. Neither had it expressly conferred on the adjudicator power to decide his own jurisdiction. It then participated in the adjudication when the adjudicator decided to proceed.

²⁰ *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); B.L.R. 377 at [39].

²¹ *Compania Maritima Zorroza Sa v Sesostris SA, The Marques de Bolarque* [1984] 1 Lloyd’s Rep. 652; *Allied Vision Ltd v VPS Film Entertainment GmbH* [1991] 1 Lloyd’s Rep. 392.

²² *Durham County Council v Kendall* [2011] EWHC 780 (TCC) ; [2011] All ER (D) 351 (Mar); [2011] B.L.R. 425.

²³ *Euro Construction Scaffolding*, above, at [27]. See also *Allied P&L Ltd v Paradigm Housing Group Ltd* [2009] EWHC 2890 (TCC); [2009] All E.R. (D) 240; [2010] B.L.R. 59.

²⁴ *Thomas Frederic’s Construction Ltd v Keith Wilson* [2003] EWCA Civ 1494, CA; [2004] B.L.R. 23; 91 Con. L.R. 161.

It would seem, therefore, that, at least in some circumstances, it is sufficient to make a clear objection, not resile from it and not expressly confer on the adjudicator jurisdiction to determine jurisdiction, for the objecting party to be able to maintain its objection on an enforcement application. This is because, it is submitted, on principles derived from arbitration case law,²⁵ a jurisdictional objection amounts to or at least in some circumstances of itself amounts to a statement that the objecting party is not agreeing to abide by the decision. In the *Thomas Frederic's* case, the form of the objection was that there could be no referral on the ground that the wrong party had been named in the notice of adjudication. That was enough to indicate that Thomas Frederic's did not agree to abide by the decision.

A similar situation arose in the *CN Associates* case,²⁶ in which Akenhead J stated:

“So far as whether there was an effective reservation by Holbeton in relation to the jurisdiction of the adjudicator, there clearly was not an express reservation as such in the sense that Holbeton did not use words such as ‘I fully reserve my position about your jurisdiction’ or ‘I am only participating in the adjudication under protest.’ However, what it did do unequivocally in its response was to assert that the adjudicator did not have jurisdiction for a number of reasons including there not being any relevant contract between it and CNA. This was re-asserted in its rejoinder.

I have formed the view that the words that it used in its response and rejoinder, Holbeton did reserve its position. One needs to judge objectively how the words used by Holbeton would or should have been understood. There is no doubt that Holbeton unequivocally was saying to the adjudicator and to CNA that it believed, rightly or wrongly, that the adjudicator did not have jurisdiction...and that was good enough, in my judgment, to make an effective reservation of its position on the point.²⁷

It is nevertheless prudent for an objecting party to reserve its position explicitly.

Conclusions

1. An adjudicator normally has no jurisdiction to determine his own jurisdiction.²⁸
2. An adjudicator will, less usually, have jurisdiction to determine his own jurisdiction if the parties have so agreed, expressly²⁹ or by conduct.³⁰ In that event, the adjudicator's decision on jurisdiction is binding until finally determined in court, arbitration or by agreement.³¹
3. Where an adjudicator does not have jurisdiction to determine his own jurisdiction, the correct course for the adjudicator when a jurisdictional objection is raised is to enquire into his jurisdiction and form a non-binding view. If the adjudicator's view is

²⁵ See *Westminster Chemicals & Produce Ltd v Eichholz and Loeser* [1954] 1 Lloyd's Rep. 99.

²⁶ *CN Associates v Holbeton Ltd* [2011] EWHC 43 (TCC); [2011] All E.R. (D) 217; [2011] B.L.R. 261.

²⁷ *CN Associates v Holbeton Ltd*, above, at [37-38].

²⁸ *Thomas Frederic's*, above; *Pegram*, above.

²⁹ See e.g. *J W Hughes*, above.

³⁰ See e.g. *Nordot*, above.

³¹ S.108(3) of the HGCR Act.

that he has jurisdiction, he should proceed to decide the substantive dispute and if his view is that he does not have jurisdiction, he should so inform the parties and decline to decide the substantive dispute.³²

4. Where an adjudicator does not have jurisdiction to determine his own jurisdiction, the court may determine the issue on the claimant's application for summary judgment to enforce an adjudicator's decision, if the jurisdictional objection is raised as an arguable defence.³³
5. A party may lose the right to make a jurisdictional objection, by acceding to the jurisdiction of the adjudicator, e.g. by participating in the adjudication, before making the objection or reserving the right to do so,³⁴ or making the objection but failing to maintain it,³⁵ or (less usually) by expressly waiving the right to make the objection.
6. A party may protect the right to make a jurisdictional objection by reserving the right to do so effectively. If its reservation is in appropriate terms, that party may then participate in the adjudication on the substantive dispute without losing the right to make good its jurisdictional objection on an enforcement application.³⁶
7. A general reservation (not specifying the ground on which jurisdiction is challenged) is probably effective to allow a responding party to raise whatever jurisdictional objection it chooses when it comes to enforcement.³⁷
8. It is prudent for a responding party in an adjudication to make its jurisdictional challenge the subject of an effective express reservation of the right to maintain its jurisdictional challenge notwithstanding its participation in the adjudication. An example of "the clearest possible" reservation is given above.³⁸
9. A party may, however, succeed in reserving its position without expressly so stating; it will be sufficient to make a clear jurisdictional objection and not to waive it subsequently.³⁹

³² See e.g. *Christiani v Shand*, above.

³³ See e.g. *Thomas Frederic's*, above.

³⁴ See e.g. *Cowlin Construction*, above.

³⁵ See e.g. *Durham County Council*, above.

³⁶ See e.g. *Project Consultancy Group*, above.

³⁷ See *Bothma*, above and *GPS Marine*, above.

³⁸ See the discussion of the *Air Design* case, above.

³⁹ See e.g. *Thomas Frederic's*, above; *CN Associates*, above.

