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Adjudicators' Decisions: Severability Update

By Peter Sheridan

Introduction

Although the writer has considered this topic on three previous occasions in Construction Act Review (CAR),[1] the courts have found it to be a difficult one and a further update is prompted by recent cases which entail, although they do not clearly identify in terms, a slightly new direction and a departure from the rules as previously stated.

It may be helpful to start by summarising briefly the relevant content of the writer's previous articles. "Severability" in this context refers to the concept that an adjudicator's decision may consist of two parts: one part valid and the other part invalid and unenforceable. If the decision is severable, the invalid part may be discarded, leaving the valid part, capable of enforcement in a suitable case. If the decision is not severable, then it is either wholly valid or wholly invalid. An adjudicator's decision will be invalid in whole or in part where made without jurisdiction or in breach of the rules of natural justice.

The writer first analysed the law on severability in CAR in 2004.[2] The case law at that time was reviewed in detail[3] and the writer drew the following conclusions.

> "(1) Where two or more disputes are referred to one adjudicator, a valid objection to one decision, on jurisdictional or natural justice grounds, will not necessarily affect the validity or enforceability of the adjudicator's decision on the other dispute or disputes.
>
> (2) Where a single dispute is referred to one adjudicator, it may not be severed so as to excise a part of the decision to which valid objection is taken, on jurisdictional or natural justice grounds, leaving the balance valid and enforceable. A decision on a single dispute is either valid and enforceable or invalid and not enforceable.
>
> (3) It follows that an adjudicator's decision may not be corrected to take account of a jurisdictional objection, with the result that a sum larger than that in the adjudicator's decision may be enforced by a claimant."

Whether the position is or should be any different in natural justice cases from the position in jurisdiction cases is also addressed in the writer's second article in 2009.[4]

The conclusions quoted above drew a distinction between adjudications in which a single dispute is referred and adjudications in which more than one dispute is referred. Cases in which two or more disputes are referred to an adjudicator may occur if the parties' contract

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[1] P. Sheridan "Severability of Adjudicators' Decisions" (2004) 20 Const. L.J. 71; P. Sheridan "Severability of Adjudicators' Decisions: Revisited" (2009) 25 Const. L. J. No. 5 376; P. Sheridan "Severability of Adjudicators' Decisions Revisited" (2011) 27 Const.L.J. 520.

[2] (2004) 20 Const.L.J.71. All the cases at fn. 2 below were considered in that edition of CAR.

[3] *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] BLR 124; *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2001) 17 Const.L.J. 127; *Farebrother Building Services Ltd v Frogmore Investments Ltd* [2001] C.I.L.L. 1589-1592 (TCC); *Shimizu Europe Ltd v Automajor Ltd* [2002] B.L.R. 113; (2002) 18 Const.L.J. 259; *R Durtnell & Sons Ltd v Kaduna Ltd* [2003] B.L.R. 225; *RSL (South West) Ltd v Stansell Ltd* (2003), unreported.

[4] See fn. 1 above.

provides that it is permissible to refer two or more disputes, or if the parties agree on an ad hoc basis to such a procedure. Otherwise, an adjudication will normally be about one dispute. A single dispute, *e.g.* as to the value of a final account may encompass many issues or sub-disputes which could, but need not be, referred to separate adjudications.

Subsequently, in *Cantillon v Urvasco*,[5] the writer's 2004 article in CAR and the above conclusions were quoted with apparent approval by the judge, Akenhead J, who also formulated the applicable principles as follows.

> "(a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.
>
> (b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.
>
> (c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).
>
> (d) The same in logic must apply to the case where there is non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.
>
> (e) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all-pervading that the remainder of the decision is tainted, the decision will not be enforced.
>
> (f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the court."[6]

The purpose of this article is to consider subsequent case law indicating that there are exceptions to principle (f) stated in *Cantillon v Urvasco* and therefore to the second conclusion stated by the writer in the 2004 article. Both principle (f) and the writer's second conclusion (for brevity called "principle (f)" in this article) are stated as being in the nature of absolute rules, as indeed appeared to be the position on the basis of the authorities at that time. However, subsequent examples suggest that an absolute rule may not be appropriate. If there are exceptions to principle (f), what is the scope of these exceptions and how is principle (f) to be qualified or re-written? In short, if there is a new rule, what is it?

A subsidiary question, if there is a new rule, arises as to the basis for it.

[5] *Cantillon Ltd v Urvasco Ltd* [2008] B.L.R. 250.
[6] *Cantillon*, above, at [65].

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An early example of departure from principle (f) as a strict rule is provided by the decision of Jackson J (as he then was) in the *Interserve* case.[7] The adjudicator ordered Cleveland to pay 80% of his fees, but had no jurisdiction to do so, because the parties' contract provided that the parties would each pay half of the adjudicator's fees. The remainder of the decision was valid. It was held (and was not contested) that the decision could be severed. The decision is correct, it is submitted, but no analysis of the applicable rule was given by the judge, nor any acknowledgment of any departure from the position taken in earlier cases.

The rule: early *obiter dicta*

Some doubt was expressed by Clarke J in the *Adonis* case[8] as to whether principle (f) was intended to be an absolute rule. The adjudicator had operated a costs clause, which assumed the application of a particular contract. If the parties' contract were constituted by a letter of intent, there would have been no such provision and the adjudicator would have exceeded his jurisdiction. After quoting principle (f), Clarke J stated, *obiter*:

> "I entertain some doubt as to whether the adjudicator's entire decision, if otherwise within jurisdiction, is to be regarded as wholly without jurisdiction because of his inapposite application of the costs clause. I am not sure that it was such a circumstance that Akenhead J had in mind."[9]

In fact, severance did not arise in the *Adonis* case because the adjudicator lacked jurisdiction altogether or it was arguable for the purposes of summary judgment that that was the position, so severance was not analysed any further.

Akenhead J himself added a further consideration, after quoting his own summary from *Cantillon v Urvasco*, in *Allied P&L Ltd*,[10] again *obiter*, as follows:

> "One can take a simple example where there is a dispute about claim 1 involving £5,000 but the referring party refers claims 1 and 2 and claim 2 (for £10,000) is wholly different from Claim 1. Assuming that the responding party effectively reserves its position on claim 2, the decision which allows both claims is impugnable in part. Unless the decision is irretrievably un-severable, verbally or mathematically, the decision on claim 1 will be enforceable; there may be elements of the decision such as the award of costs which are sufficiently abstruse as to be un-severable and therefore unenforceable in practice."[11]

This suggests some departure from principle (f), as a decision on a single dispute *may* (where practicable) be severed, where an adjudicator has allowed a new claim to be added to the dispute and then also decides it in favour of the referring party, without jurisdiction to do so.

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[7] *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] All E.R. (D) 49; [2006] EWHC 741 (TCC).
[8] *Adonis Construction v O'Keefe Soil Remediation* [2009] EWHC 2047 (TCC); [2009] All E.R. (D) 217.
[9] *Adonis Construction*, above, at [50].
[10] *Allied P&L Ltd v Paradigm Housing Group Ltd* [2009] EWHC 2890 (TCC); [2009] All ER (D) 240; [2010] B.L.R. 59.
[11] *Allied P&L Ltd v Paradigm Housing Group Ltd*, above, at [35].

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Again in *Estor v Multifit*,[12] Akenhead J added similar *obiter* comment where a question arose as to whether the adjudicator had jurisdiction to decide that Estor pay some of his fees for an earlier abortive adjudication. Akenhead J found there was no good jurisdictional objection in this regard, but if he were wrong on that he stated that he would still have enforced the remainder of the adjudicator's decision, as follows:

> "Even if I was wrong, the adjudicator's decision would still be enforceable save in respect of the identifiable part of his decision upon which on that premise he did not have jurisdiction, namely £2,325; he would simply have included a clearly identifiable element on which he did not have jurisdiction. It is no different from a decision in which two sums are awarded to a claimant and on one of them the adjudicator had no jurisdiction. The court will usually enforce the part of the decision in respect of which he had jurisdiction. I do not in this regard consider that my observations in *Cantillon v Urvasco* [2008] EWHC 282 (TCC) (paragraph 63) were wrong or need distinguishing: here, if the adjudicator had no jurisdiction over the fees for the abortive adjudication, it could be said that the dispute about that fee was a separate dispute, the decision upon which was severable and separable from the rest of the decision."[13]

This appears to the writer to be similar to *Allied P&L Ltd*; it is the right approach, it is submitted, but it is a departure from principle (f).

A very brief comment was made by Coulson J in *AMEC v Thames Water*[14] indicating that a decision on a single dispute could have been severed; in the event on the judge's findings there was no invalid part of the adjudicator's decision. The question did not arise for decision and was understandably not the subject of any analysis.

The same judge in *Pilon v Breyer Group*,[15] while deciding that the adjudicator's decision on a single dispute that was in question on the particular case could not be severed, also stated:

> "I acknowledge that it may soon be time for the TCC to review whether, where there is a single dispute, if it can be shown that a jurisdictional/natural justice point is worth a fixed amount which is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered. That was, after all, the basis on which summary judgment applications were routinely decided before the HGCRA. However, as a result of my other findings, this is not the place to consider that issue further."[16]

The suggested possible departure from principle (f) is quantum-based, the suggestion being that a decision on a single dispute could be severed only if the quantum of the invalid part is relatively small compared with the valid part. It is also left open whether there are further

[12] *Estor Ltd v Multifit (UK) Ltd* [2009] EWHC 2108 (TCC); [2009] All E.R. (D) 119; (2009) 126 Con. L.R. 40.
[13] *Estor*, above, at [38(v)].
[14] *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC); [2010] All ER (D) 267.
[15] *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC); [2010] All E.R. (D) 197; [2010] B.L.R. 452.
[16] *Pilon*, above, at [40].

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considerations other than quantum. The possibility that this approach might be taken in an appropriate case was mentioned with approval in two more recent Scottish cases, the *Highlands and Islands*[17] and the *Whyte & Mackay* cases;[18] in the latter the situation described in the passage quoted above was described as a non-material error. Neither case, though, was on its facts an appropriate case for departing from principle (f).

In the *Cleveland Bridge* case,[19] the adjudicator had jurisdiction to deal with the dispute only in so far as it arose under the part of the sub-contract which related to construction operations. The dispute referred (like the sub-contract works) encompassed both construction operations and matters which were not construction operations. The adjudicator decided that she had jurisdiction over the whole dispute and made a decision on the whole dispute. An issue that arose was accordingly whether the adjudicator's decision could be severed, so that part of the decision dealing with the construction operations could be enforced. The decision on this point was that only one dispute had been referred to the adjudicator, the adjudicator had given one decision on the whole dispute, the adjudicator's decision could not be severed and was accordingly wholly invalid.

Ramsey J formulated the rule relating to a single dispute as follows:

> "In general where a single decision is made relating to one dispute and the adjudicator does not have jurisdiction for some element of that dispute, the decision will not be valid and enforceable."[20]

The expression "in general" implies an exception or exceptions to the rule, which Ramsey J appears to have set out in the next paragraph as follows:

> "If the adjudicator had made a decision on the whole dispute but had also made a decision which dealt only with the part of the dispute which was within her jurisdiction then, in my judgment, the decision on the whole dispute would not be enforceable or valid but there would be a valid decision on the part of the dispute which was within her jurisdiction."[21]

While such a course may seem unlikely and had not happened in the *Cleveland Bridge* case, in fact the adjudicator might well have taken that course in the *Cleveland Bridge* case. An unfortunate aspect of the case from Cleveland Bridge's point of view was that it had foreseen and attempted to deal with the problem of severability. As the judge stated:

> "Cleveland Bridge contended that, even if part of the work was not construction operations, because of the nature of the dispute, this meant that in practice the adjudicator could find that the whole of the outstanding amount was due and payable to Cleveland Bridge from the Joint Venture. In the alternative, insofar as the adjudicator only had jurisdiction to award an amount to Cleveland Bridge in relation to the proportion of the final account which related to construction operations under the Act, Cleveland Bridge requested the adjudicator to set out her decision on the

[17] *Highlands and Islands Airports Ltd v Shetlands Council* [2012] CSOH 12.
[18] *Whyte & Mackay Ltd v Blyth & Blyth Consulting Engineering Ltd* [2013] CSOH 54.
[19] *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC).
[20] *Cleveland Bridge*, above, at [109].
[21] *Cleveland Bridge*, above, at [110].

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> basis of two alternatives: first, on the basis that she had jurisdiction to award the whole amount and secondly, on the basis that she was only entitled to consider the proportion of the outstanding amount which related to construction operations under the Act."[22]

However, the adjudicator decided that she was proceeding on the basis that she did have jurisdiction and decided in Cleveland Bridge's favour on all sums claimed. As the judge stated:

> "She evidently decided on the basis of her conclusion as to jurisdiction not to provide the alternative decision which Cleveland Bridge had sought so that, if necessary on enforcement, her decision would be severable."[23]

There is no clear statement in *Cleveland* Bridge of the rule applicable in place of principle (f). A principle that may be derived from the *Cleveland Bridge* case is that an adjudicator's decision on a single dispute may be severed where the adjudicator, being alive to a jurisdictional objection, gives an alternative decision that will apply in the event that the jurisdictional objection is a good one. On a narrow approach, that may be the only principle to be derived from the case in relation to revision of principle (f). In any event, the approach appears to be different from the quantum-based approach suggested by Coulson J in *Pilon v Breyer Group*.

In *Carillion v SP Power*,[24] the adjudicator, in deciding that Carillion was entitled to a sum for the provision of lamping and guarding of cable excavations, had applied rates, which from his own experience he considered reasonable. He acted in breach of natural justice in failing to give the parties notice of the rates he proposed to apply and the way he proposed to apply them. The remainder of his findings did not breach the rules of natural justice (although such was alleged by SP Power). The question arose whether the rates element of the decision could be severed. Lord Hodge stated:

> "I can see that the policy of encouraging the speedy provisional resolution of construction disputes might support pragmatic arguments in particular cases in favour of separating liability and quantum in an adjudicator's decision where he has fallen into error in relation to quantum alone. The same considerations may support the approach which Coulson J has advocated.[25] But it is not necessary for me to decide on the competency of the severance of part of a single dispute in this case as I have formed the view that a partial enforcement of Dr Hunter's award [the adjudicator's decision] would be likely to create complexities which are better avoided.
>
> In this case the decision which Dr Hunter reached on the merits may have influenced his decision on expenses. He held that SP were to pay 60% of his fees. It may be that, in so doing, he took account of the relative degrees of success of the parties' submissions. I cannot conclude that if he had decided that SP was wrong that nothing was due for lamping and guarding but that it was correct in its fall-back

[22] *Cleveland Bridge*, above at [95].
[23] *Cleveland Bridge*, above at [96].
[24] *Carillion Utility Services Ltd v SP Power Systems Ltd* [2011] CSOH 139.
[25] This a reference to the dictum in the *Pilon* case quoted above.

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> position that, if the item 26 rate applied, that rate exhausted the claim, he would necessarily have divided the liability in expenses in the same way. Thus I do not see how I can sever the decision on expenses from the decision on the merits or alter the decision on the merits while leaving the expenses decision in place."[26]

Lord Hodge thus entertained the possibility of severing an adjudicator's decision on a single dispute, albeit it was not appropriate in this case. His reason was the relationship, which is likely to exist in many cases, between the decision on the merits and the decision apportioning the adjudicator's fees and expenses between the parties.

However, leaving that point aside, there is a further complication with severance in this case. Lord Hodge assumes that the rate contended for by the claimant would apply, once one severed the decision, *i.e.* one would simply deduct from the quantum found by the adjudicator the extra quantum the adjudicator's rates had added to Carillion's rates. Such an approach could fit with Coulson J's suggested quantum-based approach, but it remains problematical, it is submitted. The position is complicated by the fact that the invalid part of the decision resulted from a breach of the rules of natural justice and not the absence of jurisdiction. It is not a simple exercise of deducting a sum decided without jurisdiction. If the adjudicator had acted in accordance with the rules of natural justice, he would not necessarily have accepted Carillion's rates. He would more likely have put his view of the correct rates to the parties for their submissions and then made his decision on the correct amount. Therefore, the application of severance in this case runs the risk of the court making a contribution to the content of the valid part of the adjudicator's decision. The result was accordingly correct for this additional reason, it is submitted.

There is no clear indication as to the rule which might replace principle (f) to be derived from the *Carillion* case, although Lord Hodge wanted to avoid the "complexities" that can arise from attempting to sever an adjudicator's decision on a single dispute; this clearly encompassed not altering or interfering with the valid content of the adjudicator's decision.

While these cases do not provide any very clear statements of the position, what the rule in place of principle (f) should be, it is submitted, is that an adjudicator's decision on a single dispute, partly made without jurisdiction, may be severed so as to give effect to the part of the decision made within jurisdiction, provided that the remaining valid part of the decision may be identified in terms of liability and quantum, without adjustment or contribution to the content of the valid part by the court. If a broad rather than a narrow view is taken of the *obiter dicta* in the *Cleveland Bridge* case on this issue, it may be that it is indicating much the same.

The same applies in respect of breach of the rules of natural justice, it is submitted, subject to two further points. Firstly, in the event of actual bias, it is submitted that the whole decision is unreliable and unenforceable. In the more usual case of apparent bias or other breach of the rules of natural justice (for example, the type of breach of the *audi alteram partem* rule that occurred in the *Carillion* case), the position should be the same as for jurisdictional cases.[27] Secondly, as a practical caveat, there are likely to be fewer instances of cases of breach of the rules of natural justice where it is clear what the adjudicator's

[26] *Carillion v SP Power*, above, at [40-41].
[27] See the writer's 2009 article for more on this issue, fn 1 above.

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decision would have been without the breach, as the writer's comments above on the *Carillion* case indicate.

The basis for the rule

While it was clearly not the state of the law at the time, the writer did float in the original article in 2004 the suggestion that a contrary approach (to the absolute rule that an adjudicator's decision on a single dispute may not be severed) was also arguable. The suggestion made was that the parties might be taken to have intended that such part of an adjudicator's decision as is valid be enforceable, rather than that the whole be unenforceable if a part only of it were invalid. The juridical basis for such an approach might be as a matter of construction of the express or implied term as to compliance with the adjudicator's decision, or by way of an implied term. The implied term alternative is no longer necessary as it does not add to the analysis.[28] It is a matter of the correct construction, in accordance with the normal rules of construction,[29] of the obligation to comply with the adjudicator's decision. Lord Macfadyen in *Homer Burgess*[30] also considered that it was open to the court to enforce an adjudicator's decision restricted to the sum reflecting the part of the decision for which the adjudicator had jurisdiction.

This argument from the writer's earlier article was considered by Ramsey J, but not accepted, at least not in relation to the relevant terms of the *Cleveland Bridge* case. The obligation of the parties in that case was set out in sub-paragraph 23(2) of Part 1 of the Scheme:

> "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

As a matter of interpretation of that statutory implied term, the judge did not consider that, as suggested in the writer's earlier article:

> "...that provision imposes an obligation on the parties to comply with the part of any decision which was within the adjudicator's jurisdiction, where part is made without jurisdiction. Neither do I consider that there can be a further implied term that the parties will comply with that part of a decision."[31]

Ramsey J expressly disagreed in *Cleveland Bridge* with Lord Macfadyen's view noted above, which is against the line of English cases. Ramsey J gives a conclusion on this issue in the passage quoted above, although the Scheme provision quoted does not give any guidance as to what the parties intended in the event of a potentially severable decision. In

[28] See Lord Hoffmann's speech in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10. A full analysis of this case and its new approach to the implication of terms is set out in the writer's article "Construction Act Review: Slip Rule Update" (2010) 26 Const.L.J. 278.
[29] See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 1101; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.
[30] Above, fn 2.
[31] *Cleveland Bridge*, above at [113].

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reality, the statutory provisions give no guidance and the rules on severability are for the courts to determine.

Ramsey J's analysis leading to his conclusion may perhaps be found later in the judgment, when Ramsey J refers to the risk that the adjudication process could be diverted into satellite litigation if adjudicators' decisions could be dissected to impose separate and several obligations to be bound by the adjudicator's decision on each of the component issues on which the decision was based. It is not right, he considered, for the court to try and dismantle or reconstruct an adjudicator's decision, which could produce a decision partly made by the adjudicator and partly made by the court. The role of the court does not include a contribution to the content of the decision.[32]

The writer agrees with Ramsey J that the role of the court does not include a contribution to the content of the adjudicator's decision. Further, the writer agrees that *in some cases* the effect of analysing an adjudicator's decision as being in two parts, one made with jurisdiction and one made without jurisdiction, could lead the court into making a contribution to the content of the decision. This would be the case where it is not clear on the face of the decision what the result would have been if the adjudicator had confined himself to the issue on which he had jurisdiction. In such a case, the writer agrees entirely with Ramsey J's view that the decision is not enforceable. (*Cleveland Bridge* was such a case and correctly decided, it is respectfully submitted, as there was insufficient information to sever the decision and arrive at the revised quantum without the court imposing its own judgment.) But on another set of facts, it could be crystal clear what the result would have been if the adjudicator had confined himself to the issue on which he had jurisdiction. He may have provided a separate analysis for each of the two issues, giving a full account of the liability and quantum considerations applicable to each and then added them together. In such a case, the invalid part of the decision may be discarded without any contribution by the court to the valid part of the decision.

It is accordingly the writer's view that Ramsey J's objections to the suggestion made by the writer in the 2004 article do not necessarily apply; it will be a matter for analysis in each case whether they apply or not. As for "satellite litigation", this is, in the current context, a judicial pejorative term[33] for litigation in connection with adjudication; there is already a great deal of "satellite litigation" arising from adjudications. It is not a matter for regret in cases where the litigation is justified, which would generally be the case in each case where enforcement of a decision made wholly or partly invalidly is sought. The "satellite litigation" relating to severability has generally been necessary, since Parliament failed to deal with the issue in the HGCR Act and the Scheme. "Dismantling" and "reconstructing" the decision is metaphorical language[34] which does not add anything clearly useful to the analysis but may in an *ad hominem* fashion suggest some loss or damage to the original content. What is required, in the writer's view, is not an exercise which involves any damage or loss to the original content, but an analysis of the position in each case to see if the decision can be severed so as to give effect to the valid part without any damage or loss to it. If so, it seems to the writer to be a respectable view that the parties would have intended to give effect to

[32] See *Cleveland Bridge*, above at [118-120 and 125(5)].
[33] Borrowed by Ramsey J in this context from Judge Lloyd's judgment in the *KNS* case, above, fn 3.
[34] Again borrowed by Ramsey J in this context from Judge Lloyd's judgment in the *KNS* case, above, fn 3, and from the repetition of it by Judge Gilliland in the *Farebrother* case, above, fn 3.

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that part, rather than to discard it with the invalid part. If not, then it is right, in the writer's view, that the decision should not be enforced.

Take the very case that Ramsey J was deciding. If the adjudicator had made the alternative decision that Cleveland Bridge sought, her decision on that alternative basis would, in Ramsey J's judgment, have been binding and enforceable. The writer agrees that would have been the correct decision for the judge to make in such circumstances. But what would be the basis for that decision and the departure from principle (f)?

There would have to be some juridical basis for the judge enforcing part of the adjudicator's decision on the single dispute and rejecting another part of it. None is expressed by the judge, but he disagreed with the writer's suggestion. The difficulty with Ramsey J's approach to this issue is that his grounds for disagreeing with the writer's suggestions are founded on the "warts and all" acceptance of adjudicators' decisions analysis in the cases establishing principle (f); but Ramsey J is accepting a departure from principle (f). In the writer's submission, that approach entails either acceptance of the writer's view put forward in the 2004 article that the correct construction of the obligation to comply with the adjudicator's decision is that the parties' intention is to comply with such part of the adjudicator's decision as is valid (where such can properly be identified as described above) or the development of some other basis for the process; none has been expressed in the case law thus far.

The *Working Environments* case

Severance of an adjudicator's decision on a single dispute, concerning interim valuation, arose as a matter for decision before Akenhead J in the *Working Environments* case. Greencoat was a contractor; Working Environments was its sub-contractor and the claimant in the adjudication. When Greencoat served its Response to Working Environments' Referral, it also attached a withholding notice. Greencoat took the position in the Response that the withholding notice did not form part of the purported dispute and the adjudicator did not have jurisdiction in respect of it, stating that "the Withholding Notice and the accompanying covering letter are appended simply to evidence the existence of the Withholding Notice and to establish that the same has been served within the time limits set out in the Sub-Contract."[35]

The withholding notice identified 12 items for withholding 12 sums of money. The adjudicator decided that he would deal with all of them, contrary to Greencoat's submission. He arrived at a net sum due to Working Environments of £250,860 (net of VAT); he had allowed some amounts of withholding which he considered valid, but he had rejected items 10 to 12 for lack of evidence. The judge found that the first nine items for withholding were the same as on a previous withholding notice (albeit with some quantum adjustments) and thus the adjudicator had jurisdiction to deal with those items. The tenth related to liquidated damages, which the judge found was part of the crystallised dispute at the time of the adjudication notice, so again he found the adjudicator had jurisdiction.

That left items 11 and 12, which were new items and had not even been mentioned previously. The judge found that they were not part of the crystallised dispute at the time of

[35] *Working Environments*, above, at [10].

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the adjudication notice, Greencoat's reservation as to jurisdiction was valid in respect of them and the adjudicator had had no jurisdiction in respect of those two items.

The judge quoted his summary from the *Cantillon* case, as quoted above, as representing the position relating to severability. Principle (f) indicates that the result in the *Working Environments* case should have been that the adjudicator's decision could not be enforced, as there was a single dispute and the adjudicator acted in excess of his jurisdiction in respect of items 11 and 12 of the withholding notice. However, the judge decided that the decision could be severed. Unfortunately there is little real analysis of the basis for this decision. The following is all that the judge said about it and is the *ratio* on the severability issue in the judgment.

> "The question therefore arises as to whether the remainder of his decision can be enforced. Items 11 and 12 were put forward in the sums of £9,629 and £11,520, which total £21,149, to which, based on the adjudicator's accounting approach, VAT of 20% should be added, bringing the final total to £25,378.80.
>
> I see no good reason why the substance of the adjudicator's decision should not be enforced albeit that the amended decision relating to the sum of £250,860 plus VAT should be reduced by £21,149 plus VAT which would produce a net sum of £229,711 plus VAT which remains as the figure due at 14 January 2012. Since he did not have jurisdiction to reject or accept items 11 or 12, he had no jurisdiction to produce a decision which adjudicated upon them. It follows that in principle Greencoat was entitled to put forward as at 14 January 2012 set-offs in respect of items 11 and 12. Effectively, what the adjudicator did was, doubtless with good intentions, to decide upon two further disputes (items 11 and 12) which were not within his jurisdiction. The court is therefore enforcing the large bulk of the adjudicator's decision; to do so is consistent with the authorities set out in the *Cantillon v Urvasco* case."[36]

Although Akenhead J appears to claim consistency with *Cantillon v* Urvasco and the earlier authorities, there is no doubt that this is a departure from principle (f). The word "materially" in principle (f) is not understood to be relevant here, but, it is submitted, is simply recognising the line of authorities to the effect that an adjudicator's decision will still be enforced if there is a jurisdictional or natural justice objection that is good in principle but not material, *i.e.* not sufficiently important to impeach the decision.

It may well be thought that it was the relatively small sums which related to the part of the decision made without jurisdiction that persuaded the judge to sever the adjudicator's decision, the point foreshadowed by Coulson J in *Pilon v Breyer Group*. Where a small amount of money relates to the invalid part of the decision and the bulk of it is not affected, the judge saw no good reason for not enforcing the major part albeit he did not really provide the juridical basis for doing so.

As already indicated, in the writer's view this approach will not necessarily work just where the sums related to the invalid part of the decision are small in comparison with the remainder. It is necessary that the sums may be readily derived from the adjudicator's decision and do not require the court to add its own judgment as to the quantum relating to

[36] *Working Environments*, above, at [33-34].

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the invalid part. This is indeed the key point; whether the sums are small or large is not relevant, it is submitted.

The quantum adjustment made by the judge in the *Working Environments* case is itself interesting and illustrative of the potential difficulty with severance, that it may involve some interference by the court with the content of the adjudicator's decision. The adjudicator had rejected items 11 and 12 for lack of evidence, wrongly, as he did not have jurisdiction in respect of them. If he had proceeded correctly, he would have made no finding in respect of items 11 and 12. The effect if he had proceeded correctly would have been that he would reached the decision that he did in fact reach, in monetary terms. He would have decided that the sum of £250,860 plus VAT was due, albeit that Greencoat would have still had its claims on items 11 and 12 intact, to be resolved another day. The effect of the judge's decision was to assume in Greencoat's favour that items 11 and 12 were good claims, by deducting them from the £250,860 plus VAT. To that extent the judgment was, it is submitted, in error as no deduction should have been made.

Subject to that relatively minor point, the result in the *Working Environments* case, as in the *Cleveland Bridge* case, is, it is respectfully submitted, correct.

As Akenhead J did not acknowledge there was a departure from principle (f), he naturally did not formulate any new principle that applies in its place. His decision is consistent with the new rule contended for by the writer, but the judge did not formulate such a rule.

Again, however, as the result is a departure from principle (f), one needs to identify the juridical basis for the severance. Again, it is submitted that severance in this case entails acceptance of the writer's suggestion in the 2004 article that the parties' intention in such a case is that the valid part of the decision be enforceable. As the valid part may be identified without the need for any contribution by the court to the content of the valid part, this fits in with the writer's views as set out above and is closely aligned with the view expressed by Ramsey J as the exception to the general rule (if broadly interpreted), as explained above.

The *Beck Interiors* case[37]

Beck engaged UKFCL as sub-contractor to install floor coverings at Selfridges. UKFCL withdrew from the contract, which Beck alleged was repudiatory breach and a dispute arose. Beck claimed damages for repudiatory breach, in the region of £31,000. Beck referred the dispute to adjudication, claiming damages for repudiatory breach and also another £36,000 for liquidated damages. Beck succeeded in recovering £19,763.41 for losses for repudiatory breach and £33,600 for liquidated damages.

Akenhead J was again the judge, and found on the facts that there was a crystallised dispute at the time of starting the adjudication in respect of the losses for alleged repudiatory breach, but not the liquidated damages. The adjudicator had therefore not had jurisdiction to decide on the liquidated damages claim and the question arose whether the decision could be severed.

Akenhead J quoted the principles set out above from *Cantillon v Urvasco*, adding the following comment:

[37] *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC).

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> "The court needs to bear in mind that there are many different types of jurisdictional challenge. They include issues as to whether a dispute has crystallised, whether two disputes have been referred to adjudication, whether the adjudicator has been properly appointed, whether there is an effective adjudication provision, whether there is a contract at all between the parties, whether the subject matter of the contract is exempt from the statutory provisions for adjudication and numerous others. Different considerations as to severability may arise in relation to different jurisdictional challenges."[38]

The judge found that the decision could be severed in this case, stating:

> "The next question which arises is therefore whether it is legitimate for the court to sever the decision and in effect enforce that part of the decision which relates to that which was generally in dispute before the notice of adjudication was dispatched. In my judgment, this is a case in which the court can and should do that. In reality, there was only one crystallised dispute which was referable to adjudication and that related only to the claim (as slightly adjusted) for £31,148.97 for the increased costs of completing the carpeting work. It is clear from the body of the notice of adjudication that the presented claim is made up essentially of two parts, £31,148.97 and the £36,000 for the new liquidated damages claim. They are presented in effect as two separate arguments with separable evidence supporting them, albeit that the losses flow from the failure to complete on time or indeed at all.
>
> There is no difficulty in identifying clearly what the adjudicator decided in relation to each claim: £19,763.41 for the increased costs of completion and £33,600 for liquidated damages. It was rightly accepted that the claim for the fixed sum of £100 under the Commercial Late Payment of Debts (Interest) Act could not be enforced because it related most obviously to the liquidated damages claim which is the only element which could be said to give rise to a debt, the other claim relating simply to common law damages. It is also difficult for the court to apportion the adjudicator's fee which he ordered (primarily) UKFCL to pay; this is because, although one could arithmetically apportion it in relation to sums recovered and others not jurisdictionally recoverable, one can not second guess what the adjudicator would have done. For instance, he might have said that each party should pay half or that Beck should pay the costs of his time relating to the jurisdictional issue and some different proportion of his costs for the balance.
>
> It follows that this is a case in which 'severance' can take place and the adjudicator's decision in relation to that for which he did have jurisdiction (£19,763.41 for increased costs of completion) should be enforced to that extent."[39]

Beck can be seen as a case where there was a single dispute, but Beck wrongly added another issue to the dispute. It may be a situation not covered by the principles stated by Akenhead J in *Cantillon v Urvasco* rather than an exception to principle (f). To the extent it is covered by the principles stated by Akenhead J in *Cantillon v Urvasco*, principle (f) applies to it and *Beck* represents an exception to or a departure from principle (f). In any case, the

[38] *Beck Interiors*, above, at [21].
[39] *Beck Interiors*, above, at [32-34].

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decision is consistent with the writer's formulation of what the rule should be in these cases. Again Akenhead J does not state a basis for the new rule, if such there be.

The *WSP CEL* case[40]

Ramsey J considered severability again briefly in this case, which concerned a final account dispute: a single dispute encompassing various issues. As the judge found the adjudicator in fact had jurisdiction for the whole decision, his comments were *obiter*, but he considered that it would have been possible to sever the adjudicator's decision, stating:

> "…if I had found that certain individual items for compensation events could not be referred to the adjudicator then this is a case where I consider that it would have been possible to sever the decision…This was a case…where the individual claims could have been isolated and where the jurisdictional challenge referred only to certain claims and not to all claims. As a result, in those circumstances, in the same way as Mr Justice Akenhead did in [*Beck*], I consider that it would have been possible to sever the decision in this case."[41]

This would have been a clear departure from principle (f); in fact it is the opposite approach. It would be a clearer example of the application of a different rule than the *Beck* case. It would, however, fit in with the writer's formulation of what the rule should be.

The *Lidl* case

In the *Lidl* case,[42] the employer, Lidl, sought to enforce an adjudicator's decision in its favour concerning entitlement to liquidated damages against a contractor, RG Carter. It was common ground that the adjudicator had decided on two items of liquidated damages which were not put to him, in excess of his jurisdiction. Lidl's position was that this part of the decision could be severed from the remainder of the decision, which related to other liquidated damages. RG Carter's position was that the decision concerned one dispute and it could not be severed.

Edwards-Stuart J decided that the decision could be severed; the two items of liquidated damages on which the adjudicator decided without jurisdiction were not part of the dispute referred to him and the reasoning relating to them had no bearing on the issues properly before the adjudicator. It seems therefore that the decision could be severed without the court contributing to the content of the valid part of the decision. The result is accordingly similar to that in the *Working Environments* case, which Edwards-Stuart J cited.

Edwards-Stuart J recognised that the *Working Environments* case represents a departure in from principle (f), rather than being an application of the principles set out in *Cantillon v Urvasco*, stating:

[40] *WSP CEL Ltd v Dalkia Utilities Services plc* [2012] 2428 (TCC).
[41] *WSP CEL*, above, at [96].
[42] *Lidl UK GmbH v RG Carter Colchester Ltd* [2012] EWHC 3138 (TCC).

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> "At first sight it may appear that the decision in *Greencoat* conflicts with the general principle that a decision cannot be severed where only one dispute or difference has been referred."[43]

He continued:

> "The rationale underlying this principle is, I think, that where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot safely be severed from the whole. However, where in the case of the referral of a single dispute additional questions are brought in and adjudicated upon, whether by oversight or error, there should be no reason in principle why any decision on those additional questions should not be severed provided that the reasoning giving rise to it does not form an integral part of the decision as a whole. However, failing this, the entire decision will be unenforceable."[44]

One might expect this further passage to explain how the decision in the *Working Environments* case does not, on further analysis, conflict with principle (f), despite appearing at first sight to do so. However, it does not quite pull off that trick. What it does is to set out the rationale for departing from principle (f), in circumstances where the integrity of the valid part of the decision may be maintained on severance. The judge does formulate a rule to replace principle (f) or an exception to it. In so doing, it is suggested that the judge may have framed the exception to the rule too narrowly, since the circumstances in which an invalid part may be severed without affecting the valid part are not limited to cases where the invalid part consists of additional questions brought in and adjudicated upon (where there was no jurisdiction to do so). Edwards-Stuart J does not formulate any basis for the revision to the rule.

The issue of the adjudicator's fees

Where severability is being considered, an issue will often arise as to the adjudicator's fees. The adjudicator will normally have required one party to pay his fees, or apportioned the fees between the parties in a manner that seems fair to the adjudicator, having regard to the result on the various issues. On severance, the balance that the adjudicator may have struck may be upset and it will not generally be known how the adjudicator would have apportioned his fees if he had not made the jurisdictional or natural justice error that led to the severance.

As noted above, Lord Hodge considered that to be a significant factor weighing against severance in *Carillion v SP Power*.

However, in *Aveat Heating*,[45] the adjudicator made a decision that was within his jurisdiction, but also made an award of costs (parties' costs, not the adjudicator's fees) that he did not

[43] *Lidl*, above, at [61].
[44] *ibid.*
[45] *Aveat Heating Ltd v Jerram Falkus Construction Ltd* [2007] EWHC 131 (TCC); [2007] T.C.L.R. 3; 113 Con. L.R. 13.

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have jurisdiction to make. The dispute was a single dispute about interim payment. Judge Havery allowed summary enforcement of the remainder adjudicator's decision, but held that the decision on costs could not stand.[46] There is no mention of severance or the case law on it in the judgment, but the decision is nevertheless an example of severance, illustrating the application of the rule contended for by the writer.

Aveat Heating also indicates a possible alternative approach to adjudicator's fees to that of Lord Hodge, which is to proceed with severance but simply not to enforce the part of the adjudicator's decision that deals with his fees. This was also the approach suggested by Akenhead J in *Bovis Lend Lease*[47] and in the *Estor* case (see above) and the approach actually taken by him in *Beck*.

This alternative approach is preferable, it is submitted, because otherwise severance which would provide the just result will often be prevented only because of the issue of the apportionment of the adjudicator's fees. It is not ideal, however, because payment of the adjudicator's fees may not be dealt with in the most just manner.

A recent twist on two disputes

As noted in the introduction above, it has been recognised from an early stage that if two disputes are properly referred to adjudication, there is normally no difficulty in severing one decision, if invalid and enforcing the other. That would normally be the case, although there could be natural justice cases where the adjudicator's conduct tainted the whole decision on both disputes.

The position where two disputes were referred to adjudication, but not properly, was recently considered in *Hillcrest Homes*.[48] The parties' contract permitted the referral of one dispute only to adjudication, but B&C referred and the adjudicator decided on two disputes: one concerning alleged negligent misstatement by Hillcrest in relation to a novation agreement and the other concerning whether there had been an effective novation. The adjudication clause permitted the referral of disputes arising under the contract and Judge Raynor found the negligent misstatement dispute did not arise under the contract. The adjudicator's decision on that dispute was accordingly made without jurisdiction and was invalid. Judge Raynor stated, but with no analysis, that the decision on the remaining dispute (as to whether there was an effective novation) could be severed. In the event, this was academic and *obiter*, as Judge Raynor found that the decision as to effective novation to have been made in breach of the rules of natural justice,[49] so it could not be enforced either. This no doubt explains the absence of analysis.

It is submitted that Judge Raynor's approach accords with common sense, where there is a decision made without jurisdiction on one dispute and within jurisdiction on another dispute. It is further submitted that the basis for rule propounded by the writer allows for this approach.

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[46] *Aveat Heating*, above, at [25].
[47] *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC); 123 Con. L.R.; [2009] C.I.L.L. 2672. The relevant passage is set out in the writer's 2009 article: see fn 1 above.
[48] *Hillcrest Homes Ltd v Beresford and Curbishley Ltd* [2014] EWHC 280 (TCC).
[49] The natural justice aspect of this decision will be considered in a future edition of CAR.

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Conclusions

It is still open to parties to argue that principle (f) is an absolute rule. In many cases at least, the result will be the same as if principle (f) applied. However, it is likely that there will be exceptions, as the cases show. In the writer's view, the rule should be that that an adjudicator's decision on a single dispute, partly made without jurisdiction, may be severed so as to give effect to the part of the decision made within jurisdiction, provided that the remaining valid part of the decision may be identified in terms of liability and quantum, without adjustment or contribution to the content of the valid part by the court. Similar considerations should apply in cases of breach of the rules of natural justice, it is submitted, except that in a case of actual bias the decision should simply be invalid.

The basis for departure from principle (f) is obscure in the cases. The writer's suggested solution is that the parties may be taken to have intended that such part of an adjudicator's decision as is valid be enforceable, rather than that the whole be unenforceable if a part only of it were invalid, where the rule described in the paragraph above applies. The juridical basis for such an approach is as a matter of construction of the express or implied term obligation to comply with the adjudicator's decision.

Wherever it is possible, particularly wherever adjudicators are aware of jurisdictional or natural justice issues that have been raised, adjudicators should endeavour to give alternative decisions on both the dispute and the apportionment of the adjudicator's fees, applicable in the event of an objection being upheld, even where in the adjudicator's own view the objection is not a good one. Then, in the event of severance, the decision will still take partial effect and so too will the alternative decision on apportionment of the adjudicator's fees.

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