CORRECTION OF ERRORS IN ADJUDICATOR'S DECISIONS: THE PART 8 ROUTE

By Peter Sheridan*

Introduction

In a recent article, the writer reviewed the up-to-date position on correction of errors in adjudicators' decisions by the use of the slip rule.[1]

A related issue arises where an adjudicator's decision contains an error which is not corrected under the slip rule. Normally, the decision is enforceable, despite the error. However, there is an exception to this rule, which was explained by Coulson J (as he then was) in the *Caledonian Modular* case. [2]

This case concerned the situation where a contractor sought to be paid a substantial sum in adjudication on the basis of an alleged payment notice which determined the sum payable in the absence of a valid pay less notice. It is one of a line of cases in which the payee succeeded in adjudication, but not on enforcement in court because the court found that the payment notice relied on was invalid. The writer considered these cases and gave a full account of *Caledonian Modular* in a previous article.[3]

Although decisions are normally enforced, right or wrong, *Caledonian Modular* was a rare case where the judge could decide the case finally at the enforcement hearing, as it involved such a narrow issue as to the validity of the alleged notice and did not require any further factual investigation. The procedural position was that the contractor sought to enforce the adjudicator's decision in the usual way with a summary judgment application. The employer counterclaimed seeking a final declaration under CPR Part 8 as to the validity of the contractor's payment notice. As the counterclaim involved only a short point of construction, the declaration could be and was granted as part of the enforcement proceedings. There was a hearing on 19 June and judgment was given on 29 June, 2015. Coulson J stated:

> "It may be asked: why is the judge dealing on enforcement with an issue that has already been decided by the adjudicator? Surely, in accordance with *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*[4] and the myriad cases thereafter, it is not open to a defendant to seek to avoid payment of a sum found due by an adjudicator, by raising the very issue on which the adjudicator ruled against the defendant in the adjudication?
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> That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration. That is what happened,

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*Partner, Sheridan Gold LLP.

[1] Peter Sheridan, Second Slip Article: Adjudicators' Decisions: The Slip Rule: The New Law and Jurisdictional Issues (2020) 36 C.L.J. 326.

[2] *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC).

[3] Sheridan, Validity of Payment Notices (2016) 32 Const. L.J. 510.

[4] [2000] B.L.R. 522.

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> for example, in *Geoffrey Osborne v Atkins Rail Ltd*.[5] It is envisaged at paragraph 9.4.3 of the TCC Guide that separate Part 8 proceedings will not always be required in order for such an issue to be decided at the enforcement hearing.
>
> It needs to be emphasised that this procedure will rarely be used, because it is very uncommon for the point at issue to be capable of being so confined."[6]

This article is concerned not with the line of cases, including *Caledonian Modular*, concerning invalid payment notices, but with the principle behind the *Geoffrey Osborne* case, to which Coulson J referred in *Caledonian Modular* in the passage quoted above.

The exception to the rule that where an adjudicator's decision contains an error which is not corrected under the slip rule the decision is enforceable, despite the error, is the use of separate Part 8 proceedings, heard at the same time as the hearing of the application to enforce the adjudicator's decision, where the case is one of the exceptional ones for which such a procedure is appropriate.

The *Geoffrey Osborne* case concerns an error made by the adjudicator and is the starting point for a consideration of the exception to the rule.

The *Geoffrey Osborne* Case

Geoffrey Osborne, a sub-contractor, sought to enforce an adjudicator's decision, the net effect of which was to order Atkins Rail, a main contractor, to pay the sum of £504,385. Under CPR Part 8, Atkins Rail sought declarations, including a declaration that the decision was plainly wrong and should be set aside or not enforced.

The adjudicator had made a significant error. By the notice of adjudication, he was asked to assess the value of two items of work, which he did. However, the adjudicator did not take into account, when ordering Atkins Rail to pay £504,385, the fact that £912,147 had already been paid in respect of the two items of work. The correct position, taking into account the adjudicator's assessment of the value of two items of work, was that Geoffrey Osborne had been overpaid by over £400,000, rather than being owed just over £500,000. The dispute related to sums payable under interim certification; not unusually Geoffrey Osborne adjudicated over two items and not the whole account.

The facts of the *Geoffrey Osborne* case were very similar to those in the *Bouygues* case.[7] In that case, the adjudicator mistakenly included within the sum that he ordered to be paid the retention, to which the sub-contractor was not at the time entitled. The decision was plainly and obviously wrong and, as in the *Geoffrey Osborne* case, large sums of money were wrongly ordered to be paid. The Court of Appeal held that the adjudicator's decision was

[5] [2010] B.L.R. 363.
[6] *Caledonian Modular*, above, at [11-13].
[7] *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] 1 All E.R. (Comm) 1041; [2000] B.L.R. 522; [2001] 3 T.C.L.R. 2; (2000) 73 Con. L.R. 135; [2000] C.I.L.L. 1673 CA.

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enforceable, because adjudicators' decisions are to be enforced, regardless or errors of fact or law, as has often been reiterated.[8]

The judge in the *Geoffrey Osborne* case, Edwards-Stuart J, was anxious to avoid enforcing a decision that was clearly in error and as a result of which a substantial sum was awarded wrongly. However, in order to do so, it was necessary to distinguish the *Bouygues* decision in the Court of Appeal, which was binding on him. He found two points of distinction from the *Bouygues* case.

In *Bouygues*, as in *Geoffrey Osborne*, there was a Part 8 challenge to the enforcement of the adjudicator's decision. The relief sought in the Part 8 proceedings in *Bouygues* was a declaration to the effect that insofar as the adjudicator decided that the retention was payable to the sub-contractor the decision was void. The grounds on which this was argued were that the adjudicator did not have jurisdiction and in effect decided a question that was not referred to him. The aggrieved party (Bouygues) was not seeking to obtain the court's ruling on a point of law or law decided by the adjudicator, but was asserting that the adjudicator exceeded his jurisdiction. In *Bouygues*, the jurisdictional objection did not succeed. How *Geoffrey Osborne* differs from this is considered below.

A second point of distinction between the two cases was that there was an arbitration clause in the sub-contract in the *Bouygues* case. It was therefore not feasible in that case to go to court for a ruling on a question of fact or law decided by the adjudicator. A final determination on a question of fact or law decided by the adjudicator could not go to court, but only to an arbitral tribunal, except in the case of agreement from the other party. There was no arbitration clause in the sub-contract in the *Geoffrey Osborne* case.

Edwards-Stuart J took the view that he was not prevented by the *Bouygues* decision from entertaining an application that the court should reach a final decision on a question decided by the adjudicator, provided that it was a question that did not involve any substantial dispute of fact and it was one that he could finally determine on the material before him.

Edwards-Stuart J then noted that the courts have made clear the proper approach to challenges to adjudicators' decisions and quoted by way of example well-known dicta from the Court of Appeal in *Carillion Construction Ltd v Devonport Royal Dockyard*.[9] However, these dicta very clearly refer only to breach of the rules of natural justice and excess of jurisdiction as grounds for resisting enforcement of adjudicators' decisions. There is no support here for the exceptions described by Coulson J or Edwards-Stuart J.

As a starting point, Edwards-Stuart J accepted that there is no reason why the court cannot determine an issue raised by Part 8 proceedings at the same time as entertaining an application to enforce an award, if it is one that meets the requirements of Part 8 proceedings by not involving any substantial dispute of fact, provided that the court is being

[8] The manifest injustice which this principle entails did not occur in the *Bouygues* case; the money did not change hands. The Court of Appeal, unlike the court at first instance, granted a stay of execution because the sub-contractor was in liquidation, there were cross-claims and insolvency set-off needed to be applied.
[9] [2005] EWCA Civ 1358, [2006] B.L.R. 15.

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asked to determine an issue that was presented to and decided by the adjudicator and that the applicant has sought an appropriate declaration.

The first submission on behalf of Atkins Rail was that since the adjudicator had clearly made an error and ordered payment of a sum that was not in truth owed, his decision must be wrong and should be set aside. The judge was firmly of the view that that submission was too broad and not correct. The principal issue before the adjudicator was the true value of the two claims. If the whole decision were set aside, the court would have to go on to determine finally the correct value of the claims, which the court could not do in the Part 8 proceedings.

The court was not impugning the adjudicator's decision on the true value of the two claims; that was the main part of the adjudicator's decision and the court did not wish to or have any basis to interfere with it.

The judge went on to say that there was a narrower way of putting Atkin Rail's first submission, and that was to confine it to the part of the decision by which the adjudicator arrived at the sum to be paid (which he did without deducting the sums already paid), which might be capable of determination on a Part 8 application.

When considering what amount was payable in respect of the two claims, the judge stated that it was self-evident that the adjudicator must take into account the sums already paid against those claims to date. Payment under the contract in question was on certificates and an interim certificate has three main components for each claim included within it: the amount claimed, the amount assessed and the amount already paid.

The judge considered, not surprisingly, that the adjudicator was wrong in law to make an order directing Atkins Rail to pay a sum in respect of the two claims that made no allowance for the £912,147 already paid against the two claims.

On the error of law, the judge found that Atkins Rail was entitled a declaration as one of the declarations it had sought was that the adjudicator erred in law and/or in fact in his conclusions in his decision. Although this was in rather general terms, in the Particulars of Claim Atkins Rail identified the specific error of law referred to in the preceding paragraph.

Atkins Rail was accordingly entitled to a declaration to the effect that the adjudicator was wrong to order payment of sums in respect of his assessment of the value of the two claims, without taking into account sums already paid in respect of the two claims. The adjudicator's assessment of the two claims remained binding on the parties.

It was also argued that the adjudicator did not have jurisdiction but the judge rejected this argument; on this point, the case was indistinguishable from *Bouygues*. A point of distinction was that the only Part 8 declaration sought in *Bouygues* was as to jurisdiction, whereas that was not the only declaration sought in *Geoffrey Osborne*.

It is important to an understanding of the *Geoffrey Osborne* case that the judge was not making a final determination of the principal issues before the adjudicator (which in this case comprised the correct valuation of the two items). Prior to the *Geoffrey Osborne* case, that was thought to be the only way to deal with an error of law made within jurisdiction. He was,

though, making a final determination, which is the purpose of Part 8. The final determination was that the adjudicator was wrong to order payment of sums in respect of his assessment of the value of the two claims, without taking into account sums already paid in respect of the two claims. It is also important to an understanding of the *Geoffrey Osborne* case that the judge was not setting aside the whole decision. The adjudicator's main finding on the correct value of the two items stood; but of course once the judge made his final determination about the error, the decision was not enforced because the sums ordered by the adjudicator to be paid were no longer payable.

The *Geoffrey Osborne* case is not authority for the proposition that any error, or that any admitted error may be overcome by a Part 8 application. The error has to be capable of being overcome by a declaration that is suitable for determination in Part 8 proceedings without disputed evidence and in short order and application for a declaration in appropriate terms must have been made.

The *Geoffrey Osborne* case was decided before the current law on the slip rule came in by statute.[10] It may be thought that if the error was drawn to the attention of the adjudicator and he declined to correct it, or if it was not drawn to the attention of the adjudicator in time and was not corrected under the slip rule, that it seems odd that the court could then in effect correct it. It is doubtful if that is what parliament intended. It is possible, therefore, that the *Geoffrey Osborne* principle would not apply to an error that could have been corrected under the slip rule, but was not. This can occur in different ways, for example an error may be drawn to the attention of an adjudicator, who decides it was not an error or was an error but not within the slip rule. It can also arise where there is an error covered by the slip rule, but it is not drawn to the attention of the adjudicator in time to be corrected under the slip rule. It is possible that the *Geoffrey Osborne* principle would not be applied to assist a party who could have but failed to raise the error with the adjudicator under the slip rule. This remains to be seen.

It is also possible that the slip rule does not limit the court's separate jurisdiction to apply the *Geoffrey Osborne* principle, regardless of the slip rule. For the time being, the writer is inclined to this view. In the writer's view the judge was not incorrect in the *Geoffrey Osborne* case. So long as the Part 8 procedure is used correctly, an adjudicator's decision should not be enforced when a court has been able to determine finally that the decision was wrong before enforcement. That is also, correctly in the writer's view, the position in the line of cases concerning invalid payment notices.

The *Geoffrey Osborne* approach will not work if the contract contains an arbitration clause, as noted above and as was the position in *Bouygues*.

Subsequent Reference to *Geoffrey Osborne* and the *Hutton* Case

[10] See Sheridan, Second Slip Article: Adjudicators' Decisions: The Slip Rule: The New Law and Jurisdictional Issues (2020) Const.L.J.

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In *Hutton*,[11] Coulson J (as he then was), on the question of enforcement of an adjudicator's decisions, stated that the starting point was if an adjudicator has decided the issue referred to him and he has acted broadly in accordance with the rules of natural justice his decision will be enforced, citing *Macob*[12] and the Court of Appeal authorities *Bouygues*[13] and *Carillion*.[14]

The judge continued:

> "There are two narrow exceptions to this rule. The first, exemplified by [*Geoffrey Osborne*] involves an admitted error. In that case the calculation error was raised by the defendant in a separate Part 8 claim. Because the error was admitted by everyone, including the adjudicator, and because there was no arbitration clause, there were no reasons why, in that case, the error could not be corrected. If there had been an arbitration clause, the court would not have had the power to determine the issue and the decision would have been enforced…"[15]

The second narrow exception related to the line of cases concerning application for enforcement of adjudicator's decisions in favour of a party claiming payment based on a payment application, with no payment notice or pay less notice in response (sometimes referred to as "smash and grab" claims), where the court was able to decide on a Part 8 application that the notice relied on by the claimant was invalid.[16]

The error in *Geoffrey Osborne* was not in fact admitted by everyone, including the adjudicator. The adjudicator was invited by Atkins Rail to correct his decision, but he declined to do so and did not admit to an error. The position was similar in *Bouygues*, where again the adjudicator did not admit to the error. It was common ground between the parties in *Geoffrey Osborne* that there was an error.

However, in the writer's view the *ratio* of *Geoffrey Osborne* is not to do with the extent of agreement that there was an error. The *ratio* is that if an error is capable of being overcome by a declaration that is suitable for determination in Part 8 proceedings without disputed evidence and in short order and application for a declaration in appropriate terms has been made, such a declaration may defeat an application for summary judgment to enforce an adjudicator's decision made in error. The extent of agreement that there was an error may go to the ease with which such a result may be obtained as a matter of practicality, but in the writer's view the principle can apply without any agreement at all that there was an error.

In the writer's view, there are not two narrow exceptions to the general rule, but one exception, which is that a declaration that is suitable for a Part 8 application and is suitable to be heard at the same time as or before an application for summary judgment, may defeat

[11] *Hutton Construction Limited v Wilson Properties (London) Limited* [2017] EWHC 517 (TCC).
[12] *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] All E.R. 143; [1999] B.L.R. 93; [1999] T.C.L.R. 113; (1999) 64 Con. L.R. 1; (1999) 15 Const. L.J. 3000; [1999] C.I.L.L. 1470.
[13] *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] 1 All E.R. (Comm) 1041; [2000] B.L.R. 522; [2001] 3 T.C.L.R. 2; (2000) 73 Con. L.R. 135; [2000] C.I.L.L. 1673 CA.
[14] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, CA; [2006] B.L.R. 15; 104 Con. L.R. 1.
[15] *Hutton Construction*, above, at [4].
[16] See Sheridan, Validity of Payment Notices (2016) 32 Const. L.J. 510.

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the application for summary judgment. The correction of an error by the adjudicator, as in *Geoffrey Osborne*, and a decision that a payment notice forming the basis of an adjudicator's decision in favour of a contractor was invalid, as in the line of cases including *Caledonian Modular*, are examples of the application of the one exception. They may be two narrow examples of the one exception, but it would not be accurate to describe them as the only possible two examples.

Coulson J later rowed back a little from his description of the application of this principle as one in a hundred in *Caledonian Modular*. There have been many cases concerning invalid payment notices; recognising this in *Hutton*, Coulson J noted justifiably that the proliferation of these cases was not predictable at the time of *Caledonian Modular*. These cases should have decreased as adjudicators now know from the case law that the validity of the default notice must be carefully considered, but they still occur. Calculation errors are common in adjudicators' decisions, which is understandable given the tight timetables applicable. Given the very narrow nature of the slip rule, cases of the *Geoffrey Osborne* type can be expected from time to time.

In *Hutton*, Coulson J noted that the invalid payment notices cases had involved a significant degree of agreement between the parties. They all involved a tacit understanding that the parties' rights and liabilities turned on the decision as to the validity of the particular payment notice; if invalid, then no enforcement of the adjudicator's decision. The judge then gave guidance as to the procedure in the absence of consent.

> "The first requirement is that the defendant must issue a CPR Part 8 claim setting out the declarations it seeks or, at the very least, indicate in a detailed defence and counterclaim to the enforcement claim what it seeks by way of final declarations. For the reasons already explained, I believe a prompt Part 8 claim is the best option.
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> It might be fairly said that there is some support in paragraph 9.4.3 of the TCC Guide for a more informal approach…This…must now be taken to have been superseded by the guidance given in this judgment.
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> On this hypothesis, there is a dispute between the parties as to whether or not the defendant is entitled to resist summary judgment on the basis of its Part 8 claim. In those circumstances, the defendant must be able to demonstrate that:
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> (a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;
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> (b) the issue requires no oral evidence or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;
>
> (c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.
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> What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's

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> categorization of a document as, say, a payment notice when, on any view it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in *Macob, Bouygues* and *Carillion*."[17]

In *J&B Hopkins*,[18] Fraser J reiterated that if an adjudication decision has been issued with jurisdiction and without material breaches of natural justice, it will be enforced by way of summary judgment, citing *Macob* and *Hutton*. He also stated, although this was not part of the *ratio* of his decision:

> "The principles of enforcement are subject to two narrow exceptions. They are identified in *Hutton v Wilson* as well at [4]. The first is an admitted error; the second is a self-contained legal point concerning timing, categorization or description of payment notices or pay less notices, in respect of which the potential paying party has issued Part 8 proceedings seeking a final determination of that or those substantive points. That is dealt with at [5] of *Hutton*."[19]

This summary, which repeats that in *Hutton*, is inaccurate, in the writer's respectful view, for the reasons given above in respect of the *Hutton* decision's description of two narrow exceptions.

Again in *J Tomlinson*,[20] the same judge, Fraser J, in an *ex tempore* judgment, stated the general principle that adjudicators' decisions will be enforced unless they are made without jurisdiction or made in material breach of the requirements of natural justice, before citing the *Hutton* case for the proposition that there are two narrow exceptions to the general principle. Fraser J also referred specifically to Coulson J's "99 cases out of 100" dictum almost as though it lays down a rule[21] and his example of an adjudicator's construction of a contract clause being "beyond any rational justification", as though that were a test that had to be satisfied.[22]

The *Willow* Case[23]

Willow, a company incorporated in Luxemburg, appointed MTD by contract to design and build a hotel in Shoreditch. The parties also entered into a later supplementary agreement. In an adjudication, the adjudicator's decision was that certain sums were to be paid by Willow to MTD. As part of this decision, the adjudicator found, as a result of his construction of the supplementary agreement, that Willow was not entitled to claim liquidated damages of £715,000. This was only part of the decision; the net result of the adjudicator's findings was that Willow was to pay MTD a sum of £1,174,854.92. MTD sought to enforce the decision and applied for summary judgment.

By a Part 8 claim, Willow sought declarations, by which it sought to resist enforcement, although Willow had taken the initiative by issuing its Part 8 proceedings before MTD issued

[17] *Hutton*, above, at [15-18]
[18] *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305 (TCC).
[19] *J&B Hopkins* at [15].
[20] *J Tomlinson Ltd v Balfour Beatty Group Ltd* [2020] EWHC 1483 (TCC).
[21] *J Tomlinson Ltd v Balfour Beatty Group Ltd*, above, at [25].
[22] *J Tomlinson Ltd v Balfour Beatty Group Ltd*, above, at [24].
[23] *Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1591 (TCC).

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its enforcement proceedings. The court dealt with the two matters together, as had been agreed by the parties.

In the part 8 proceedings, Willow sought declarations as to the proper construction of the supplementary agreement. If Willow were correct in its contentions on the supplementary agreement, the effect was that the adjudicator's decision that Willow was not entitled to claim liquidated damages of £715,000 would be wrong. The judge, Pepperall J, took the view that the construction issue was short, self-contained and well-suited to being determined in Part 8 proceedings. He then made a final determination in Willow's favour on the construction issue.

This decision entailed an extension of the previously established principles on severability of adjudicators' decisions, which allow enforcement of the balance of an adjudicator's decision after excising part of a decision made without jurisdiction or, less usually, in breach of the rules of natural justice, where it is practicable to separate the valid from the invalid. This is most readily done where more than one dispute has been referred. Pepperall J extended the principle to a case where the bad part of the decision arose not from lack of jurisdiction or breach of the rules of natural justice, but from a final decision of the court on an issue decided by the adjudicator. In addition, he stated on severability:

> "In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced.
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> In this case, I am satisfied that the effect of the error of law on the issue of contractual construction was limited to Mr Molloy's dismissal of the claim for liquidated damages and that such error did not infect the balance of the decision. I therefore consider that the good can and should be severed from the bad."[24]

The *ISG Construction* Case[25]

Platform Interior Solutions (Platform) obtained an adjudicator's decision in its favour. ISG sought declarations under CPR Part 8 with the purpose of preventing enforcement, including a declaration that the decision of the adjudicator was wrong and beyond rational justification, in that the adjudicator's assessment of sums due to Platform was inconsistent with the terms of the parties' sub-contract. The phrase "beyond rational justification" is taken from Coulson J's judgment in *Hutton*, at paragraph 17 (quoted above). ISG contended that the adjudicator had not calculated sums due to Platform following termination in accordance with the contractual provisions setting out the method of calculation required. Platform sought to

[24] *Willow Corp*, above, at [74-75].
[25] *ISG Construction Ltd v Platform Interior Solutions Ltd* [2020] EWHC 1120 (TCC).

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enforce; its application was in the event listed first, against ISG's wishes and it had already succeeded on enforcement.

Judge ter Haar quoted extensively from *Hutton* and endorsed the "two exceptions" rule set out in *Hutton*. He did point out that a Part 8 application in relation to a legal principle underlying an adjudicator's decision outside of the two exceptions may be appropriate, but he considered that where a Part 8 application is to be deployed to prevent timely enforcement of an adjudicator's decision, it is to be limited to the two exceptions as described in *Hutton*. The first exception, admitted error, did not apply here. As to the second exception, this case was concerned with the approach set out at paragraph 17 of the judgment in *Hutton*, where there is no agreement by the enforcing party to the effect of the Part 8 application on the enforcement.

Judge ter Haar found that ISG were not within the guidance given by Coulson J, who referred to "a short and self-contained issue which arose in the adjudication". The point now being raised by ISG, though arguable, was not raised in the adjudication, in which the parties had been agreed on how the adjudicator should approach valuation. The Part 8 application should be dismissed on this basis. In addition, ISG would need to go further than establishing the correct approach under the contract; it would need to show what figure the correct approach would produce by way of a different result from the adjudicator's. That went beyond a short point of construction and would require valuation evidence. In addition, it was impossible for ISG to succeed on the point that the adjudicator's construction was beyond rational justification, when the adjudicator did what the parties asked her to do.

Conclusions

In the writer's view, as stated above, there are not two narrow exceptions to the general rule, but one exception, which is that a declaration that is suitable for a Part 8 application (narrow, self-contained and not requiring further factual investigation) and is suitable to be heard at the same time as or before an application for summary judgment, may defeat the application for summary judgment. The "two exceptions" are merely examples of this one exception.

The *Willow* case illustrates the writer's view that there is one exception to the rule that an adjudicator's decision will be enforced, whether right or wrong in law or on the facts, if made within jurisdiction and not in contravention of the rules of natural justice. The final decision under Part 8 in the *Willow* case does not fall within either of the two narrow exceptions as described by Coulson J in *Hutton*, Fraser J in *J&B Hopkins* and *J Tomlinson* and Judge ter Haar in *ISG*.

The *Willow* case is not referred to in the *ISG* case. The result in the *ISG* case is, in the writer's view, correct, although the acceptance of the "two exceptions" approach is in the writer's view flawed for the reasons given above. The analysis in the *ISG* case, and in Fraser J's judgments in *J&B Hopkins* and *J Tomlinson,* also tends to treat obiter dicta of another first instance judge in *Hutton* rather as though they were statutory provisions, whereas in fact they are merely persuasive but non-binding guidance. Coulson J in *Hutton* gave the colourful example of an adjudicator's construction of a contract clause "beyond any rational justification", but that should not be taken as a rule of law laying down the test to be applied. His reference to 99 cases out of 100 is also not a rule, nor based on statistical data but is merely an emphatic way of stating that most adjudicators' decisions will be enforced if there is no valid jurisdictional objection nor breach of the rules of natural justice.

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The focus should be on the one exception and whether it applies or not. If a declaration is suitable for a Part 8 application (narrow, self-contained and not requiring further factual investigation) and is suitable to be heard at the same time as or before an application for summary judgment, it may defeat the application for summary judgment. It has to be a matter that was argued before the adjudicator. It will occur in however many cases out of 100 as these circumstances are applicable.

Where construction of a clause in a contract is the issue, it will not, it is submitted, be necessary for the adjudicator's construction of the clause to be beyond any rational justification. Coulson J and Fraser J seems to regard the "beyond any rational justification" hurdle as being desirable so that the number of adjudicators' decisions enforced is maximised. One can test that proposition and the "beyond any rational justification" approach as follows. Suppose that an adjudicator's construction of a clause is wrong in law; the court so decides as a final determination but decides that the adjudicator's analysis was not beyond any rational justification. It would be a perverse result, contrary to the interests of justice and the purpose for which the courts exist, if the court made a final determination that the adjudicator's ruling on law was wrong, but the adjudicator's decision were nevertheless enforced. The desirability of such a result also presupposes that it is equally desirable that wrong decisions and right decisions of adjudicators are enforced. However, it is not desirable that decisions that are wrong in law are enforced; it is rather accepted that this drawback is a price that has to be paid, normally, for the advantages of adjudication. Once a court finally determines that the adjudicator was wrong, there is no benefit in enforcement.

Coulson J's two exceptions are an obiter description of the two exceptions which happened to have come before the court at the time; they should not be elevated to rules of law akin to statute, precluding other exceptions.

In the writer's view, the lower courts' view that there is this one exception is correct (although it may not have been formulated completely accurately in the lower courts as quoted above). Strictly, if the lower court decisions are correct, that means the well-known and much-quoted expositions of the position in the Court of Appeal in cases such as *Carillion v Devonport* are not correct. However, that is a detail that is likely to continue be glossed over as statements of the law are refined in the case law. As a practical point for the time being, Coulson LJ is likely to deliver the leading judgment in any future decision of the Court of Appeal on this topic and to uphold the exception.