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Adjudicators' Decisions: Severability Update Part 1

*By Peter Sheridan**

Introduction

Although the writer has considered this topic on four previous occasions in Construction Act Review (CAR),[1] the last occasion was eight years ago and there has since been a significant further development and redefinition of the courts' approach.

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. It may also be shown to be invalid in whole or in part by a subsequent declaratory final decision of the court given pursuant to the CPR Part 8 procedure.[2]

The writer first analysed the law on severability in CAR in 2004.[3] The case law at that time was reviewed in detail[4] 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.
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> (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."

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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; P. Sheridan "Adjudicators' Decisions: Severability Update (2014) 30 Const. L. J.249.

[2] See *Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1192 (TCC), discussed in detail below.

[3] (2004) 20 Const.L.J.71. All the cases at fn. 2 below were considered in that edition of CAR.

[4] *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.

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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 *Cantillon v Urvasco* case and other cases[7] which were recent at the time were considered in the writer's second article on severability in 2009.

The early decisions focused on whether a single dispute had been referred to adjudication (in which case the early cases held that severance is not available), which is the normal situation, or whether two or more disputes had been referred (in which case the early cases held that severance may be available). Two or more disputes may be referred, but this is less usual as it is dependent on agreement. Normally a single dispute is referred to adjudication. The

[5] *Cantillon Ltd v Urvasco Ltd* [2008] B.L.R. 250.
[6] *Cantillon*, above, at [65].
[7] *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC); [2009] B.L.R. 328; [2009] C.I.L.L. 2665; *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] All E.R. (D) 49; [2006] EWHC 741 (TCC); *Aveat Heating Ltd v Jerram Falkus Construction Ltd* [2007] EWHC 131 (TCC); [2007] T.C.L.R. 3; 113 Con. L.R. 13; *Hitec Power Protection BV v MCI Worldcom Ltd* [2002] EWHC 1953; *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC); [2004] T.C.L.R. 6.

severability concept would have more utility if it were applicable in relation to a single dispute. This is so particularly as a single "dispute" may be broad in nature and encompass multiple issues. For example, a dispute as to what interim payment is due may encompass disputed issues as to the valuation of several variations, several items of measured work and several contra charges.

While describing the law at the time based on the case law at the time, the writer also floated in the first article an alternative approach to that adopted by the courts, whereby adjudicators' decisions on a single dispute may be severed, so that an invalid part of a decision would not be enforced but the valid part would be enforced. The writer suggested this might reflect the parties' intention or be an implied term. Ramsey J considered the writer's suggestion in the *Cleveland Bridge* case but did not consider either that an obligation to comply with an adjudicator's decision meant that the parties were obliged to comply with part of an adjudicator's decision made within jurisdiction when part was made without jurisdiction; neither did he consider there was an implied term to that effect. The *Cleveland Bridge* case was considered in detail in the writer's third article on severability.[8]

Ramsey J's pure view had the virtues of clarity and certainty, but it has the drawback that where there is an adjudicator's decision on a single dispute which may in large part be valid and where is it feasible on the facts to separate the valid part from the invalid, none of the decision would be enforced. As examples have come before the courts, they have been unwilling to take the purist view, so there have been departures from Akenhead J's principle (f).

The purpose of the writer's 2014 article was 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 is, if there is a new rule, what is the juridical basis for it?

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.[9] 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.

[8] Severability of Adjudicators' Decisions Revisited (2011) 20 Const. L.J. 520.
[9] *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] All E.R. (D) 49; [2006] EWHC 741 (TCC).

The writer in the 2014 article[10] considered numerous cases in addition to the *Interserve* case, in which the courts departed from principle (f) or would have done if necessary or entertained the possibility of doing so[11] but the courts did not formulate the proposition that they were departing from principle (f),[12] nor did the courts address the juridical basis for the approach they were taking or considering.

In this article, the recent cases in which the courts do reformulate the rule, the *Willow* and *Dickie & Moore* cases, are considered.

In Part 2 on this topic in a future edition, the writer will consider decisions after the *Willow* and *Dickie & Moore* cases and will revisit whether the position is or should be any different in natural justice cases from the position in other cases.

Cases since the writer's 2014 article: no new test formulated

In *Stellite Construction*,[13]an adjudicator found that time was at large and went on to decide what was a reasonable time for completion. It was held by Carr J that the adjudicator did not have jurisdiction to decide what was a reasonable time for completion. That issue was not part of the dispute set out in the notice of adjudication and it was not encompassed by the responding party's defence. It was common ground between the parties that the part of the adjudicator's decision deciding what was a reasonable time for completion could be severed, so it was, but there was no analysis as to the law on severability.

In *Paice v Harding*,[14] O'Farrell J was still in 2016 citing *Cantillon v Urvasco* as setting out the position on severability. An adjudicator ordered the repayment of sums overpaid in the sum of circa £300,000. Included in the decision was a sum of £6,049.60, which the claimant

[10] Adjudicators' Decisions: Severability Update (2014) 30 Const. L.J. 249.
[11] *Adonis Construction v O'Keefe Soil Remediation* [2009] EWHC 2047 (TCC); [2009] All E.R. (D) 217; *Allied P&L Ltd v Paradigm Housing Group Ltd* [2009] EWHC 2890 (TCC); [2009] All ER (D) 240; [2010] B.L.R. 59; *Estor Ltd v Multifit (UK) Ltd* [2009] EWHC 2108 (TCC); [2009] All E.R. (D) 119; (2009) 126 Con. L.R. 40; *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC); [2010] All ER (D) 267; *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC); [2010] All E.R. (D) 197; [2010] B.L.R. 452; *Highlands and Islands Airports Ltd v Shetlands Council* [2012] CSOH 12; *Whyte & Mackay Ltd v Blyth & Blyth Consulting Engineering Ltd* [2013] CSOH 54; *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC); [2010] All E.R. (D) 206; [2010] B.L.R. 415; *Carillion Utility Services Ltd v SP Power Systems Ltd* [2011] CSOH 139; *Working Environments Ltd v Greencoat Construction Ltd* [2012] EWHC 1039 (TCC); [2012] B.L.R. 309; 142 Con. L.R. 149; *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC); [2012] B.L.R. 417; *WSP CEL Ltd v Dalkia Utilities Services plc* [2012] 2428 (TCC); *Lidl UK GmbH v RG Carter Colchester Ltd* [2012] EWHC 3138 (TCC); *Aveat Heating Ltd v Jerram Falkus Construction Ltd* [2007] EWHC 131 (TCC); [2007] T.C.L.R. 3; 113 Con. L.R. 13; *Hillcrest Homes Ltd v Beresford and Curbishley Ltd* [2014] EWHC 280 (TCC).
[12] Except in the *Lidl* case, where the reformulation of principle (f) or exception to it is very narrowly framed.
[13] *Stellite Construction Ltd v Vascroft Contractors Ltd* 165 Con. L.R. 108; [2016] B.L.R. 402; [2016] EWHC 792 (TCC).
[14] *Paice v Harding* [2016] EWHC B22 (TCC).

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deducted for design provided by the claimant. The judge found that the dispute as to the design fees arose, if at all, under a separate contract. The adjudicator did not have jurisdiction to determine the design fees dispute. As the adjudicator had identified and valued the design fees claim separately, there was no difficulty is severing that part of the decision from the rest, which was enforced.

In *Aecom v Staptina*,[15] the claimant in Part 8 proceedings sought declarations that certain paragraphs and two further sentences of an adjudicator's decision were unenforceable for lack of jurisdiction or breach of the rules of natural justice. Aecom did not seek to impugn the enforceability of the decision as a whole, merely those parts which it sought to have severed. In the event, the jurisdictional and natural justice objections failed, so severance did not arise. If severance had arisen, Staptina did not object to it, so it was common ground that severance was available.[16] The judge, Fraser J, otherwise would have had misgivings about the suitability of this case for severance and described Aecom's severance case in the following disparaging terms:

> "AECOM maintains that the objectionable passages should simply be severed from the remainder. The net effect of this approach by AECOM would be to take a scalpel to the decision in a surgical fashion, removing isolated sentences as well as several paragraphs, but leaving intact the simple finding by the adjudicator that AECOM could make deductions for defects, without saying anything about how those deductions, in principle, were to be calculated. This would then leave AECOM free to go about making deductions from the Staptina termination account for defects – because the adjudicator would have decided that such deductions were permitted as a matter of contractual interpretation – but in an entirely different fashion to how she decided that contractual mechanism was to work."[17]

In the *Ove Arup* case,[18] the possibility arose of severance of an adjudicator's decision dealing with a contract for both construction operations and for non-construction operations (a hybrid contract). If that were the case, severance of the part of the decision on matters that fell outside Part 2 of the HGCR Act would have arisen for decision. In the event, O'Farrell J found the whole decision to be valid and enforceable, the jurisdictional objections failed and severance did not arise. The judge stated:

> "If I had accepted the jurisdictional challenge as valid, I would however have had difficulty in carrying out any severance of the matters that fell within or without Part 2 of the Act. I note that both parties have relied upon the decision in *Cleveland Bridge UK Ltd v Whessoe*…

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[15] *AECOM Design Build Limited v Staptina Engineering Services Limited* [2017] EWHC 723 (TCC).
[16] *Barr Ltd v Law Mining Ltd* (2001) 80 Con. L.R. 135; [2001] C.I.L.L. 1764 QBD (TCC) is an early Scottish case in which it was common ground that where it was possible to separate the "good part" of an adjudicator's decision from the "bad part", there could be partial enforcement. As this was common ground Lord Macfadyen did not analyse the separability issue any further.
[17] *AECOM*, above, at [18].
[18] *Ove Arup & Partners International Ltd v Coleman Bennett International Consultancy PLC* [2019] EWHC 413 (TCC).

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> In that case Ramsey J stated that the court would carry out a severance exercise if the adjudicator had made a decision not only on the whole dispute, but also a decision which dealt only with the part of the dispute that was within the adjudicator's jurisdiction. If, contrary to what I have already said, parts of the contract between the parties fell within Part 2 of the Act, but parts fell outside, it would not be sufficient, in my judgment, for the adjudicator to have set out, as he did at paragraph 55, the relevant proportions of the work that related to different aspects of the work. What would be required would be for the adjudicator to have made a decision as to precisely what figure would have been allowed and what decision would have been made in that event.
>
> Therefore, subject to the matters that I have already decided against the defendant, this would not have been a case where it would have been possible for the court to point to an alternative decision made by the adjudicator that would have allowed the court to sever those parts that were within jurisdiction."[19]

In *PBS Energo*,[20] an adjudicator's decision was not enforced because it was properly arguable that it had been obtained by fraud. Pepperall J stated severance was not available because "an adjudicator's decision on a single dispute is either valid and enforceable or invalid and not enforceable". Although *Cantillon v Arvasco*, cited by the judge, is indeed authority for that proposition, there had by the time of this decision in April 2019 been many cases in which the courts had departed from that proposition. Pepperall J's alternative rationale, that it was not for the court to seek to re-engineer the adjudicator's decision and to identify what, if any sum might have been ordered to be paid in the event that there had been no arguable fraud, is a firmer foundation for the decision.

The new approach: the *Willow* case[21]

Severability arose in this case not from a jurisdictional objection or from breach of the natural justice, but in the following way.

An adjudicator had ordered Willow to pay to its contractor, MTD, £1,174,854.92 plus VAT. Willow did not pay but issued a Part 8 claim seeking declarations as to the proper construction of a supplementary agreement the parties had made, having first contracted on terms including the JCT Design and Build contract, 2011 edition. MTD sought to enforce the adjudicator's decision, although this Part 7 application came some time after Willow's application. The two applications were heard together by Pepperall J.

The adjudicator had decided that on the true construction of the supplementary agreement the employer's agent was required to certify practical completion provided that there was an agreed list of outstanding work. Since there was such a list, he concluded that Willow was not entitled to claim liquidated damages of £715,000.

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[19] *Ove Arup*, above, at [41-43].
[20] *PBS Energo A.S. v Bester Generacion UK Ltd* [2019] EWHC 996 (TCC).
[21] *Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1192 (TCC).

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The judge considered the construction issue to be short, self-contained and well suited to being determined in Part 8 proceedings. Willow had taken the proactive step of issuing its Part 8 claim first; it was not simply seeking to resist summary judgment on the basis of the Part 8 claim. The judge was accordingly content to make a final determination of the construction issue.

The judge's finding on this issue was that the supplementary agreement did not require Willow to accept that practical completion had been achieved simply upon agreement of a list of outstanding works. The correct construction was that MTD was required to achieve practical completion by 28 July 2017, save only in respect of certain works identified in a schedule to the supplementary agreement. Willow remained entitled to liquidated damages if MTD did not meet the revised practical completion obligation. The judge's final determination thus overrode the adjudicator's decision on the construction issue. On the judge's construction of the supplementary agreement, the amount due to MTD would be reduced by £715,000, so the question arose whether severance was permissible to allow MDT to enforce the balance of the £1,174,854.92 plus VAT.

Pepperall J cited some of the cases considered in the writer's 2014 article, where the courts had moved away from Akenhead J's principle (f) but without making it particularly clear that they were doing so or the extent to which the rule was being altered.[22] Pepperall J then grasped the nettle and formulated the new approach as follows.

> "I agree with Edwards-Stuart J that in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. 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 safely be 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."[23]

The process is to identify the part of the decision that is flawed or in error, because it is made without jurisdiction or in breach of the rules of natural justice, or, as in the *Willow* case, because it relates to something that has been finally determined in court in a way that is contrary to the adjudicator's decision. If one were then to excise the flawed part of the decision, the question is whether the balance of the decision is unaffected by the error.[24] If so, it may "safely" be

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[22] *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC); *Working Environments Ltd v Greencoat Construction Ltd* [2012] EWHC 1039 (TCC); [2012] B.L.R. 309; 142 Con. L.R. 149; *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC); *Lidl UK GmbH v RG Carter Colchester Ltd* [2012] EWHC 3138 (TCC)

[23] *Willow Corp*, above, at [74].

[24] See *Willow* Corp, above at [73] and [75] for this further explanation as to when it is "safe" to enforce the balance.

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enforced. One aspect of this approach, at least with a decision ordering the payment of money, may be that the adjudicator's decision must identify with precision the quantum of the flawed part of the decision as well as the remainder of the decision, so that it is merely a matter of arithmetic to excise that part. In the *Willow* case, the value of the claim for liquidated damages was £715,000; the judge enforced the balance of the decision.

This decision indicates that, so long as the exercise described in the paragraph above is feasible, it will not matter that the quantum of the excised part is larger than the remaining balance. It is not the case, on this approach, that severance is only available to excise a relatively small part of the decision.[25] The test described by Pepperall J seems to the writer a better approach than one based on quantum, as it will allow a consistent approach to a wider range of different facts. Pepperall J's approach is essentially the same as the approach the writer has been advocating since the writer's 2004 article.

Pepperall J does not suggest any juridical basis for his approach.

The new approach: the *Dickie & Moore* case

The most thorough and intellectually satisfying analysis of the new approach is set out in Lord Drummond Young's judgment in the Scottish case, *Dickie & Moore Ltd v McLeish*.[26]

This case is an example of a successful "no dispute" argument, which in itself is relatively unusual. A material part of the dispute described in the notice of adjudication, in respect of which the adjudicator made an extension of time award and associated loss and expense award of £63,093.47, had not crystallised before the notice was served. The Inner House held, upholding the decision of the commercial judge, that the parts of the claim in which the adjudicator lacked jurisdiction could be severed from those where he had jurisdiction, and that the latter parts of the decision could be enforced.

Lord Drummond Young considered that the policy considerations that underlie adjudication were an important starting point. The reasons for the passing of the HGCR Act and the Scheme were well known; "…we are of the opinion that the provisions of the Scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found due without undue delay. In particular, the intention is to avoid delay by lengthy dispute-resolution procedure."[27]

Turning to the case law, Lord Drummond Young noted that *Cantillon v Urvasco* has been repeatedly relied on in later cases, but the law has developed since that case was decided. Lord Drummond Young then went through the cases considered in the writer's fourth article

[25] Cf the dictum of Coulson J, as he then was, in *Pilon Ltd v Breyer Goup plc*, above, fn 8: "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 that is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered." This quantum-base approach was discussed in the writer's 2014 article.
[26] *Dickie & Moore Ltd v McLeish* [2020] CSIH 38.
[27] *Dickie & Moore*, above, at [25].

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that indicate the initial move away from principle (f) in *Cantillon v Urvasco*, so that the distinction between "single dispute" cases and cases where more than one dispute is referred to adjudication ceases to be decisive, but rather becomes a factor in a flexible and practical approach. Lord Drummond Young expressly disagreed with the approach of Ramsey J in the *Cleveland Bridge* case.

Arriving at the *Willow* case, Lord Drummond Young stated that Pepperall J had suggested that the best approach was to ignore the parts of the decision where the adjudicator lacked jurisdiction, to focus on the remainder and ask "whether it is clear that there is anything left that can be safely enforced". Lord Drummond Young then stated:

> "While the test of whether a particular conclusion is 'safe' has never attracted support in Scotland, we are of opinion that a test along these lines is appropriate. In considering whether a decision which is partially *ultra vires* of the adjudicator can be severed and the valid part enforced, the correct approach in our opinion is that the court should make the assumption that the parts of the decision that are invalid, for example because the dispute had not crystallised, did not exist. On that basis, it should then consider whether the remainder of the decision can be enforced without its being tainted by the invalid part of the decision."[28]

This may be taken to be the test in Scotland; however the position is not really different from the position in England.

If the test in England were that the court should disregard the invalid of the adjudicator's decision and then consider whether it were safe to enforce the balance, that would be a circular test, since that proposition begs the question for which the test is designed: when is it safe to enforce the balance? That circular proposition appears at first sight to be put forward in the passage from the *Willow* case quoted by the writer above and from Lord Drummond Young's reference to the *Willow* case. However, Pepperall J was not guilty of formulating a circular test in the *Willow* case, because if one considers the passage from his judgment quoted above in context,[29] Pepperall J does identify when it is safe to enforce the balance: it is when, if one excises the invalid part of the decision, one can find that the balance is clearly unaffected or not tainted by the error. That is the whole test as formulated in the *Willow* case as properly understood. It is in the writer's view the same test as in the *Dickie & Moore* case. It is also the same test as that advocated by the writer in previous articles, although at that time it was the writer's view as to what the law should be, not what the law was. Now it is also what the law is.

Lord Drummond Young went into more detail about the process of applying the test.

> "Acting outwith jurisdiction in respect of one aspect of the dispute, however, does not necessarily taint the remainder. The whole relationship of the *intra vires* and *ultra vires* parts of the decision must be examined, to determine how far the reasoning in the latter has influenced the former. Influence may take a range of forms. Some of the evidence of primary fact may be the same, although it must be borne in mind that

[28] *Dickie & Moore*, above, at [42].
[29] Particularly *Willow Corp*, above, at [73] and [75].

> primary facts such as the terms of the contract will almost inevitably be relevant to both the *intra vires* and *ultra vires* parts, and should not taint the *intra vires* part. Inferences of fact, based on the primary facts, are perhaps more liable to taint the reasoning in the *intra vires* part of a decision if they are adopted in the *ultra vires* part, although this is not inevitable if the inference appears to have been drawn independently in each part. The application of the law to the facts is a separate area where influence is possible, and here again each case must be considered on its merits. 'Law' for these purposes includes the terms of the parties' contract. The critical question is whether the adjudicator's reasoning in the invalid part of his decision has had a significant effect on his reasoning in the *ex facie* valid part. If there is a significant influence, it is likely that severance will be impossible, with the result that the whole decision must fail."[30]

Lord Drummond Young also provides a juridical basis for the severance rule. The parties' contract included the JCT standard form of building contract (2011 edition), which incorporates Part 1 of the Scheme for Construction Contracts. Under the Scheme, paragraph 23(2), the decision of an adjudicator is binding on the parties and they are obliged to comply with it until the dispute is finally determined by legal proceedings, arbitration or by agreement. The provisions of the Scheme were to be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and sub-contractors to obtain payment of sums to which they have been found due without undue delay. In particular, the intention is to avoid delay caused by lengthy dispute-resolution procedure. The court's view on severability is thus based on interpreting the Scheme by reference to the policy considerations which are said to underlie the Scheme. Construing the Scheme was stated to be analogous to construing legislation.

The writer had in previous articles suggested that the juridical basis for the severance rule was the parties' intention or an implied term. Under s.108(3) of the HGCR Act, a construction contract shall provide in writing that the decision of an adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration or by agreement. Many construction contracts contain such provision and other provisions compliant with s.108(1) to (4), in which event the Scheme does not apply. The writer's suggestion in these cases is that, when agreeing that an adjudicator's decision is binding, they mean that the valid part is valid, where there is an invalid part that may be severed in accordance with the principles set out in the *Willow* case and the *Dickie & Moore* case; or there is an implied term to that effect.

Where the Scheme applies, either because the parties' construction contract is not compliant with s.108(1) to (4), or because the Scheme is incorporated by reference, as with JCT contracts, then Lord Drummond Young's analysis applies.

[30] *Dickie & Moore*, above, at [45].