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CONSTRUCTION ACT REVIEW

Adjudicators' Decisions: Severability: the New Rule (Part 2)

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Introduction

"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.[1]

The Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act) says nothing about severance, so the applicable rules are from case law.

In Part 1 of this article, the writer described the new rule as to severability, based on the *Willow* case[2] and the *Dickie & Moore* case.[3] The old rule was that severability applied only where more than one dispute had been referred to adjudication. In an appropriate case, an invalid decision on one dispute could be severed, leaving the decision on another dispute valid and enforceable.

The new rule concerns the position where a single dispute is referred to adjudication, as is usually the position. The invalid part of a decision may be severed leaving the valid part valid and enforceable, where the valid part of the decision is not tainted or affected by the adjudicator's error. If one disregards the part of the decision affected by the error, the task for the court is to determine if there remains, as Pepperall J put it in the *Willow* case, a core nucleus of the decision that may be safely enforced.[4]

The purpose of this article is to consider cases since the *Willow* case and the *Dickie & Moore* case.

Bexheat[5]

An objection that an adjudicator did not have jurisdiction to award £100 compensation pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 was made in relation

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[1] See *Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1192 (TCC).
[2] See fn 1.
[3] *Dickie & Moore Ltd v McLeish* [2020] CSIH 38.
[4] The analysis of the courts in these cases is set out in detail in the writer's previous article on this topic at [ ].
[5] *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC); (2022) 38 CLJ Issue 4 244.

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in proceedings to enforce the adjudicator's decision. O'Farrell J, citing *Cantillon v Urvasco* and *Willow Corp*, stated:

> "Where part of an adjudication award is held to be unenforceable, the court has power to sever that part and enforce the remainder…In this case, the compensation awarded is a fixed sum in respect of a discrete issue and of very modest value in comparison to the remainder of the award. Therefore, it would be an appropriate case for the court to consider severance."[6]

However, severance did not occur in this case because the right to challenge jurisdiction on this issue had been waived.

While it is correct that the compensation was of modest value in comparison to the remainder of the decision and that it was an appropriate case for the court to consider severance, the way this is expressed and the use of the word "therefore" are a little misleading. For reasons explained in the first part of this article, it is not necessary for the part of the decision that is to be severed to be of modest value in comparison with the remainder of the decision, despite some early tentative dicta to that effect. The new rule for severance is as described above and correctly, it is submitted, does not include a quantum-based test.

Down Road Developments[7]

The claimant in an adjudication, a contractor, Laxmanbhai, obtained a decision on the sum due in respect of interim payment application 34. The employer, DRD, asserted a contra charge in the adjudication, for breach of contract by the contractor in respect of the capping beam.

The adjudicator decided he did not have jurisdiction to rule on the capping beam claim. Judge Eyre found that the adjudicator had taken an unduly narrow view of his jurisdiction and to that extent he had failed to answer the question before him. The failure to address the employer's defence was also a breach of the requirements of natural justice.

The failure to address DRD's defence and thus the breach of the rules of natural justice was also a material one. The adjudicator had found £103,826.98 was due from DRD to the contractor. The capping beam claim, which the adjudicator did not consider, was for £149,692.30. Thus, if the capping beam claim had been considered, the result might have been that no payment was due to the contractor and that some payment was due from the contractor to DRD.

DRD argued in court that the adjudicator's decision on the capping beam was not enforceable, but the decision was binding in respect of the valuation of interim application 34. DRD argued that the decision could be severed so that the decision remained effective on the question of the valuation of the interim application.

[6] *Bexheat*, above, at [80].
[7] *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* [2021] EWHC 2441 (TCC).

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Judge Eyre was satisfied that the new rule referred to above, based on the *Willow* case and the *Dickie & Moore* case, is normally applicable. However, he noted that in those cases and other earlier cases which he reviewed, the result of severance was enforcement of a sum in favour of the claimant in the adjudication, but in a lesser sum that would have been the case without severance. He stated:

> "Rather different considerations come into play when severance would lead not to enforcement of the adjudicator's award but to enforcement of a particular part of the decision in question with that part having been a stage in the process prior to the ultimate decision."[8]

The judge raises two points here: (1) severance not leading to enforcement of the adjudicator's decision in favour of the claimant and (2) severance having the effect that part of the decision, which was a stage in the decision-making process prior to the ultimate decision, would be valid. These two points, though taken together by the judge, are not, in the writer's view, connected to one another.

On the first of these two points, it is correct that there is a difference between enforcement in favour of the claimant in a lesser amount than claimed, after severance, on the one hand, and, on the other hand, a case in which the effect of severance is that part of the decision remains valid, without there being enforcement in favour of the claimant. It is correct that the two situations are not the same, but that is not the same thing as the two situations requiring different rules as to severance. The judge noted that partial enforcement of an adjudication decision is compatible with the policy "underlying the [HGCR Act]" of maintaining cash flow in the construction industry by enabling contractors to obtain prompt payment of sums which are due. While that is true so far as it goes, the policy identified is not the only policy behind the HGCR Act. It is also the case that the HGCR Act has application in respect of all disputes under construction contracts, whether concerned with cash flow to contractors or not. The writer's view is that the rule from the *Willow* and *Dickie & Moore* cases, summarised above, should apply to both situations. Where parties have gone to the trouble and expense of obtaining an adjudicator's decision on a matter which would not result in cash flow to a contractor after severance of an invalid part, the writer considers the remaining part should be valid, if it is not tainted or affected by the adjudicator's error. The judge did not provide any further justification for this first point.

The second point, severance leading to enforcement of a particular part of the decision in question with that part having been a stage in the process prior to the ultimate decision, seems a legitimate area of concern when considering severance. But it is difficult to see why it is an area of concern on the facts of this particular case; this point is considered further below.

The judge was much exercised by the second point. He proceeded from the passage quoted above:

> "I will proceed on the footing that severance is potentially available in such cases but particular care will be needed to determine whether the part in question can "safely" be enforced separately from the decision as a whole (to adopt Pepperill J's language) and whether the decision on the part has been 'tainted' by failings affecting the overall

[8] *Downs Road Development LLP*, above, at [91].

> decision (in the language of the Inner House). The court must also, in my judgment, guard against creating an artificial outcome which could not have been the result of a proper decision by the adjudicator. The court will need to consider whether the adjudication is properly to be seen as (a) containing a series of decisions independent of each other or (b) being a single decision resulting from a connected chain of reasoning. The former analysis will be correct in some cases. This is more likely to be the position if multiple disputes have been referred to the adjudicator and in such a case severance with enforcement of the decision or decisions in respect of one or more disputes may be appropriate even where the decision or decisions in respect of other disputes also referred cannot be enforced. The test cannot be solely whether the adjudicator was dealing with single or multiple disputes but where an adjudicator is dealing with a single dispute the latter analysis of the decision is more likely to be correct. Where there is such a single decision severance is unlikely to be appropriate even where the stages in the chain of reasoning leading to the adjudicator's conclusion are set out and can be said to be logically distinct. Severance in those circumstances is unlikely to be appropriate because it would involve an artificial division of a continuous chain of reasoning and would create the risk of imposing on the parties an outcome which could not have resulted from the adjudication. This is particularly so where the conclusion in respect of that part of which separate enforcement is sought favoured the party who was unsuccessful on the ultimate issue. As a matter of principle if in a particular case severance is appropriate with the consequence that part of a decision is binding then this will not be precluded by the fact that this will enable the party which lost overall to enforce a part of the decision which went in its favour. Nonetheless, the risk of creating an artificial result is greater in such a case with the consequence that severance is less likely to be appropriate."[9]

This passage seems to some degree to be harking back to the old rule, whereby severance was available only where more than one dispute had been referred to adjudication. However, the judge accepts there is some, though seemingly reduced, possibility of severance in the case of a single dispute. In such an instance, the judge is concerned at the prospect of an "artificial" result, by which he seems to mean one that could not have resulted from the adjudication. The judge therefore seems to be rowing back from the new rule or re-formulating it, albeit paying lip service to it or recognising its validity for the general run of cases. The writer's understanding is also not assisted by the metaphor of a chain of reasoning, nor the concept of dividing the chain.

The writer is prepared to accept that severance is more likely to be appropriate where more than one dispute is referred to adjudication than where a single dispute is referred. However, while that general proposition is not objectionable, it does not advance matters much. Most adjudications concern a single dispute. The new rule only applies to a single dispute. The interesting questions are whether the new rule is of general application, if not why not and what adjustments are required to it and why.

The new rule is designed for and applicable only in respect of a single dispute. It is accordingly implicit in the new rule that the adjudicator is likely to have made a single decision, rather than

[9] *Downs Road Development LLP*, above, at [92].

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a series of separate decisions. It is also implicit in the new rule that there is a break in the chain of reasoning of the adjudicator, because the invalid part of the decision is excised. There is accordingly a different result from the one envisioned by the adjudicator.

It is difficult in fact to imagine a situation in which an adjudicator would make a series of separate decisions, independent of each other, when deciding a single dispute, in a manner different from the present case.

What the adjudicator had done was to decide the sum due in respect of interim application 34 and that £103,826.98 was due from the employer in respect of it. The adjudicator's "chain of reasoning" was accordingly the following:

(1) the correct interim valuation was £103,826.98;
(2) the adjudicator did not have jurisdiction to consider the employer's claim in respect of the capping beam;
(3) therefore, the employer should pay £103,826.98.

Point (2) was the adjudicator's error, as he should have considered the cross-claim in respect of the capping beam.

It is difficult to see why it is apt to describe this as a single decision resulting from an indivisible chain of reasoning, rather than a series of decisions leading to a conclusion. It is difficult to see why it would be wrong to sever point (2) and leave the remainder standing. Once can test both points in the following way: if the adjudicator had not made the error, one can ask what his decision on the correct interim valuation would have been. The answer must surely be that it would still be £103,826.98. To put it another way, the "chain of reasoning" is not "connected".

If it is correct that without the error the adjudicator's decision on the correct interim valuation would still have been £103,826.98, then it does not seem "artificial" for that to be the result once the part of the decision made in error is severed. One then comes back to the judge's apparent discomfort with the notion that severance could result in a different party being the net winner. The writer does not share that concern. An adjudicator, acting properly, does not decide who deserves to be the net winner, and then, working backwards, provide an indivisible chain of reasoning to justify that conclusion. An adjudicator should decide the merits and quantum of the issues comprising the dispute and be led by that to the conclusion as to who is the net winner. In the present case, the net winner might have been the employer, but for the error. That would occur if the capping beam claim overtopped the £103,826.98; if the capping beam claim were below the £103,826.98, the contractor would be the net winner. Since the correct interim valuation would remain at £103,826.98, whatever the result on the capping beam claim, it seems to the writer that the adjudicator's decision should have been severed by application of the new rule, which does not need to be adjusted in the light of the facts of this case.

On other facts the judge's concerns could be well founded. An adjudicator might provide a line of reasoning for a decision, in circumstances where, if the court struck down an element of the reasoning, it would not be clear what the result of the adjudication would be without the court entering into the further task of contributing to the content of the decision. Severance should not be available in those circumstances.

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CC Construction[10]

Another recent decision of Judge Eyre neatly illustrates his concern over the "net winner" issue and his acceptance of the new rule in cases where that concern does not arise.

An adjudicator deciding a final account dispute found that £483,512.12 was due from an employer to a contractor. The adjudicator declined to consider a defence of set-off of liquidated damages raised by the employer in the adjudication. The judge found the adjudicator to have been in material breach of the rules of natural justice in not considering that defence. The sum the employer sought to set off was £343,237.74.

As neither counsel had addressed the judge on the scope for severance in these circumstances, the judge stated that he would invite further submissions if it became necessary, but his provisional assessment was that the adjudicator's failure to consider the liquidated damages claim in the sum of £343,237.74 was a discrete matter and not capable of tainting or affecting his decision as to amounts in excess of that sum. In those circumstances, the judge was minded to adopt the new rule and to find that there was a core nucleus of the decision that could safely be enforced.

This case is a further illustration of the point that the new rule applies notwithstanding that the adjudicator's error is in respect of a very substantial sum in comparison with the amount decided by the adjudicator in the claimant's favour.

Natural Justice

A breach of the rules of natural justice makes it less likely that severance will be available than where there has been an error in respect of jurisdiction, because a breach of the rules of natural justice is more likely to taint or affect the whole decision. The *CC Construction* case is a further illustration of the principle that severance is nevertheless available, in an appropriate case, where there has been a breach of the rules of natural justice. An appropriate case is one in which the breach of the rules of natural justice does not taint or affect the remainder of the decision. This principle was common ground in a recent decision of the Outer House, Court of Session in Scotland.[11]

This principle is now well established.[12] It is also in the writer's view a satisfactory principle. As stated by Akenhead J in *Cantillon v Urvasco*,[13] if a 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. This deals adequately with the issue. Whether an adjudicator has decided a

[10] *CC Construction Ltd v Raffaele Mincione* [2021] EWHC 2502 (TCC).
[11] *Van Oord UK Ltd v Dragados UK Ltd* [2022] CSOH 30.
[12] See also *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC); *Cantillon Ltd v Urvasco Ltd* [2008] B.L.R. 250; *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC); *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC); [2010] All E.R. (D) 197; [2010] B.L.R. 452; *AECOM Design Build Limited v Staptina Engineering Services Limited* [2017] EWHC 723 (TCC).
[13] *Cantillon Ltd v Urvasco Ltd* [2008] B.L.R. 250.

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single dispute and there has been a breach of the rules of natural justice, the task for the court is to consider whether or not the adjudicator's error taints the whole decision.

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