If it ain't broke don't fix it

With a new Construction Act on the horizon, Ian Pease explains its potential effects on adjucation procedures

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The Housing Grants, Construction and Regeneration Act 1996 (the Construction Act) was quite a departure. Conceived in the wake of the Latham Report of 1994, it sought to address the endemic disputes about payment and other issues that bedevilled the construction industry. We now face the prospect of 'the Construction Act II', and some are saying that it's more trouble than it's worth.

The original Construction Act came into force in Spring 1998 and, as one would expect given that it was the breakwater against the forces of litigation and dispute, it has itself been the subject of constant challenge in the courts. The results of those challenges have been the clarification of points of uncertainty and the occasional case that set the cat among the pigeons. For example, in *RJT Consulting Engineers v DM Engineering* [2002] the Court of Appeal held that the full contract terms have to be in writing. In the words of Ward LJ:

> Writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable.

The present position on what the Act means has largely been settled, but that does not mean that the present position on construction disputes and contract payments is entirely satisfactory. There have of course been subterranean burrowings by lawyers raising arguments that some would say undermine the purposes of the legislation, and the Construction Act II is meant to go after these moles. The greater question, I suppose, is what the lawn will look like when and if the animals are caught.

A cure that's worse than the disease?

The proposal is to repeal s107 of the Construction Act (the section that states that the construction contract has to be in writing), thereby allowing oral and partly oral contracts. However, this change is like bringing a stranded elephant onto a row-boat: the motive is laudable but the effect is liable to be disastrous.

I believe that Ward LJ was right when in *RJT* he said:

> Dealing with section 107(5) His Hon Judge Bowsher QC said:
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> > 'Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and *are not readily susceptible of resolution by a summary procedure such as adjudication*. It is not surprising that Parliament should have intended that such disputes should not be determined by Adjudicators under the Act.' (Emphasis added.)
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> I agree. That is why a record in writing is so essential. The written record of the agreement is the foundation from which a dispute may spring but the least the Adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute.

Adjudicators are extremely hard-pressed to decide the factual disputes as it is. Imagine if they were to be forced to investigate the oral terms of the contract. For a start, they could not do this without hearing the parties' testimony. Section 38(5) of the Arbitration Act 1996 gives arbitrators the power to administer oaths and affirmations, but a similar power is not given to adjudicators by either the

present Construction Act or Construction Act II. Unsworn oral evidence will be of much reduced cogency, but that is not the principal problem. Evidence takes time to deploy. Witness statements need time to draft, and the witness then has to be cross-examined and re-examined. As it is, adjudicators quite often find that they can decide disputes without the need for an oral hearing. If this proposal goes ahead that will end and hearings will extend, possibly to several days. A process that was originally envisaged to be short, sharp, rough justice (see Akenhead J's comments in *Gipping Construction v Eaves* [2008]) will become bloated, and not very different from litigation or arbitration. It is often remarked that arbitration lost its way when it took on most of the trappings of litigation, and now adjudication risks the same fate.

Something in the *Air*

Going hand-in-hand with the probable burdening of adjudicators with new procedural requirements about evidence is a new line of jurisdictional attack when an oral contract is in play.

Section 108(1) of the Construction Act says:

> [A] party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. (Emphasis added.)

Does this oust from consideration in one adjudication what may be said to be a second dispute about what the oral terms of that contract are? It's at least an argument, but not a good one, I would suggest. The dispute as to the oral terms definitely arises 'under the contract' (remember that adjudication provisions sometimes contain the wider phrase 'under, out of, or in connection with'. See *L Brown & Sons v Crosby North West Homes* [2005].)

Furthermore, courts are increasingly minded to construe contractual clauses in a pragmatic and commercial fashion. Impetus was given to this by the House of Lords in *Fiona Trust and Holding Corp v Privalov & ors* [2007], and this was taken up by Akenhead J in *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* [2008]

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when dealing with an adjudication clause. Thus, while in *Air Design* the factual scenario was different (whether the parties had entered into multiple separate contracts or just one that had later been varied), the essence of the problem was the same: whether the adjudicator was addressing one dispute or several. The Court held that:

> The substantive decision-making process that the adjudicator had to embark

The purpose of adjudication

The aim of adjudication is to be provisionally binding. This was expressed by Lord Menzies at several points in CSC Braehead Leisure Ltd & anor v Laing O'Rourke Scotland Ltd [2008]:

- 'Moreover, there were proceedings which might determine the issues and end the provisional binding nature of the adjudication…'
- 'The intention of the adjudication procedure was to obtain a quick and possibly interim decision and that challenges such as those which he was making might subvert this intention.'
- 'Adjudication does not oust the jurisdiction of the courts or of an arbiter. Its primary purpose is to regulate a dispute ad interim, pending a definitive resolution of it by litigation, arbitration or agreement.'

> upon in relation to the disputed claim, necessarily involved a consideration of whether there was more than one contract.

In just the same way, where a partly oral contract is in play, the adjudicator will necessarily have to consider both the oral and written terms of the contract in order to determine the underlying dispute. The 'dispute' as to the oral and written terms is a dependent dispute. There is no essential difference between construing oral and written terms: the argument is an academic one and is likely to be given short shrift by the pragmatic courts.

The interesting case of the fading wood

The history of adjudication shows a Darwinian struggle between the forces of 'the will of Parliament' (as interpreted by the courts) and the aforementioned 'subterranean burrowings' of the legal teams of unsuccessful parties arguing that enforcement should not take place. *Water Lilly v DMW Developments* [2008] appears to be a strike at the Achilles' heel of adjudication: its interim binding nature (see boxout, above). The judge, Coulson J, sets the scene in his opening paragraph:

> This dispute gives rise to interesting questions about the interrelationship between construction adjudication, CPR Part 7 and CPR Part 8. I apprehend that these are matters which will become commonplace over the next year or so, as parties to construction contracts seek a quick resolution of their disputes in an uncertain economic climate.

The facts, which need not detain us too long, concern the installation of American black walnut veneer. The adjudicator found that there had been a colour change after installation that was due to natural light, but went on to find that this constituted a breach of contract on the part of the installer (the claimant).

There was no 'enforcement' in the usual sense. Rather, the claimant issued CPR Part 8 proceedings (which are used to dispose of disputes 'unlikely to involve a substantial dispute of fact' and ironically are usually used by a party seeking to enforce an adjudicator's decision) seeking a declaration that the adjudicator had got it wrong at law and that, as no proper breach of contract was found, they were entitled to a declaration to that effect.

In one sense one can see the alarm on the defendant's side. If the claimant got its declaration then a deadly blow would have been struck to the decision's heart. The defendant argued that the Part 8 application was effectively an appeal from the adjudicator and therefore was invalid. However, the judge did not accept this. He said:

> It seems to me that, although the adjudicator has reached a decision, and that decision is temporarily binding on the parties, it is thereafter open to either party to come to court for a final decision on the point considered by the adjudicator. That is what the claimant has done by these proceedings.

As a fall-back the defendant argued that, on the facts of the case, a Part 8 application was not available to the claimant because there were diverse matters of fact that needed determining. In the end the judge didn't grant the knockout declaration that the claimant had wanted, calling it 'too wide', but it does raise an interesting question: are the courts now willing to hear a Part 8 application addressing a point of law that the adjudicator got wrong? If the Court does address such a point of law and rules (effectively) that the adjudicator got it wrong, where does that leave the enforcement of a decision? Could the Court then go on to enforce? The conventional answer is that to do otherwise would be to defeat the will of Parliament. Casting one's mind back, that is exactly what the Court did in one of the first enforcement actions: *Bouygues v Dahl-Jensen* [2000]. In that case Bouygues claimed under Part 8 for declarations as to the adjudicator's decision. The application did not get far, with the Court remarking:

> It will be convenient to start with Dahl-Jensen's application for summary judgment, since if that succeeds, the remaining applications fall away.

Would that case have turned out differently if the court had decided the declarations first, before the summary judgment application? We shall never know, but *Water Lilly* suggests that the answer may be yes. ■

Air Design (Kent) Ltd v Deerglen (Jersey) Ltd
[2008] EWHC 3047 (TCC)

Bouygues v Dahl-Jensen
[2000] 1 BLR 49

CSC Braehead Leisure Ltd & anor v Laing O'Rourke Scotland Ltd
[2008] CSOH 119

Fiona Trust and Holding Corp v Privalov & ors
[2007] UKHL 40

Gipping Construction v Eaves
[2008] EWHC 3134 (TCC)

L Brown & Sons v Crosby North West Homes
[2005] All ER (D) 63 (Dec)

RJT Consulting Engineers v DM Engineering
[2002] 1 BLR 217

Water Lilly v DMW Developments
[2008] EWHC 3139 (TCC)