

# Construction Adjudication

## Adjudication Decision: Approbation and reprobation or “blowing hot and cold”

In this update we look at the recent case of *Dawnus Construction Holdings Limited v Marsh Life Limited* [2017] EWHC 1066 where the Technology and Construction Court (“TCC”) held that by inviting the adjudicator to correct his decision under the slip rule and by failing to expressly reserve its right to challenge the validity of the decision, the responding party had treated the decision as valid and had therefore waived or elected to abandon its right to challenge enforcement of the decision. The court referred to this election as “blowing hot and cold” or “approbation and reprobation”, i.e. where a party may have relied on the decision and paid part of the sum awarded, paid the adjudicator’s fees or had asked the adjudicator to modify his decision under the slip rule. Parties that have maintained an objection to jurisdiction during (and even after) an adjudication or parties that want to challenge the validity of an adjudicator’s decision must be careful not to inadvertently elect to treat the adjudicator’s decision as valid and must reserve their position otherwise they risk losing the right to challenge the decision.

### The adjudication

Dawnus Construction Holdings Limited (the “**Contractor**”) was employed by Marsh Life Limited (the “**Employer**”) to design and build a hotel and retail complex at Lifeboat Quay in Poole, Dorset under a JCT 2011 Design and Build Contract. The works started in September 2014 and the original completion date was July 2015.

The works suffered various delays including delays arising from the discovery of an incorrectly placed SSE electricity cable, which led to an exclusion zone over part of the site while the cable was re-routed, and as a consequence delays arising from weather sensitive works being pushed into the winter period. The works were effectively completed in November 2016 and the Contractor’s employment was terminated.

Various disputes ensued and were referred to four adjudications. The fourth adjudication is concerned with the Contractor’s termination account which included a delay claim in relation to the SSE Cable and Winter Working loss and expense claims.

On 6th March 2017, the adjudicator issued his decision in which he awarded the sum of £972,050.30 to the Contractor. However, both parties made submissions inviting the adjudicator to correct alleged errors in his decision.

### Correction of clerical or typographical errors under the “Slip rule”

Section 108(3A) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) and paragraph 22A of the Scheme for Construction Contracts 1998 (as amended) allow an adjudicator to correct a clerical or typographical error arising by accident or omission in the decision under the slip rule, either on his own initiative or at the request of one of the parties.

In this case, both parties had invited the adjudicator to correct errors under the slip rule.

The Contractor had asked the adjudicator to correct a mathematical error which had the effect of increasing the net sum due to it. The employer had asked the adjudicator to revise his decision such that certain items should be reduced to “nil monies” based on a number of matters including alleged breaches of the rules of natural justice arguing that the adjudicator had failed to take into account its defence to the loss and expense claims.

On 9th March 2017, a revised adjudication decision was issued, awarding the contractor the sum of £1,038,018.30 and the adjudicator rejected the points raised by the employer.

## Enforcement Proceedings

In resisting the enforcement of the adjudicator's decision in court, the Employer maintained its position on the alleged breaches of the rules of natural justice. The key question before the judge was whether the Employer was entitled to challenge the validity of the adjudicator's decision given that it had invited the adjudicator to correct the decision under the slip rule and in the absence of a general reservation of rights.

## Approbation and reprobation

Approbation and reprobation, also known as "blowing hot and cold" are principles based on the doctrine of election. The effect is to prevent a party that has elected to do something from resiling from that election provided that party has "... taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent."<sup>1</sup> Previous case law suggests that once a defendant has elected to treat a decision as being capable of being referred to arbitration, he is bound to treat that decision as binding and enforceable unless revised by the arbitrator.<sup>2</sup> This was followed in subsequent court judgments where it was held that a party cannot simultaneously approbate or reprobate an adjudicator's decision, i.e. either the whole of a decision must be accepted or the whole of it must be contested, such that an invitation to invite an adjudicator to correct an award under the slip rule would mean an acceptance that the decision was valid in all other respects.<sup>3</sup>

## Reservation of rights

A party could rely on a general reservation of jurisdictional rights and apply under the slip rule to have the adjudicator correct the decision or make a payment without losing its right to challenge the adjudicator's decision in later court proceedings<sup>4</sup>. If a party wishes to invite an adjudicator to correct his decision under the slip rule then it should be careful not to inadvertently elect to treat the adjudicator's decision as valid.

The judge in *Dawnus Construction v Marsh Life* held that the Employer had waived its right to challenge the adjudicator's decision by inviting the adjudicator to correct it under the slip rule without first reserving its rights. The court also indicated that the Employer could have expressly reserved its right to pursue the breach of natural justice claim when it invited the adjudicator to make corrections under the slip rule. However, the Employer did not do so. On the facts, it had waived or elected to abandon its right to challenge enforcement as it had elected to treat the adjudicator's decision as valid. It was not open to a party to an adjudication to approbate and reprobate an adjudicator's decision and the judge went on to say that:

*"Assuming that good grounds exist on which a decision may be subject to objection, in the absence of an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested."*

In analysing the relevant parts of the adjudicator's decision, the judge found that while the adjudicator appeared to have misunderstood the Employer's defences and arguments on the issue of loss and expense, he had nevertheless dealt with the loss and expense claims and rejected the Employer's arguments.

## Comments

While an adjudicator's misunderstanding of a party's argument may have serious financial consequences, it is well established that an adjudicator's mistakes of facts or law cannot be challenged in enforcement proceedings. The very limited circumstances available to a dissatisfied party challenging the enforcement of an adjudicator's decision, as recently summarised by the Technology and Construction Court<sup>5</sup>, is only if there had been a material breach of the rules of natural justice or the adjudicator has acted in excess of his jurisdiction. This case re-emphasises the importance of "expressed" reservation of rights in relation to future challenge to the enforcement of an adjudicator's decision and the risk of inadvertently electing to treat the decision as valid. The doctrine of election prevents a party from approbating and reprobating in relation to adjudication decisions. The case is also a reminder that in determining challenges to enforcement of adjudication decisions on the ground of a breach of the rules of natural justice, the courts would usually consider the claims, defences and decision more broadly at a higher level rather than analysing the pleadings exchanged by the parties or the decision in detail.

<sup>1</sup> *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] 1 Ch 112

<sup>2</sup> *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739

<sup>3</sup> *Shimizu Europe Ltd v Automajor Ltd* [2002] EWHC 1571 (TCC)

<sup>4</sup> *Laker Vent Engineering Ltd v Jacobs E&C Ltd* [2014] EWHC 1058 (TCC)

<sup>5</sup> *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC)

### The tiny print

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