Adjudication: Does size and/or complexity matter?

Patrick Heneghan of **3PB Barristers** asks whether Parliament intended adjudication to used in large or complex disputes. Can challenges based on claiming that the dispute is too large or complex succeed?

KEY POINTS

- **A recent decision would appear to affirm that the size and/or complexity of a dispute in and of itself is no bar to its adjudication.**
- **Is there life left in a challenge based on concerns that a dispute is too large and/or complex to be the subject of a referral?**
- **With a challenge based on size and/or complexity the principal issue is whether the dispute can be resolved in a manner consistent with broad principles of natural justice.**
- **The success of a challenge related to size and complexity will likely depend on providing convincing evidence that the breach caused a material difference to the outcome of the adjudication.**
- **The door seems ajar for size and complexity alone to combine to render a dispute unsuitable for adjudication where an adjudicator concludes that she/he is unable to consider the issues so as to do broad justice between the parties.**

The recent decision of ***Home Group Limited v MPS Housing Limited [2023] EWHC 1946 (TCC)*** would appear to affirm the received wisdom that the size and/or complexity of a dispute in and of itself is no bar to its adjudication. This would appear to be based, at least in part, on the principle that Parliament provided for any dispute to be referable to adjudication and therefore must have envisaged that there would be simple disputes referred, as well as the immensely detailed and complex disputes which can arise on a construction contract.

Whether Parliament in fact did so envisage is, perhaps, open to question. In *Coulson on Construction Adjudication (4th Ed.)* the author, in a discussion on elephants in rooms, notes that it "might be said with some force that [large and/or complex disputes were] not what the framers of the *1996 Act* had in mind when creating the adjudication process, and that the use of the judication process to resolve such claims is demonstrably wrong and unfair" (¶13.13).

There have been a number of other judicial comments in a similar vein, including that of Chadwick LJ in ***Carillion Construction Limited v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358*** where he doubted whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme or whether such disputes were suitable for adjudication under the scheme at all (¶86).

This article considers the recent decision in ***Home Group*** and what life is left, if any, in a challenge based on concerns that a dispute is too large and/or complex to be the subject of a referral.

Decision in *Home Group*

In ***Home Group***, the claimant ("Home Group") sought summary enforcement of a £6.5 million decision in its favour. The losses arose from the wrongful termination of a contract by the defendant ("MPS") pursuant to which it had been required to undertake thousands of relatively minor jobs in respect of Home Group's sizeable property portfolio. The losses consisted of the additional costs incurred by Home Group in engaging third parties to undertake those works. Liability had already been determined in Home

Group's favour in an earlier adjudication and the decision sought to be enforced concerned quantum.

There had been exchanges between the parties concerning the quantum of the claim over a number of months. Home Group had proposed access to its systems and information in respect of an agreed sample of individual work items. MPS insisted on a more comprehensive and time consuming analysis of each of the items. Home Group also provided MPS with a draft expert report on quantum on a without prejudice basis in advance of the adjudication in substantially the same form as it would, in due course, come to rely on.

In the event, no agreement was reached on a way forward and Home Group commenced adjudication proceedings. The referral notice included a quantum expert report of 155 pages, supported by extensive electronic files, and 88 pages of factual witness statements, supported by hundreds of pages of exhibits. Whilst there was some dispute as to the volume of this material if printed, MPS claimed that the materials would have amounted to 127 double sided lever arch files. Whatever the utility of such a comparison, which was also disputed, the volume of the material was, on any view, significant.

The adjudicator rejected MPS's challenge that the dispute referred was too large and/or complex to be determined by adjudication. MPS subsequently refused to agree to an extended timetable which did not provide it with the period it sought for its response, with the result that it was left with 19 days to respond. MPS claimed that this period was insufficient, was a breach of natural justice and led to a material difference in the outcome of the adjudication such that the decision was unenforceable.

Constable J reviewed the relevant case law and endorsed the summary set out by Coulson J (as he then was) in ***Amec Group Limited v Thames Water Utilities Limited [2010] EWHC 419 (TCC) (at ¶60)*** that:

- The mere fact that an adjudication is concerned with a large or complex dispute does not of itself make it unsuitable for adjudication.
- What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator had: (a) sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (b) was satisfied that he could do broad justice between the parties.
- If the adjudicator felt able to reach a decision within the time limit then a court, when considering whether or not that conclusion was outside the rules of natural justice, would consider the basis on which the adjudicator reached that conclusion. In practical terms, that consideration is likely to amount to no more than a scrutiny of the particular allegations as to why the defendant claims that the adjudicator acted in breach of natural justice.
- If the allegation is that the adjudicator failed to have sufficient regard to the material provided by one party, the court will consider that by reference to its nature, when it was provided and the opportunities available to the parties, both before and during the adjudication, to address it.

Constable J also noted (at ¶38) Coulson J's conclusion that "size/complexity will not of itself be sufficient to found a complaint based on a breach of natural justice" (¶61 of Amec).

MPS relied on the decision in ***Whyte & Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd [2013] CSOH 54***, which the author of Coulson on Construction Adjudication considered was "careful and well-reasoned" and about which the author concluded that: "Finally there is a case that concludes that sometimes a claim will be too large and/or complicated and/or raised too long after completion to be suitable for adjudication" (at ¶13.28).

Constable J noted (at ¶43) that the decision in ***Whyte & Mackay*** was not enforced due to the failure of the adjudicator to deal with certain issues (which, it is noted, would have potentially been a complete answer to the claim made in that case) rather than the size and/or complexity of the dispute per se. Constable J further noted that the passage relied upon by MPS concerning the "next to impossible task" which the adjudicator was faced with in that case given the nature of the dispute (at ¶47), concerned the question of whether enforcement would be a breach of Article 1, Protocol 1 of the European Convention on Human Rights.

This involved the balancing of the property rights of the defenders and the public interest

behind the statutory right to adjudication. This, Constable J considered, was a different exercise to the one with which he was concerned. He also concluded that the facts in ***Whyte & Mackay***, concerning a professional negligence claim brought many years after practical completion and in circumstances where a loss would not be suffered for many years, were very different from the case before him, which in reality was little more than a "vanilla" final account (at ¶46).

Constable J distilled the relevant legal position as follows:

> "(1) Adjudication decisions must be enforced even if they contain errors of procedure, fact or law.
> (2) An adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material, in that it has led to a material difference in the outcome. However, the Court should examine such defences with a degree of scepticism;
> (3) Both complexity and constraint of time to respond are inherent in the process of adjudication, and are no bar in themselves to adjudication enforcement. Whilst it is conceivable that a combination of the two might give rise to a valid challenge, in circumstances where the Adjudicator has given proper consideration at each stage to these issues and concluded that he or she can render a decision which delivers broad justice between the parties, the Court will be extremely reticent to conclude otherwise;
> (4) In cases involving significant amounts of data, an adjudicator is entitled to proceed by way of spot checks and/or sampling. …"

Constable J concluded that MPS's jurisdictional objections were without merit. He considered that Home Group's pre-adjudication conduct mitigated the limited amount of time available to MPS to respond in the adjudication. He took a dim view of MPS's "strategically driven" pre-adjudication rejection of a sampling approach, which in his view was the only proportionate way to proceed. He also considered that MPS's written evidence had been clearly drafted so as to preserve MPS's jurisdictional arguments.

Although MPS's expert had apparently felt unable to produce an alternative valuation in the time available, he concluded that MPS had, however, provided a comprehensive response and (quite properly) put forward an alternative valuation through other evidence and submissions. The adjudicator had considered the relevant issues and MPS had not provided the court with any evidence of what it would have submitted in the adjudication if it had had more time, and therefore that any breach of natural justice alleged had been material.

Discussion

While the general direction of travel is tolerably clear, statements in judgments and legal texts concerning Parliament's intentions and whether or not the size and/or complexity of a dispute are a bar to enforcement are not always easy to reconcile. It would appear implicit in a challenge based on size and/or complexity that the principal issue is in fact whether the nature of the dispute is such that it can be resolved in a manner consistent with broad principles of natural justice.

The door seems ajar at least for size and complexity alone to combine to render a dispute unsuitable for adjudication where an adjudicator concludes that he or she is unable to consider the issues between the parties so as to do broad justice between them. While it would appear some weight may be given to an adjudicator's conclusions on these issues, and the court may be slow to intervene, it is ultimately a matter for the court as to whether or not any given dispute can be resolved consistent with broad principles of natural justice notwithstanding its size and/or complexity.

On a practical level, perhaps, where a decision has been rendered it may be that general complaints about size and/or complexity will have difficulty succeeding. This is because it will be apparent at that stage whether the adjudicator has succeeded in considering the relevant issues so as to do broad justice between the parties. In those cases it will likely be a specific breach of natural justice, such as a material issue not being considered (as in ***Whyte & Mackay***), which will lead to a decision not being enforced rather than the size and/or complexity of the dispute per se.

The size and/or complexity of the dispute may simply provide the backdrop or context for the specific breach of natural justice, or may even have been a cause of the breach. In any event, it is likely to be key to the success of any challenge in this context to adduce convincing evidence that the alleged breach has caused a material difference to the outcome of the adjudication. **CL**