2. Adjudicator's decision - good in part. Can it be saved?

A Scottish court in ***Dickie & Moore Ltd v Ronald James McLeish*** and others decided that part of the claim in a notice of adjudication (for an extension of time and loss and expense) had not crystallised before service of the notice. The adjudicator did not therefore have jurisdiction to deal with that aspect of the claim but could the remaining part of the decision be severed and enforced?

In a second hearing the court reviewed the case law, notably the criteria for severability summarised in ***Cantillon v Urvasco***, which, the court thought, did not lay down rigid rules, but rather general principles or guidance. The court considered that something which may be one "***dispute***" in terms of the Scheme and referable to an adjudicator as such, may on analysis, looking at the substance, be treated as being more than one dispute when it comes to determining whether severance is possible. It also considered that the Scheme contemplates that a "***dispute***" is a matter in respect of which the adjudicator has jurisdiction, and consequently paragraph 20(1) of the Scheme compels an adjudicator to decide matters in dispute which are within jurisdiction, and the "***decision***" which binds parties under paragraph 23(2) is the entire decision where all of it is valid, or the part of it that is valid and severable where part is invalid.

Whether or not the court's analysis of Cantillon was correct, it thought it was a mistake to think that severance ought never to be available where a decision involves a single dispute. A blanket ban on severance in single dispute cases is likely to produce disproportionate and unjust results in a not insignificant number of cases. It also considered that the critical question ought not to be whether there is a single dispute or difference, but whether it is clear that there is a core nucleus of the decision that can safely be enforced. It would further the statutory aim of supporting enforcement of adjudication decisions if the courts were more willing to order severance where there is such a core nucleus. It was satisfied that, in the case in question, there was a core nucleus of the adjudicator's decision which could safely be enforced. The apportionment between the parties of liability for the adjudicator's fees and expenses was not, however, a part of the core nucleus of the award that could safely be enforced.

https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csoh87.pdf?sfvrsn=0

3. Adjudication: is there a dispute if the payer says it needs more details of the claim?

To go to adjudication you need a dispute but if a claim is so "…*nebulous and ill-defined that the* ***respondent cannot sensibly respond to it*** … , neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute...". But what if the paying party says it needs more information in order properly to evaluate the claim?

In ***LJH Paving Ltd v Meeres Civil Engineering Ltd*** the paying party alleged it had insufficient information to be able to assess the claim in question and that, consequently, there was no crystallised dispute. The court confirmed that it remains a question of fact in each case as to whether a dispute has crystallised. It noted, however, previous case law to the effect that it will be an 'unusual' case where a dispute has not crystallised because a claim is so "***nebulous and*** *ill-defined that the respondent cannot sensibly* ***respond to it***", and that when a contractor or a sub-contractor makes a claim, it is for the paying party to evaluate that claim promptly, and form a view as to its likely valuation, whatever points may arise as to particularisation. Efforts to acquire further particularisation should proceed in tandem with that valuation process. In an ordinary case, a paying party cannot put off paying up on a claim forever by repeatedly requesting further information and cannot suggest that there is no dispute at all because the particularisation of the claim is allegedly inadequate.

The court in ***LJH*** said that it therefore seems "***very unlikely***" in the ordinary case that it will be relevant or appropriate, in seeking to demonstrate that a dispute has not crystallised, to look at the requests for information following presentation of a claim, and draw an inference about crystallisation from the purported reasonableness of those requests and the absence of a response. It ruled that the claim in question was far from "***nebulous and*** *ill-defined*" and this (and other challenges) failed.

LJH Paving Ltd v Meeres Civil Engineering Ltd [2019] EWHC 2601