Fenwick Elliott

Solicitors, Adjudicators and Mediators
Constructive Law

Summer 2002

INTRODUCTION

Welcome to Fenwick Elliott's Summer Review for 2002, our annual reflection on the key developments in our specialist field of construction law over the past 12 months. Inevitably this year's Review focuses once again on adjudication, which in only 4 years has made such a striking impact on the way in which the construction industry works. However, mediation should not be forgotten and we begin the Review with a look at the increasing importance given to ADR by the courts. As usual, we end the Review with a round-up of key cases reported by Fenwick Elliott either in the *Construction Industry Law Letter* or the *Fenwick Elliott Dispatch* over the past year.

CONTENTS

353 Strand, London WC2R 0HT, Tel: +44(0)20 7956 9354 Fax: +44(0)20 7956 9355
E-mail: reception@fenwickelliott.co.uk
Editor: Jeremy Glover

1. MEDIATION

There is no doubt that one of the most striking changes in judicial attitudes over the past year has been the increasing focus on alternative dispute resolution. Not for nothing did Mr Justice Lightman in the case of *Hurst v Leeming* remark that ADR was now *"at the heart of today's civil justice system"*. It is now clear that parties to a dispute must give serious consideration to whether attempts should be made to resolve that dispute through ADR.

The role of ADR was enshrined in the Woolf Reforms. By CPR 1.4(2) the court is given the power to encourage parties to consider ADR. One of the questions in the Allocation Questionnaire asks whether the parties want to stay the claim for a month to try and resolve the matter through ADR.

Equally, the Pre-action Protocol for Construction & Engineering Disputes requires the parties to consider whether the matter in dispute could be resolved by a form of ADR. This question is one of the matters to be discussed at the pre-action meeting.

Over the past year it has become clear how the courts will interpret these requirements and if a party, without good reason, refuses to attempt ADR then it is highly likely that sanctions (probably in the form of costs) may be imposed.

In *Dunnett v Railtrack Plc*, *Railtrack* were the successful party. However, they were not awarded their costs. The reason for this was that the Court of Appeal had suggested that an attempt be made to settle the dispute through ADR. Railtrack refused this suggestion and were duly penalised by the Court of Appeal for that refusal.

In *Cowl v Plymouth City Council*, the Court of Appeal made it clear that a court should enquire of the parties why some form of ADR had not been attempted, the implication behind this being that a party should have a good reason for declining to take up that option.

The *Dunnett* and *Cowl* cases were widely reported. However, one feature of them was that they both effectively involved two public bodies. There might therefore have been a school of thought that such strictures would only apply to cases where similar parties were involved. This has proven not to be the case.

In *Malkins Nominees Ltd v Société Financière Mirelis SA and others*, Etherton J found in favour of the claimant in respect of a disagreement over the existence of a conditional agreement. However, he was not prepared to award the successful claimant all of its costs, since prior to a directions hearing the defendants had made an offer for ADR which had been rejected by the claimant. Etherton J took the view that the dispute was one suitable for ADR, and only awarded the claimant 75% of its costs.

As a consequence, the claimant applied to have the costs order reconsidered. In particular, the claimant said that when the ADR offer had been made only the claimant and not the defendants had given disclosure. The offer of ADR was merely a tactical manoeuvre. The claimant also pointed out that the Master at the first hearing had not granted the defendants' application for a stay of proceedings pending ADR.

Whilst on the basis of the new evidence, the Court did recognise that there were reasons why the claimant had refused ADR, there was no suggestion that the offer was made because the defendants knew that they would be unsuccessful at trial. The Court remained of the view that the case was one that was suitable for ADR. Therefore, the defendants were ordered to pay 85% (not 75%) of the claimant's costs.

In *Hurst v Leeming*, the claimant's professional negligence claim against a

barrister was dismissed. However, the claimant suggested that the defendant was not entitled to his costs because both before and after the commencement of the proceedings, he had refused the claimant's proposal of mediation.

The defendant put forward a number of reasons for refusing mediation. These included the seriousness of the allegations of professional negligence, the lack of substance of the claims, the fact that legal costs had already been incurred when the proposal was made, the lack of any real prospects of the successful outcome of the mediation and the fact that the claimant was a man "*obsessed with the notion that an injustice had been perpetrated on him, [and] he would not be able or willing to adopt in the course of a mediation the attitude required if a mediation was to have any prospect of success…*".

The Judge said:-

"*mediation is not in law compulsory, and the protocol spells that out loud and clear. But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences [of any refusal to mediate] may be attracted.*"

The critical factor was whether the mediation had any real prospect of success. If not, a party may with impunity refuse to proceed via mediation. Here, the claimant suggested that mediation would have led him to accept that his case was weak. The Court disagreed. The claimant was bankrupt and, having nothing to lose in proceedings, may not have been prepared to accept a mediation, which did not result in him obtaining money.

Thus Lightman J recognised that on the facts of this case, mediation was not appropriate because there was no realistic prospect of success owing to the character and attitude of the claimant. However, he also stressed that this was an exceptional case in that it was clear that the claimant was plainly wrong about the strengths of this case.

Therefore care should be exercised by anyone who rejects a genuine offer of mediation in the future.

Further, the Government's "Dispute Resolution Guidance" pledges a commitment to ADR and states that its policy is to avoid disputes and "*to ensure that the relationships between the client and supplier are non-adversarial… litigation should usually be treated as the dispute resolution method of last resort*".[1]

In addition to this, the Lord Chief Justice, Lord Woolf, has announced that he is supporting an initiative by CEDR to help the Government achieve the Lord Chancellor's pledge to avoid litigation where possible. CEDR are to audit the Government's mediation practices and produce guidance on the best way to develop mediation in a public sector context.

CEDR's latest annual survey on commercial mediations for the period 2001/02 shows that of 338 commercial cases in the year, 77% of cases settled during the mediation or shortly afterwards as a result of the progress made during the mediation process.

Of these, 12% were construction-related, making construction the biggest category. The cases ranged in value from £8,000 to over £60 million. However, the settlement rate for these was only 54%. CEDR have suggested that this was because of the

[1] Office of Government Commerce, "Dispute Resolution Guidance", www.ogc.gov.uk

increasing complexity of construction cases.

Since these mediations cover only a one-year period it is difficult to read anything into the low settlement rate and certainly the figures could not be used to justify not attempting to resolve a dispute through ADR. However, these figures do suggest that the construction industry rightly is more willing than others to embrace different dispute resolution techniques.

As a result of this increased focus on ADR, Fenwick Elliott, King's College London and University College London are collaborating in order to collect and analyse data on contracted mediation. Contracted mediation attempts to fuse team building, dispute avoidance and dispute resolution in one procedure. The impartial contracted mediation panel, consisting of one lawyer and one commercial expert who are both trained mediators, is appointed at the outset of the project. The panel attends site meetings and conducts workshops. The panel members should therefore have a working knowledge of the project and the individuals working on that project. This knowledge allows the panel to resolve contractual differences before they escalate, and provides an immediate medium for the confidential, mediated resolution of disputes.

However, experience of its actual use in practice is limited and evidence supporting the benefits of contracted mediation is anecdotal[2]. However, it could provide an economic dispute management technique for the majority of the industry's projects that cannot justify the cost of a dispute review board. But is there a real demand for contracted mediation in the industry? In other words; does it offer real benefits, is there a need for contracted mediation *and* is there a willingness to pay for it?

[2] Contracted mediation was used on Jersey Airport, see "Stopping disputes before they start", *Commercial Lawyer Special Report*, February 2001.

Recently, some major players in the industry, as well as the Government, have started to actively encourage the use of contracted mediation for future projects. It is therefore possible that we will see some use of this process on several new developments in the next few years.

The research project hopes to capture these developments, collect data on its implementation, and provide the first research on contracted mediation in practice. If you have any experience of contracted mediation, or would like to consider using it on a project or would just like further information then please contact Nicholas Gould (Senior Research Fellow, King's College, London) at ngould@fenwickelliott.co.uk.

2. ADJUDICATION

Adjudication has now been with us for four years. It is clear that following the judicial approval given by courts in the *Macob* and *Outwing* cases, adjudication has been embraced (not necessarily willingly) by the construction industry. This robustness of the courts in dealing with a great many of the jurisdictional challenges, and willingness to enforce adjudicators' decisions by way of summary judgment, must have gone a long way in contributing to the enormous growth and widespread use of adjudication.

Recent research by Glasgow Caledonian University suggests that the number of adjudications arising from nominations by the Adjudicator Nominating Bodies ("ANBs") amount to just over 6,000 in the UK. This figure arises purely from ANB appointments. It is clear from our own experience that on top of this many ad hoc adjudications are now taking place, and so the figure may well be far in excess of 6,000, perhaps being as high as around 10,000.

However, recently some people have suggested there has been a change in

attitude by the courts. Nicholas Gould examines whether there is any truth in this, below.

Caution from the Courts

Are the courts now demonstrating an increasingly cautious approach to cases involving the enforcement of adjudication decisions?

Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") was brought into force on 1 May 1998. At that time, the key question was whether the courts would enforce a decision of an adjudicator. Section 108(3) of the Act states that the "contract shall provide that the decision of the adjudicator is binding …". There was some concern about the appropriate way to enforce a decision of an adjudicator and, in particular, whether summary judgment would be available or whether the court would hear the matter afresh in a full trial thus defeating the purpose of adjudication.

As is well known, the first case of *Macob Civil Engineering Ltd v Morrison Construction Ltd* swept away those concerns. The Hon. Mr Justice Dyson delivered his judgment on 12 February 1999 confirming that the decision of an adjudicator is enforceable summarily regardless of any procedural irregularity, error or breach of natural justice. The judge adopted a purposive approach to the construction of the word "decision", refusing to accept that the word should be qualified.

The majority of the cases following *Macob* adopted a similar approach, enforcing adjudicators' decisions that had found their way to the courts. This robust and purposive approach was reinforced by the first Court of Appeal decision of *Bouygues v Dahl-Jenson (UK) Ltd* (31 July 2000).

Here, the Court of Appeal upheld the first instance decision of Mr Justice Dyson. They confirmed that the purpose of the adjudication procedure set out in section 108 of the Act was to provide the parties to a construction contract with a speedy mechanism for resolving disputes, which, although not finally determinative, could and should be enforced through the courts by way of summary judgment. More importantly, even where an adjudicator had answered the question put to him in the wrong way, the court would not interfere with that decision but would enforce it.

The decision of an adjudicator was and is being treated much like the decision of an expert resulting from an expert determination. Providing that an expert, and by analogy an adjudicator, has asked the right question then the decision will be enforced regardless of any errors made along the way. Only if the expert and therefore the adjudicator were to ask the wrong question would the decision be a nullity, because the adjudicator would not have jurisdiction to answer that "wrong" question.

The courts have now heard at least 100 cases relating solely to adjudication. A simple comparison between the figures suggests that adjudication is successful and effective. In other words, arguably only 1% of the disputes referred to adjudication progress to the courts for the purposes of enforcement.

Most of the 100 or so cases arising from adjudication turn upon the specific facts of the particular case. The judges in the majority of those cases adopt the purposive and robust approach taken in *Macob*. But has this trend continued? Some have questioned whether the courts are now taking a more restrictive view, perhaps to "reign in" the process of adjudication and reinforce the checks and balances that one would normally expect to see operating within the dispute resolution arena.

There are, of course, those jurisdictional challenges that will remove any chance of enforcing the adjudication decision. For example, the ability to demonstrate that there was no contract, that the adjudicator asked the wrong question, or rather that he did not answer a question put to him. However, the increasing caution recently shown by the courts has been demonstrated by a reconsideration of the application of the rules of natural justice, enforcement exceptions in respect of insolvency, whether there was in fact a "dispute", and, more recently, the restricted view taken in respect of construction contracts "in writing" by the Court of Appeal in *RJT Consulting Engineers v DM Engineering (NI) Ltd* on 8 March 2002.

RJT Consulting, the third decision of the Court of Appeal in respect of adjudication, was an appeal from the TCC decision of HHJ Mackay, who dismissed RJT's claim for a declaration that the construction contract was not an "agreement in writing" within section 107 of the Act. The adjudicator had decided that the oral contract was sufficiently evidenced in writing by drawings, schedules and minutes of the meeting, etc. HHJ Mackay agreed.

However, the appeal was allowed by the Court of Appeal. Lord Justice Ward and Lord Justice Robert Walker held that all of the terms of the construction contract had to be evidenced in writing. It was not sufficient for merely the material terms, such as the identity of the parties, nature of the work and price, to be recorded in writing. Further, even if they were wrong, the documents relied upon in this particular case were described as "wholly insufficient". Auld J considered that only the material terms of the agreement were required, and therefore trivial or unrelated issues did not need to be recorded. However, his approach is not shared by the majority. So on one view, all of the terms of the contract need to be recorded in writing in order that a dispute under any contract can be referred to adjudication.

Some might consider this an unfortunate decision, perhaps opening the door to a flood of jurisdictional challenges. The industry rarely records all of the material terms in writing, indeed those terms which are material are often not recorded in writing.

The courts have also reconsidered the role of natural justice, arguably adopting a more cautious approach. In the case of *Discain Project Services Ltd v Opecprime Development Ltd* (11 April 2001), the defendant challenged the enforcement of an adjudicator's decision on the basis that the adjudicator held "private" telephone conversations relating to the issues in dispute without adequately informing the other party about the nature of those discussions.

HHJ Bowsher QC declined to enforce the decision as he held that the telephone calls created the appearance of bias. It was irrelevant whether there was any actual bias; the important issue was that the calls created the appearance of bias. One might assume that telephone calls would be required given the restricted timescales in adjudication, providing that the other party is given an opportunity to consider and comment on the matters discussed. However, HHJ Bowsher QC took the view that telephone calls should be restricted to administrative matters, and could perhaps be made by a secretary rather than the adjudicator himself.

More recently, in the case of *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* (12 April 2002), Balfour Beatty sought to enforce the decision of an adjudicator, part of which related to an extension of time claim. The referral had not included a critical path analysis. The adjudicator obtained further information

from both of the parties and then proceeded to develop a critical path analysis. HHJ LLoyd QC considered that the adjudicator had exceeded his jurisdiction by "making good a fundamental deficiency" in Balfour Beatty's claim and then basing his decision on it without giving the other party any opportunity to consider and comment upon the critical path analysis. He went on to find that failing to allow the parties to comment upon the critical path analysis was potentially a serious breach of either impartiality or fairness, such that the decision was invalid.

Some suggest that the courts have adopted an esoteric legalistic approach to the consideration of whether or not a "dispute" has arisen, such that it can be referred to adjudication. In the case of *Hayter v Nelson* [1990] 2 Lloyds Rep 265, Saville J refused to give summary judgment and stayed the matter because of the existence of an arbitration clause. In his judgment, he stated that the word "dispute" should be given its ordinary meaning and went on to cite the infamous "boat race" definition of a dispute. As a general principle, any form of disagreement appears to be adequate. This approach, together with the mandatory nature of a stay of legal proceedings pursuant to section 9 of the Arbitration Act 1996, means that the court will stay legal proceedings such that the parties must pursue their differences in arbitration.

But can it be argued that the courts have adopted a different approach in respect of disputes that are referred to adjudication, perhaps requiring a more stringent test? In the case of *Edmund Nuttall Ltd v RG Carter Ltd* (21 March 2002), a breakdown of additional costs relating to delay and disruption was provided in May 2001. There were some further exchanges in correspondence before a notice of adjudication was issued on 14 December 2001. The claimant's expert prepared a report in support of the claim, but adopted different figures and relied upon several different matters in support of the claim. The defendant objected on the basis that the expert's report set out a new claim, which Carter had not seen before. They argued that, therefore, it did not relate to the dispute referred to adjudication. The adjudicator continued and nonetheless made a decision.

HHJ Seymour QC considered the authorities relating to the meaning of the words "dispute" and "claims", and came to the conclusion that a claim must be formulated, put to the other party and cannot become a "dispute" until that other party has had an opportunity to consider the claim and reject it. Failure to respond within a reasonable time will amount to rejection. HHJ Seymour QC held that the claim advanced in the expert's report was different to the original claim referred to in the notice of adjudication. He therefore declined to enforce the award.

Care is therefore needed not just to adequately identify the matters in dispute, but also to identify the precise scope of the supporting arguments. A change to the detail supporting a claim will result in a different claim. The other party must then have the opportunity to consider, and accept or reject it. A dispute in respect of the revised claim cannot crystallise until that revised claim has been rejected.

Finally, if the receiving party is in liquidation or receivership or there is a serious doubt about its ability to repay then a stay of execution may be granted. This principle was recognised in *Bouygues v Dahl-Jenson*, but has more recent application in the case of *Rainsford House Ltd (in Administrative Receivership) v Cadogan Ltd* (13 February 2001). In that case, Rainsford fell into the category of "serious doubt on the ability to repay" by the very fact that they were in administrative receivership. HHJ Seymour QC stated that the question of whether to grant a stay on the basis of some serious

doubt on the ability of the claimant to repay would need to be considered on the circumstances of each case. He stated that an applicant would need to put before the court "credible material which, unless contradicted, demonstrated that the claimant is insolvent" (at paragraph 11). However, he stated that the applicant merely needed to put evidence before the court as to the financial position of the claimant at the time of the application, and did not need to predict when the adjudicator's decision might be challenged, nor attempt to predict the financial standing of the claimant at that time. Providing that the defendant is able to produce such evidence, then it is for the claimant to contradict the evidence.

In conclusion then, the courts have in some instances adopted a more cautious approach to the enforcement of adjudicators' decisions. However, it must be right that both parties understand the subject matter of the dispute that is to be referred to adjudication, and can expect the "natural justice" safeguards to apply to the process of adjudication as one would expect those proper checks and balances to apply to any dispute resolution process.

Nonetheless, the case of *RJT Consulting* may provide many opportunities for jurisdictional challenges on essentially technical grounds. It remains to be seen whether future Court of Appeal cases will adopt such a restrictive approach or whether we will see a return to the purposive approach originally pioneered by His Hon. Mr Justice Dyson.

Fenwick Elliott – Adjudication Seminars

We have continued to hold our regular seminars at the Savoy Hotel. Our fifth, held in May and chaired by Simon Tolson, was the most popular yet. One of the speakers was David Richards of Mouchel International, the adjudicator in the *Carter* and *Lambeth* cases referred to by Nicholas Gould. Thus, his views, set out below, on how an adjudicator should act were of particular interest:

"In *Balfour Beatty v Lambeth*, Balfour Beatty's case was not well made out. It provided some unlinked bar charts, some as-built analysis and a statement of the events relied upon. Lambeth understandably said that Balfour Beatty had not made out its case and, as it was entitled to do, produced no other case in rebuttal. Lambeth had certain difficulties in its relationship with its architect.

"Now, my perception of the adjudicator's role is that the adjudicator may dig and delve and shake the matter up so that he can arrive at an appropriate decision. What's more, it is my view that an adjudicator should do that as, provided he gets the answer in the right ball-park, his decision will then be an end to the dispute between the parties. That, to my mind, is one of the real values of adjudication. However, as in the Balfour Beatty case, a losing party may be persuaded to challenge the decision and may, as in the Balfour Beatty case, be successful in that challenge.

"…it seems to me that the challenge to the decision may have been made only to enhance Lambeth's negotiating position. It does not seem to me likely that the challenge prevented Lambeth from having to repay at least some of the liquidated damages it had deducted.

"The reason Lambeth succeeded in their challenge to the adjudication decision was not because the decision necessarily was wrong. HHJ LLoyd, in concluding his judgment, stated: *'It is hard to believe that, even if Mr Richards had complied with his obligations, his decision would have endorsed the architect's opinions. Mr Richards plainly proceeded in a methodical manner.'* My decision was overturned purely and simply because I had decided that I would act as if in the place of the

architect and make up my own mind on entitlement to extension of time on the basis of the material in front of me.

"What I should have done is tell the parties what I was going to do and, once I had done it, give them the opportunity of reviewing the conclusions I had drawn. HHJ Lloyd's decision does not, it has to be said, represent a new departure in terms of judicial control of adjudication. Rather, if anything, I have been too robust in my approach. Following on from this, what we may be certain of is that adjudicators will not adopt the approach that led to the decision being overturned in the Balfour Beatty case. Adjudicators, rather, will seek to limit themselves to the parties' cases and the evidence before them."

It is clear that even four years on, the way adjudication is treated by both the parties to disputes is still evolving and a careful watch will need to be kept on the latest developments.

Adjudication – What's Next?

Whilst there is bound to be a keen interest in the fall-out from the cases such as *Balfour Beatty*, one other thing to look out for over the next year is the possible implementation of the DTI proposals to amend the HGCRA.

The DTI have proposed the following amendments to the Scheme for Construction Contracts:-

(i) The amendment of Regulation 20 of the Scheme to ensure that the role of adjudicators does not extend to determining the parties' costs. In other words each party should bear their own costs. The DTI believes that this will help to ensure that adjudication remains focused on the principal issues in dispute;

(ii) The amendment of Regulation 22 so that an adjudicator may set a deadline by which parties can request reasons;

(iii) The insertion of an explicit "slip rule" after Regulation 22. This makes it clear that the adjudicator has the power to correct manifest clerical or arithmetical errors in the decision and sets a tight timetable, namely 5 days, for doing so.

These draft amendments will only apply to the Scheme.

It is also proposed that the HGCRA be amended to outlaw the insertion into contracts of requirements that the party that refers a dispute to adjudication should bear the other party's legal and other costs. This proposal has been fairly universally welcomed, both in the interest of justice and in order to ensure a level playing field (which was one of the prime purposes of adjudication). However, it is not known when parliamentary time will be found to implement these changes. Indeed Brian Wilson, the Construction Minister, has suggested that whilst time will be allocated to amend the HGCRA to prohibit parties from claiming their costs, other changes will (or could) be incorporated through amendments to the Guidance which is discussed below.

In July of this year, the Construction Umbrella Bodies Adjudication Task Group published its Guidance Notes for adjudicators. These again are said primarily to apply to Scheme adjudicators. The notes cover the following areas:-

(i) Natural justice;
(ii) Challenges to jurisdiction;
(iii) Intimidatory tactics;
(iv) Unmanageable documentation;
(v) Reasons for the decision;
(vi) Clerical mistakes or errors; and
(vii) Parties' costs.

The Guidance is expressly stated to be advisory and not binding. It is not a set of rules. The Guidance sets out the relevant issue, then discusses the relevant law and finally puts forward suggestions.

Whilst there is no substitute for reading the Guidance Notes themselves, the following is a brief summary of some of the key points:-

(i) Natural justice

This is always a tricky subject, especially since natural justice is not really a defined term. The fact that the section on natural justice is twice as long as any other section within the Guidance speaks for itself. The Guidance starts from the proposition that an adjudicator must act in accordance with the principles of natural justice. In short, the adjudicator must consider whether his actions might give rise to the possibility that he might be (seen to be) biased and must do his best to ensure that every party has the reasonable opportunity to present its case.

In *Balfour Kilpatrick Ltd v Glauser International SA*, HHJ Gilliland QC rejected arguments that the very number or complexity of the matters made them unsuitable for adjudication. The referring party would have been prepared to grant further time, and as such, the process was neither unfair to the defendant nor in breach of natural justice.

The Guidance ends by suggesting that any information upon which an adjudicator intends to rely in reaching his decision is known to both parties so that they have the opportunity to respond.

No guidance has been given as to how an adjudicator should act when they have been asked to act as a mediator. Following the Glencot[3] case, the advice is probably currently don't do it or if you do, say you will have to resign your appointment as adjudicator.

(ii) Challenges to jurisdiction

An adjudicator does not have jurisdiction to make a final decision about jurisdiction (unless he has been given that power by the parties[4]). However, the Guidance confirms that the prudent adjudicator should investigate any jurisdictional challenge and reach his own non-binding conclusion.

If you choose to proceed, consider obtaining confirmation from the Referring Party that your fees will be paid.

(iii) Intimidatory tactics

Remember that you are the master of the procedure. Parties must comply with any request of the adjudicator.

(iv) Unmanageable documents

You are master of the procedure. If necessary consider imposing (reasonable) limits. The adjudicator is still obliged by Regulation 17 of the Scheme to consider all documents, if only to conclude they are irrelevant.

(v) Reasons for the decision

Following the proposed amendment you should consider setting a date at the outset of the adjudication by which any request for reasons should be made.

(vi) The slip rule/Clerical errors

Remember, act quickly. Correction of any error must be made within a reasonable time. In the *Bloor* case the correction was

[3] *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* – TCC 13 February 2001.
[4] *Nordot v Siemens* – TCC 14 April 2001.

made in a matter of hours. In *Nuttall v Sevenoaks* the delay was apparently over a week.

(vii) Costs

Under the amended Scheme, it will not be possible for the parties to give the adjudicator power to award costs. At the moment each party is responsible for their own costs unless they agree otherwise.

Conclusion

The Guidance Notes will inevitably take on a greater importance than perhaps was intended. One can sense that they will feature in enforcement cases and certainly every adjudicator should be aware of them. However, they are not cast in stone and some care will be needed since undoubtedly they will not provide a ready answer for every situation.

www.adjudication.co.uk

Fenwick Elliott continue to be one of the backers of this premier free adjudication website. If you log on you will find not only full up-to-date details (including, where possible, transcripts) of the latest reported decisions, but also practical assistance on all aspects of the adjudication process.

It is also possible to request the appointment of an adjudicator from the site. The cost of doing so is £250 including VAT which makes it cheaper than many of ANB's. In addition, the appointment fee will be part of the Adjudicator's fees and so there is no need to pay this up front.

If you have any comments, either fill in the feedback form on the site or contact Chris Hough.

3. COSTS

We have discussed above the possibility that the courts will apply cost sanctions if a party refuses to consider ADR. Equally, if a party fails to comply with the various pre-action protocols, then that party will be at risk on costs. We discuss below the case of *Paul Thomas Construction Ltd v Hyland and another* where the court ordered Thomas to pay costs on an indemnity basis as a result of acting unreasonably and in breach of the TCC pre-action protocol. More recently, in *Phoenix Finance Ltd v Federation International de l'Automobile and others*, the successful Defendants were awarded their costs on an indemnity basis since the Defendant had failed to send a letter before action or given any other warning that proceedings were being contemplated.

One of the biggest changes introduced by the Woolf Reforms was the concept of proportionality. CPR 1.1 states that the overriding objective of the Reforms is to deal with cases justly. This includes dealing with the case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.

Proportionality applies to the question of costs as much as anything else. Eddie Farren discusses exactly what it means, below.

Prior to the introduction of CPR on 26 April 1999, costs claimed by a successful party were assessed by the court without any regard to proportionality. However, since the introduction of the CPR, there has been much debate on how proportionality should be applied to costs.

It is important to remember that proportionality only applies to costs which have been awarded on a "standard basis" as opposed to an "indemnity basis". If a claimant makes an offer of settlement and later exceeds his own offer, then the party that failed to accept the offer may be

penalised by having costs ordered against them on an indemnity basis.

The judgment of Lord Woolf in the Court of Appeal case of *Lownds v Home Office* has gone some way in addressing many of the questions that are often asked by the judiciary, solicitors and their clients alike.

Factual background

This case concerned a clinical negligence claim brought by the claimant who was a prisoner. The claimant settled for damages of £3000 plus costs, prior to the matter going to trial. The costs that were included in the claimant's bill amounted to £17,126.78 plus VAT of £2,278.60, totalling £19,405.38. These costs were assessed by the court at £14,871.30 plus VAT of £1,913.23, totalling £16,784.53. The defendant appealed on the grounds these costs were excessive in relation to the sums involved.

A complicating factor in all of this is the fact that the majority of costs claimed had been incurred prior to the CPR coming into force. This meant that no costs for work undertaken before 26 April 1999 would be disallowed if those costs would have been allowed before 26 April 1999. The appeal was therefore dismissed because of the transitional provisions and the costs incurred during the relevant periods. However, the Court of Appeal stated that had the entire bill of costs related to work which occurred after 26 April 1999, then a significantly different view would have been taken.

Therefore what did come out of this Appeal was guidance on how proportionate and reasonable costs ought to be applied in future. When considering proportionality the court must have regard to the following factors:

- conduct of the parties before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre- action protocol;
- the efforts made, if any, before and during the proceedings in order to try and resolve the dispute;
- the amount or value of any money claim or property involved;
- whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- the manner in which a party has pursued or defended his case or a particular allegation or issue;
- whether a claimant who has succeeded in his claim, in whole or part, exaggerated his claim;
- the importance of the matter to all parties;
- the particular complexity of the matter or difficulty or novelty of the questions raised;
- the skill, effort, specialised knowledge and responsibility involved;
- the time spent on the case; and
- the place where, and the circumstances in which, work or any part of it was done.

Paragraph 11.2 of the costs practice direction states:

"In any proceedings there will be costs which will inevitably be incurred and <u>which are necessary</u> for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute."

The words underlined above, *"which are necessary"*, are the key to how the courts should give effect to the issue of proportionality. Therefore, if it is *necessary* for a step to be taken in proceedings then a reasonable amount for that step should be allowed and any step that appears unnecessary should be disallowed likewise. In deciding what is necessary the factors above should be considered.

If at assessment, a party's costs appear proportionate then a reasonable amount ought to be allowed for the costs reasonably incurred. On the other hand, if a party's costs appear disproportionate then the court should determine whether costs were necessary, and if necessary, that the costs are reasonable.

Conclusion

The above outlines the importance of parties' conduct throughout litigation and making and/or accepting offers of settlement, and hopefully should encourage parties to co-operate and conduct litigation in a proportionate manner.

4. ARBITRATION

One noticeable recent trend has been the reduction in the number of disputes being arbitrated or litigated. The decline in the number of domestic arbitrations has been particularly acute and this in turn has led to some commentators suggesting that, for domestic disputes at least, the "death" of arbitration is imminent.

Ted Lowery discusses below some of the reasons why arbitration, perceived by many to be a costly and lethargic process, has suffered in comparison with adjudication, its young and dynamic offspring.

Modern arbitration was originally conceived as a means of dispute resolution that was commercially superior to that provided by the courts. Unfortunately, over the course of the twentieth century, arbitration evolved into a form of private litigation incorporating many of the expensive, time-consuming and pedantic features of litigation in the courts. Arbitration even suffered by comparison with litigation where, by contrast, both the judge and the venue were provided by the state at no additional charge.

Furthermore, one of the perceived crucial weaknesses of arbitration was the frequent lack of finality: it was not too difficult to find grounds upon which to appeal the arbitrator's decision to the courts[5], so that in some cases, arbitration comprised a lengthy and expensive preliminary step to court proceedings.

The Arbitration Act of 1996 was introduced against a background of increasing dissatisfaction with arbitration procedure. The underlying principles of the Act were (unusually for an English statute) set out in the opening section and may be summarised as follows:

- The objective of arbitration should be to secure efficient, fair and impartial resolution of disputes. (section 1(a))
- The parties should be free to agree how the disputes are to be resolved, subject to public interest safeguards. (section 1(b))
- The court's power to interfere should be limited. (section 1(c))

The first principle is axiomatic but the second and third principles are rather more radical, asserting as they do the concept of party autonomy, i.e. that consensus between the parties takes priority, whilst the court's power to interfere contrary to that consensus is limited.

[5] Particularly after the Arbitration Act of 1950 introduced a right of appeal to the court by way of case stated, although generally speaking, rights of appeal were narrowed by the Arbitration Act of 1979.

The provisions of the Act governing arbitration procedure are divided into two categories: those that are mandatory and those that are non-mandatory. Bearing in mind the second underlying principle, the latter greatly predominate, prefixed with the self-explanatory phrase, "Unless otherwise agreed by the parties…". Thus, although the Act has much to say about how arbitrations ought to be conducted, the Act's provisions will be superseded by the parties' agreement (except in relation to a limited number of fundamental matters).

The second principle is given particular effect by section 46 of the Act. Section 46(1) states that the arbitrator is to decide the dispute:

(a) in accordance with the law chosen by the parties…, or

(b) …in accordance with…other considerations as are agreed [by the parties] or determined by the tribunal

This allows the parties a considerable degree of flexibility. In accordance with sub-section (a) the dispute may be decided in accordance with any system of law the parties agree upon: say, for example, French law, or a body of principles (as distinct from the law of a nation state) such as those of *ex aequo et bono*, meaning in accordance with equity and good conscience.

Sub-section (b) is wider again and hypothetically encompasses any dispute resolution process agreed upon by the parties so long as that procedure is not contrary to public interest safeguards.

At common law judges have used the term "public policy" rather than "public interest", as provided for by sub-section 1(b), but these two phrases mean much the same thing: for example, an agreement (for arbitration or otherwise) that is in some way illegal or has an illegal purpose will be contrary both to public policy and the public interest and therefore will not be enforceable.[6]

The scope of section 46(1) may be considered in the light of the following examples:

Example 1

Two violently belligerent parties agree upon dispute resolution by means of trial by combat.

Example 2

Two historically minded parties agree that their dispute is to be decided by an arbitrator applying the Code of Hammurabi[7].

Example 3

Two particularly taciturn parties agree that an arbitrator shall decide the dispute but in so doing, may consider no more than the first 2,000 words of their respective written submissions.

Example 1 would fall foul of the public policy restriction. Trial by combat used to be perfectly legal in England[8] (arguably up until the nineteenth century in the form of the duel), but in our arguably more enlightened times, the potentially fatal consequences for the loser would mean that any agreement to trial by combat would almost certainly be contrary to public policy as having a criminal object. Further, by definition, an arbitration does require some consideration of the merits of the dispute. Thus whilst deciding a dispute by means of tossing a coin would not be

[6] The classic example being that of the agreement between two highwaymen as to the division of the spoils.
[7] A body of rules devised by Hammurabi, King of Babylonia, during the eighteenth century BC.
[8] In 1398 a Court of Chivalry ordered that a dispute between the Earls of Mowbray and Bolingbroke (later Henry IV) be decided by trial by combat.

contrary to the public interest[9], it would probably not amount to an "arbitration" for the purposes of the Act.

Examples 2 and 3 illustrate the adaptability of the Act. So long as some review process is undertaken, the public interest restraint within section 1 is unlikely to catch all but the most outrageous agreements as to procedure made between commercially minded and pragmatic parties.

The Act therefore encourages the parties to take the initiative and adopt bespoke and, if necessary, innovatory procedures best suited to their own particular disputes, in the expectation that "traditional" costly and time-consuming practices be avoided.

In addition to encouraging the parties' invention, the Act also imposes a requirement upon arbitrators themselves to adopt a flexible approach. Section 33 of the Act places a general duty upon arbitrators to act fairly and impartially (in accordance with the first principle). Section 33(1)(b) requires arbitrators to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense.

Bearing in mind these provisions, it was not so surprising that a number of commentators regarded the new Act as heralding a revolution in arbitration practice. However, generally speaking, these rather fervent expectations have not been realised. Over the last five years the innovatory potential of the Act has not been fully utilised and in practical terms, there has been little change in arbitration procedure. (In that sense the revolution has been "English" rather than "French".)

There seem to be two main reasons for this turn of events:

Firstly, parties and their lawyers have been reluctant to implement alternative procedures.

The second reason is that referred to at the start of this article: the impact of statutory adjudication which has been available to parties to construction disputes since 1 May 1998. Parties seeking an expeditious alternative to long-winded and costly arbitration (or litigation) have been happy to choose "off the peg" statutory adjudication, rather than take the time to select bespoke arbitration.

Hence the terminal decline of arbitration has been regarded by some as inevitable. However, the future of arbitration need not be so bleak if, as is anticipated, the popularity of adjudication begins to wane and the parties and their lawyers use this opportunity to make greater use of the flexibility inherent in the 1996 Act.

There is increasing anecdotal evidence that dissatisfaction with adjudication is on the rise. The popularity of adjudication has led to increasingly complex and high value claims being referred to adjudication. The courts have opined that such disputes were not intended for adjudication and in a number of recent decisions have applied the brakes. For example:

- To be referred to adjudication a "dispute" must have been fully explored and considered by the parties during the course of an open exchange of views and arguments.[10]

- Adjudicators may only deal with disputes arising out of contractual terms and the effects of contractual terms

[9] In *Woodward v Sarsons* (1875) LR 10 CP 733 Lord Coleridge CJ indicated that deciding a local election by means of tossing a coin would not be lawful but that was in circumstances where electoral law required a secret ballot.

[10] *Edmund Nuttall Ltd v R G Carter Ltd* – judgment of HHJ Seymour QC dated 21 March 2002 (unreported)

which are recorded in writing with a necessary degree of certainty.[11]

- Adjudicators' decisions may not be enforced by the courts where there is evidence (which may be minimal) that the receiving party may not be able to repay the money if subsequently ordered to do so.[12]

Thus the courts appear to be restricting the hitherto universal application of adjudication to all construction disputes. At the same time, at a more practical level, the increasing complexity and scope of referred disputes has led to further perceived problems with adjudication as follows*:*

- Some adjudicators lack the skill or experience to deal with complex claims, for example time claims which require planning and programming expertise, or money claims which require forensic accounting skills.

- The chances of successfully resisting enforcement proceedings are increasing (largely fuelled by the willingness of the courts to intercede).

- Unless extended, the 28-day period is simply too short to properly and fairly deal with the points at issue.

- The parties' legal costs are usually unrecoverable and these costs may be significant where complex claims require detailed presentation by lawyers, experts, etc.

Adjudication is therefore in danger of becoming hoist on the petard of its own popularity and in consequence is less and less likely to be regarded as the first choice forum for construction disputes.

So, with a complex and potentially costly dispute on your hands, what should you do? You want a procedure that will encompass the alacrity of adjudication, the comfort of confidence in the decision-maker and the opportunity to recover your legal costs at the end of the day.

Arbitration tailored to your requirements could represent the best option. Under the 1996 Act, the parties to an Arbitration Agreement could agree upon an expedited hybrid arbitration procedure which combines the best features of adjudication and arbitration. Bearing in mind the flexibility of the 1996 Act, the possible permutations are endless but, by way of example, construction specialist barrister Paul Darling QC recently suggested[13] an arbitration procedure with the following principal characteristics:-

- The arbitrator to publish the award within 100 days from the date of appointment and his/her remuneration based upon achieving that timetable.

- A Statement of Case to be served within 7 days of commencement and the Response to be served within 28 days thereafter.

- Within 7 days of receipt of the Response, the arbitrator (as empowered under section 39 of the Act) to decide whether or not to make a provisional award.

- Limited provision for disclosure of documents.

- There be a right to a hearing of limited duration.

- The parties to agree to exclude a right of appeal to the courts or limit the grounds of appeal.

[11] *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* – judgment of the Court of Appeal dated 8 March 2002 (unreported)

[12] *Rainford House Ltd v Cadogan Ltd*, CILL March 2001 page 1709; *Herschel Engineering Ltd v Breen Properties Ltd* (No. 2) (unreported)

[13] Article in the TECBAR Review for March 2002 entitled "What is the future for arbitration in the light of adjudication?"

- The arbitrator to be entitled to award costs and/or security for costs, but in the case of the latter, not if he/she forms the view that to do so would stifle either the claim or the defence.

The benefits of such a process are immediately obvious. The concept of the 100-day arbitration should neither be regarded as impractical nor unrealistic: after all, parties and adjudicators have been shoe-horning complex disputes into a 28-day process for four years, so a 100-day period should be comparatively relaxed. The fundamental point of this or any other agreed procedure is that the parties take the initiative and utilise the flexibility offered by the 1996 Act. Arbitration is far from dead but it does need reviving. It will be up to the parties and their lawyers to administer a dose of the 1996 Act to encourage its recovery.

5. FACILITIES MANAGEMENT

Recently two "*standard form*" FM Contracts have been produced. The first under the auspices of the CIOB, and the second by PACE (the "Property Advisers to the Civil Estate"). As standard forms are being used more extensively and, to some extent, they are both competing to become an "industry norm", Jon Miller explains below some of the key features and differences of both.

CIOB Standard Form Facilities Management Contract

When should it be used?

The CIOB Facilities Management Contract was issued in 1999. In the first six months of operation it was used for over £40 million worth of business. At its launch it was described by the CIOB as "*especially suitable for 'soft' FM services, including general building maintenance, catering, cleaning, administration, security, etc. It may also be used for more complex FM services"*[14].

The CIOB Facilities Management Contract can be used directly with the party providing services, or with a Manager/Consultant who undertakes to provide the services by the use of sub-contractors, etc.

Quality

According to the CIOB Facilities Management Contract the Facilities Manager will provide the services:

- *"with reasonable skill, care and diligence"*
- *"in accordance with the Specification and this Agreement"*
- *"in accordance with all instructions issued to him by the Client"*[15]

The Facilities Manager has an **absolute** obligation to comply with the Specification; it is not open to him to say that he cannot do what the Specification requires of him. This is particularly important with an Output Specification – this sets out an **absolute** goal which the Facilities Manager must attain. In so far as the Specification and Agreement are silent, the Facilities Manager must use "*reasonable skill, care and diligence"* – essentially this is the same standard as that which would be required from a reasonably competent Facilities Manager.

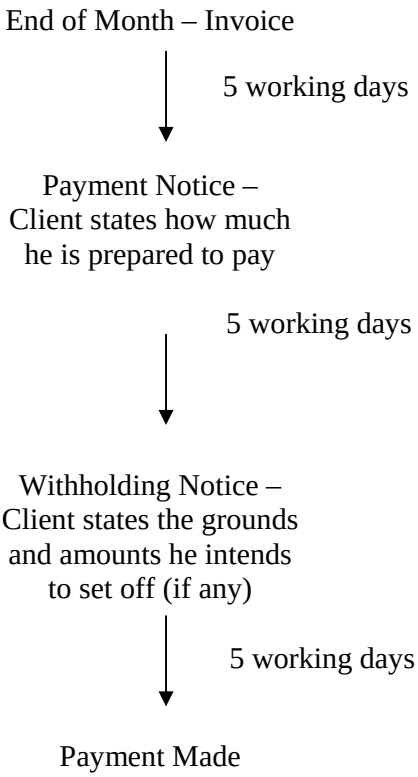
Best available quality

There is an exception in relation to goods and materials. All goods and materials supplied as part of the services are to be as specified in the Specification. However, where such quality and standards are not stated, "*such materials and/or goods shall*

[14] CIOB press release May 1990
[15] Clause 3.1

*be of the **best**[16] available quality"*. On a relatively simple soft FM contract such as cleaning, where price may be the only distinguishing factor, "*best*" may not be what the Client asked for or the Facilities Manager ever intended to provide. A cheaper (but adequate) cleaning material may be what was always envisaged.

Payment terms



NB This whole process lasts 15 working days.

Withholding payment/set-off

If the Client does not serve a valid Withholding Notice, the Client will not be entitled to withhold payment. If a Payment Notice or Withholding Notice is not served, or payment is not made in time, the Facilities Manager can suspend the services on giving 7 days' notice to the Client.

Penalty points

The CIOB Facilities Management Contract allows the Client to deduct, when payment is due, sums incurred as a result of the Facilities Manager's breach of contract. A penalty point system is incorporated in the Specification; no guidance is given as to what the penalty point system should be. Penalty points may not be valid. Courts will uphold genuine pre-estimates of losses, such as liquidated and ascertained damages for delay in building and engineering contracts. However, if the amount deducted is out of all proportion to the losses which the Client suffers as a result of the breach, then the courts will not uphold a "*penalty*" clause.

The problem for most Clients is that a breach by the Facilities Manager may not actually result in a financial loss. For example, if a prisoner decides to pole vault over a wall this may lead to a 100 point deduction for the security firm, but not result in the Client actually incurring financial loss or damage. Similarly, failure to remove chewing gum from the floors in reception may lead to a 20- point deduction, but again the Client will not actually suffer a financial loss as a result of dirty floors.

These arguments are (legally) very interesting but I doubt that commercially they amount to much. The truth is, seeking a decision from the adjudicator, or worse still the courts, to overturn a penalty point reduction can be quite expensive and time-consuming. It is only if the Facilities Manager has had a substantial sum deducted (and does not want the contract to be renewed or extended) will he bother to take the issue before an adjudicator/court/arbitrator.

Termination

Either party may terminate the Agreement "*with immediate effect*" if the other is in breach. If the breach is capable of remedy,

[16] Clause 7.1

one party can terminate after serving 15 working days' notice requiring the breach to be remedied.

This is uncertain, as even a member of the legal profession would find it difficult to say which breaches are capable of remedy and which are not.

Either party can terminate at any time by giving three months' notice in writing.[17] However, it is not by any means certain that, should the Client terminate under these circumstances, the Facilities Manager will be able to recover his loss of profit.

TUPE

The Client has to indemnify the Facilities Manager against all claims, costs, etc arising out of any claims by employees of the previous facilities manager (or sub-contractor).

GC Works 10 Facilities Management General Conditions of Contract

When should it be used?

Although the form of contract is essentially a government/public form[18], it can be used by private companies. GC Works 10 is designed for "hard" FM and more substantial FM services than its CIOB counterpart. It is more pro-Client than the CIOB Facilities Management Contract. One GC Works 10 form can be used for a large number of sites.

Good faith, mutual co-operation, open relationship, etc

The G C Works 10 provides:

"*The Employer and Contractor shall deal fairly in good faith and in mutual co-operation with one another, and the Contractor shall deal fairly in good faith and in mutual co-operation, with all his sub-contractors and suppliers.*"[19]

The form goes on to say that "*Both parties accept that a co-operative and open relationship is needed for success, and that team work will achieve this.*"

This approach leads to two unique features:-

(i) a party **may** not be able to insist on strict compliance with the Agreement, Specification, etc if this would result in an unjust, inherently uncommercial result. Similarly, an adjudicator may refuse to strictly enforce the Agreement.[20]

(ii) the GC Works 10 sets out procedures for liaison meetings which are to take place between the Client and the Facilities Manager.[21] The meetings are to try to reduce costs as far as possible. Cost savings are to be shared between the Facilities Manager and the Client.

Quality

Not surprisingly, the Specification is the key document. The GC Works 10 provides a model output Specification for cleaning services within the accompanying Guidance Notes.

Liaison meetings

Keeping with the duties of good faith and management, an obligation is based on the

[17] Clause 17.1.1
[18] The "GC" suite of contracts are a set of Government Contracts for procurement
[19] Clause 2.1
[20] Page 39 of the Guidance Note to the GC Works 10 states that the Adjudicator will look at "*to what extent each of them has acted promptly, reasonably and in **good faith**"(*emphasis added)
[21] Clause 2.3

parties to hold a meeting each month. Five days before each meeting the Facilities Manager is to submit a report stating:-

(i) the performance of the services and any relevant instructions;

(ii) all outstanding requests for information;

(iii) any new circumstances which have interfered with services or may increase the costs.[22]

Within 7 days after each meeting the Client is to submit a written statement which specifies:-

(i) the matters which a Client believes had interfered with the services or increased the costs;

(ii) the steps that would have been taken to reduce or eliminate such interference or increased costs;

(iii) a response to the outstanding requests for information.

Existing plant/machinery and the premises

According to the GC Works 10, the Facilities Manager is deemed to have satisfied himself as to the nature and extent of services, any conditions which may affect the premises, the means of communication and access to the premises, or conditions affecting labour, the nature and true extent of the Client's property, etc.[23]

Further, the Facilities Manager cannot rely upon any survey, report, document or any other information supplied by the Client. Surveys of existing services, the premises, plant and materials cannot be used. This places quite an onerous obligation on the Facilities Manager. The Facilities Manager should ensure that he has surveyed not only the premises, plant, materials and the services supplied by his predecessor, but also worked at legal documents which set out the true extent of the Client's ownership.

Client's property

This includes all plant and machinery which the Facilities Manager is servicing, together with the premises themselves. There are three options, only one of which can be selected:-

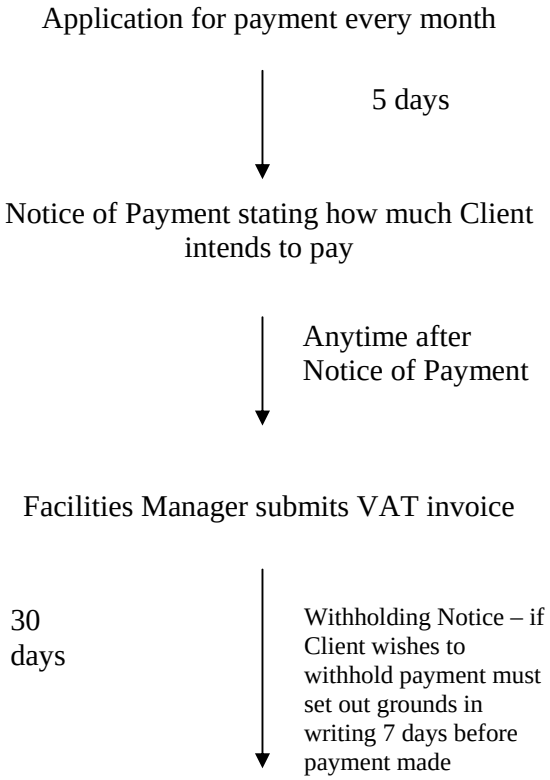
(i) the Client is responsible for replacement of the Client's property, unless the need for repair or replacement is caused by the Facilities Manager's failure;

(ii) the Facilities Manager is responsible for repair/replacement up to a predetermined sum. If the costs of repair and replacement exceed this sum, then it becomes the Client's responsibility;

(iii) the Facilities Manager is responsible for repair and replacement save where this is caused by the Client's failure. Even then the Client will only be responsible for repair and replacement that occurred after the commencement date, he will not be responsible for failures that occurred prior to the Facilities Manager starting work – the Facilities Manager is deemed to have inspected and taken plant/machinery/ premises "*as seen*".

[22] Clause 23(3)
[23] Clause 7(1)

Payment terms



NB Payment is triggered by invoice which can only be submitted after Client issues Notice of Payment. Facilities Manager should ensure he issues an invoice as soon as he gets a Notice of Payment.

If payment is not made and an effective Withholding Notice is not served, Facilities Manager can suspend performance or give 7 days' notice.

Withholding and set-off

For a valid set-off the Client must serve an effective Withholding Notice. However, GC Works 10 goes further in that the Client, or any other member of the Client's group, may set off any sum which is recoverable from the Facilities Manager or any other member of the Facilities Manager's group.

A Facilities Management company may find that payment has been validly withheld because a debt is owed by a sister (say) scaffolding company to another member of the Client's group of companies, which the Facilities Manager has no knowledge of.

This provision hardly reflects the spirit of good faith and team working.

Penalty points system

Like the CIOB Facilities Management contract, GC Works 10 allows for deductions to be made on a penalty points system. The scope of the penalty points is again a matter for the Specification.

Termination for breach

If either party is in breach then the contract can be terminated on serving 90 days' notice. Again, however, if the default is not capable of remedying or is a fundamental breach of the contract, the contract can be terminated forthwith.

GC Works 10 allows the **Client** only to terminate at will on giving 3 months' notice.[24] If the Agreement is terminated the Facilities Manager will receive his costs, expenses, etc, but it is expressly provided that he will not be paid any loss of profit.

Again, such a one-sided clause would not seem to be in keeping with the overriding duty of good faith.

TUPE

Under the GC Works 10, the Client is still liable for claims brought by employees of the previous Facilities Manager and his sub-contractors.[25]

However:-

(i) GC Works 10 prevents a Facilities Manager from placing employees

[24] Clause 44
[25] Clause 14

on a contract to whom he knows is about to come to an end (and who might otherwise be difficult to get rid of);

(ii) the Facilities Manager must give an accurate list of his employees. If he fails to do so, the Facilities Manager indemnifies the Client against any cost (TUPE or otherwise) arising out of any deficiency or any inaccuracy in the information.[26]

Conclusions

The CIOB Facilities Management contract is aimed at soft FM and (relatively) simple hard FM operations. GC Works 10 is better suited to hard FM services involving a complex and long-term relationship.

There is no reason why GC Works 10 cannot be used by private companies.

The CIOB Facilities Management contract tends to be slightly more pro-Facilities Manager, whilst GC Works 10 is more pro-Client.

7. PARTNERING

The article on "Partnering" in last year's Summer Review drew attention to the uncertainty surrounding how a court would construe some of the typical terms in partnering arrangements in the event that one or more of the parties attempted to found a breach of contract claim upon them.

In order to probe further the questions raised in that article about the likely approach of the court to the interpretation of obligations to work in a spirit of trust, fairness and mutual co-operation for the benefit of the Project, Peter Webster looks at the court's approach to breach of contract claims based upon implied terms of a similar nature, where damages were sought for ongoing losses arising from injury to reputation incurred after the termination of the contracts between the parties.

Two recent House of Lords cases, *Mahmud v Bank of Credit & Commerce International (1997)* and *Johnson (AP) v Unisys Ltd (2001)*, have considered the scope of an implied term of trust and confidence in contracts of employment. Both of these cases concerned individuals who had been full-time permanent employees of the respondent companies at fairly senior levels. Both employees had been dismissed by their employers, Mr Mahmud by reason of redundancy when the Bank went into liquidation, Mr Johnson summarily on disciplinary grounds. Both obtained statutory compensation in respect of their dismissals, but sought to obtain a remedy at common law also, in actions for breach of the above mentioned implied term of their contracts. Both sought to recover damages for financial loss arising from this alleged breach, including an element for damage to their future employment prospects. Mr Mahmud's appeal succeeded, while Mr Johnson's failed. The existence of the following obligation, implied by law as an incident of a contract of employment, was however acknowledged in both cases:

"The employer would not without reasonable cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between itself and the employee."

Mahmud v Bank of Credit & Commerce International (1997)

The House of Lords held that, in principle at least, BCCI could be liable for "continuing financial losses" suffered by Mr Mahmud which were proven to have been caused by a breach of the implied term, and which were not too remote. Lord

[26] Clause 14(7)

Steyn also suggested that "the obligation probably has its origin in the general duty of co-operation between contracting parties".

This raises the question whether a party who has undertaken such an obligation as part of a partnering charter and is found to have breached it, causing the Project to collapse, could be liable to the other parties to the partnering charter who find their reputations damaged by the Project's failure, such that they find it difficult to obtain fresh work of a similar nature.

In the BCCI case, the House of Lords commended an approach based on the ordinary principles of contract law. Such an approach could readily be transferred to the context of an employer contracting with an independent contractor as opposed to one of his own permanent staff. The following principles were highlighted in the leading judgments of Lords Steyn and Nicholls:

(i) A breach of the implied term will not occur because the business (or Project) is run incompetently or unsuccessfully, only if it is run dishonestly and corruptly.

(ii) In assessing whether there has been a breach, what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended, and the impact will be assessed objectively.

(iii) A breach of contract will be established if positive damage is done to an employee's future job prospects by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.

(iv) If a breach of contract is established, then if it was reasonably foreseeable that a particular type of [continuing financial] loss was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable.

(v) The recoverability of damages is subject to a duty to mitigate loss.

Johnson (AP) v Unisys Ltd (2001)

In the Unisys case, the House of Lords decided by a majority that Mr Johnson could not recover damages for injury to his reputation in an action for breach of an implied term of trust and confidence in his contract, on the grounds that a common law right embracing the manner in which an employee was dismissed could not satisfactorily co-exist with the statutory regime laid down for providing employees with compensation for unfair dismissal.

In the context of a partnering charter, where the employer is employing independent contractors, the statutory regime for unfair dismissal would be irrelevant.

If one removes this factor from the discussion, then one finds ample support in principle for a common law right to recover damages for injury to reputation in the Law Lords' speeches.

One cannot of course altogether disregard the fact that the judgments were given in the context of a dispute between an employer and a former full-time employee. Significant account was taken in all the judgments of changing social realities affecting an employer–employee relationship. Nevertheless, as in the BCCI case, there was significant discussion concerning general principles of contract law, and the proper scope that these dictated for the implied term of trust and confidence.

In his leading judgment, Lord Hoffmann observed as follows:

"In Wallace v United Grain Growers Ltd (1997) 152 DLR (4th) 1, 44–48, McLachlin J (in a minority judgment) said that the courts could imply an obligation to exercise the power of dismissal in good faith. That did not mean that the employer could not dismiss without cause. The contract entitled him to do so. But in so doing, he should be honest with the employee, and refrain from untruthful, unfair or insensitive conduct. He should recognise that an employee losing his or her job was exceptionally vulnerable and behave accordingly. For breach of this implied obligation, McLachlin J would have awarded the employee, who had been dismissed in brutal circumstances, damages for mental distress and loss of reputation and prestige.

"My Lords, such an approach would in this country have to circumvent or overcome the obstacle of Addis v Gramophone Co Ltd (1909) AC 488, in which it was decided that an employee cannot recover damages for injured feelings, mental distress or damage to his reputation, arising out of the manner of his dismissal. Speaking for myself, I think that, if this task was one which I felt called upon to perform, I would be able to do so. In Mahmud v Bank of Credit and Commerce International SA (1998) AC 20, 51 Lord Steyn said that the true ratio of Addis's case was that damages were recoverable for loss caused by a breach of contract, not for loss caused by the manner of its breach. As McLachlin J said in the passage I have quoted, the only loss caused by a wrongful dismissal flows from a failure to give proper notice or make payment in lieu. Therefore, if wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation. On the other hand, if such damage is loss flowing from a breach of another implied term of the contract, Addis's case does not stand in the way. That is why in Mahmud's case itself, damages were recoverable for financial loss flowing from damage to reputation caused by a breach of the implied term of trust and confidence."

Although Lord Hoffmann preferred in the circumstances of the case before him to consider an implied term in relation to the manner of dismissal rather than trust and confidence (which he saw as characteristic of a continuing relationship rather than one which was coming to an end), he affirmed the approach taken in the BCCI case of implying a term embracing damage to reputation for which a separate breach of contract claim could be brought, and for which damages could be recovered in accordance with ordinary contractual principles.

Lord Hoffmann went on to consider the difficulties posed by the potential scope of what were described in the BCCI case as "continuing financial losses":

"Another difficulty is the open-ended nature of liability. Mr Johnson's case is that Unisys had knowledge of his psychological frailty by reason of facts lodged in the corporate memory in 1985–87 and therefore should have foreseen when he was engaged that a failure to comply with proper disciplinary procedures on dismissal might result in injury which deprived him of the ability ever to work again. On general common law principles it seems to me that if the necessary term is implied and the facts are made out, the claim should succeed. It may be that such liability would be grossly disproportionate to the employer's degree of fault. It may be likely to inhibit the future engagement of psychologically fragile personnel. But the common law decides cases according to principle and cannot impose arbitrary limitations on liability because of the circumstances of the particular case. Only statute can lay down limiting rules based upon policy rather than principle."

Conclusions

The terms typically contained in partnering charters are familiar to the courts from the field of employment law, where they are implied by law into contracts in a consistent form.

The courts have dealt with claims for breach of these implied terms in the way they approach any breach of contract claim, on general contractual principles.

These principles have been held to found claims for continuing financial losses arising from injury to reputation in certain circumstances, such as where one party deals harshly with another party or dishonestly with third parties.

The losses which may be recoverable are open-ended, and not necessarily proportionate to the degree of fault of the party from which they are recovered.

8. SCL DELAY PROTOCOL

In November 2001, the Society of Construction Law issued the first draft of a Protocol for Determining Extensions of Time and Compensation for Delay and Disruption. The first draft received a lot of attention and following comment a second draft was produced and a workshop, chaired by His Honour Judge LLoyd QC, held in May 2002 at which over 180 people attended. Following the feedback from that workshop, the Protocol has been subject to further review and currently the SCL intend to launch the finalised Protocol shortly.

Details of how to obtain copies of the draft Protocol can be found on the SCL website at www.scl.org.uk.

The aim of the Protocol is to provide a best practice guide which aims to provide the material necessary to avoid unnecessary delay-related disputes about how to record and manage delay during any construction process. The idea is that if the guidance within the Protocol were to be followed, then this would reduce the scope for argument and dispute about the causes of and extent of any delay. Further, were there to be any dispute, the Protocol is intended to provide a means to resolve that dispute via agreement.

One of the key features of the Protocol is the recognition that transparency of information and methodology is central to both dispute prevention and dispute resolution. The Protocol aims to provide a framework both for the management of a programme during the project and for the measurement of any delay that may occur. Thus, for example, the Protocol recommends the production of a regular transparent programme with updates to reflect actual progress on site.

One of the main criticisms of the first draft of the Protocol was the suggestion that parts of it might be incorporated into actual contracts. In fact this suggestion is going to be deleted from the final draft. Instead, the Protocol recommends that those who draft contracts should merely use the Protocol as guidance for the drafting process in order to identify the type of issues in relation to delay that ought to be addressed. The Protocol is not intended to take precedence over the actual terms of the contract. Neither is it intended that contracting parties should simply state that the entire Protocol should be incorporated into a contract.

Although the Protocol is currently being revised, it seems appropriate to set out some of the current proposals. Remember it is proposed that the Protocol be a Guide. Remember also that these proposals may change:-

- Contracting parties should reach a clear agreement on the type of records that should be kept. In theory, if records are kept, the scope for disagreement should be reduced.

- The contractor should prepare at the outset, a programme showing the manner and sequence in which it intends to carry out the works. This programme should regularly be updated to record progress and any extensions of time that may be granted. It should be prepared as a critical path network. The software package should be shared between the relevant parties who all have the programme in electronic form.

  Concern has been expressed that the administrative burden imposed on the parties in terms of record keeping and programme updating will lead to increased costs.

- Applications for an extension of time should be made and dealt with as closely as possible to the relevant delaying event. Where contractor delay to completion occurs concurrently with employer delay then that in contractor concurrent delay should not reduce any extension of time due. However, if the contractor incurs additional costs resulting from the two concurrent delays then it is then entitled to recover compensation if it is able to identify separately any additional costs caused by the employer delay.

- Compensation for prolongation should be based on the actual additional cost incurred by the contractor, i.e. putting the contractor in the same financial position as they would have been had the delaying event not occurred. An entitlement to an extension of time does not automatically carry an entitlement to compensation during the period for which the extension is granted.

- Global claims are discouraged. This is on the basis that if accurate records have been kept and if a programme has been regularly updated then a contractor should be able to establish the necessary causal link between the delaying events.

- Interest may be a component of damages if the party claiming can show that a loss was actually suffered as a result of a breach of the contract. To show a loss, the party needs to be able to show that it has had to pay interest on bank borrowings or has lost the opportunity to earn interest on bank deposits. It is always in the contemplation of the parties that if one party is deprived of money then there will be interest penalties. The starting date for payment of interest should be the earliest date on which the sum should have been payable.

- If possible the likely effect of variations should be pre-agreed. This includes not only the labour and material costs but also time/delay-related costs and provisions to the programme. Everything flows from the original programme and the gradual updates made to it.

- Contractors should not be entitled to recover the costs of preparing a claim unless the contractor can show it has been put to additional costs as a result of some unreasonable (in)action on the part of the contract administrator.

9. FENWICK ELLIOTT NEWS

Personnel

There have been a number of changes at Fenwick Elliott over the past year and there are a number of new faces.

As you may know, Robert retired on 1 April 2002 to become a consultant. Simon Tolson was appointed to follow Robert as senior partner.

In February 2002, Chris Whittington joined as a partner from Shoosmiths where he had been head of the southern region of their construction group. Chris specialises in non-contentious matters, typically advising on procurement methods and drafting, vetting, negotiating or advising on contracts, bonds, warranties and the like.

Matthew Needham-Laing and Jeremy Glover, who were already associates, became partners on 1 April 2002.

Susannah Bailey joined as an associate in October 2001. As well as working for private practice Susannah has gained substantial in- house experience with both BT and London Underground.

Two further new associates joined in March, Jon Miller after 12 years at Masons, and Nicholas Gould, previously an assistant at Forsters.

Nick, a qualified chartered surveyor and member of the SCL Council, is the senior research fellow at King's College, Centre of Construction Law and Management. He is also the author of *Dispute Resolution in the Construction Industry*. Jon, who started work as an apprentice at Matthew Hall, is an accredited adjudicator and Fellow of the Chartered Institute of Arbitrators. He also sits on the board of the Institute of Management, City branch.

Peter Webster joined as an assistant in March 2002. At Masons, since qualification in 1999, Peter has advised on contracts out in the Middle East and worked with local authorities, concessionaires, employers and subcontractors.

In May 2002, Trina Peters joined from Simpson Grierson in New Zealand. Amongst the usual array of construction-related work, she prepared submissions to the New Zealand Parliament on the Construction Contracts Bill (their equivalent of the HGCRA).

Finally, we are pleased to welcome Leigh Child who is the first ever trainee solicitor employed by the firm.

New Offices

As a result of our expansion, we have taken on new office space. The 4th Floor at 408 Strand, just 5 minutes away, has been remodelled into a suite of meeting rooms. Therefore if you come to a meeting please remember the new address. However, post should continue to be delivered to the 353 Strand address.

FE Dispatch

As technology continues to advance at an ever-increasing pace, the need to keep up to date with the latest changes is becoming ever more crucial. We believe that our commitment to the www.adjudication.co.uk website (see page 11 above) is one example of our response to our clients' needs.

Our monthly bulletin, entitled *Dispatch*, which is available in hard copy or electronic form, has now been running for over two years. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.co.uk. If you would like to receive a copy every month, please contact Jeremy Glover.

European Society of Construction Law

In October 2001, Victoria Russell, who has just come to the end of a successful two-year stint as Chairman of the UK SCL, was unanimously elected President of the European Society. It has been a busy year for Victoria, who has also in October 2001, became the first ever female Master of the Worshipful Company of Arbitrators.

10. CASE ROUND-UP

Tony Francis continues to edit the *Construction Industry Law Letter* ("CILL"). We set out below extracts from CILL which are of particular interest. These extracts were first published by

Informa Professional. For further information on subscribing to the *Construction Industry Law Letter*, please contact Eleanor Slade by telephone on +44 (0) 20 7017 4017 or by email: eleanor.slade@informa.com.

We have split the case round-up into two, and deal first with those cases relating to adjudication. In addition, we have included summaries of the most recent adjudication cases, which have only recently been decided and have not yet been reported in CILL. An index appears at the end of this review.

ADJUDICATION

Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth

The Technology and Construction Court

HHJ LLoyd QC

Judgment delivered 12 April 2002

Facts

In adjudication proceedings, the Claimant sought an extension of time under the JCT Standard Form of Building Contract 1998 Edition, Local Authorities Without Quantities, and an order for the repayment of liquidated and ascertained damages levied by the respondent. The Claimant's case was based upon a delay analysis which did not sufficiently show cause and effect.

The Adjudicator found that the Claimant was entitled to a substantial extension of time and therefore repayment of the bulk of the liquidated and ascertained damages. In making this finding, the Adjudicator relied upon his own delay analysis which neither side had been given the opportunity of commenting upon.

The Claimant applied for summary judgment. Amongst the Respondent's grounds for resisting were that the Adjudicator had not acted impartially such that there was a real possibility of bias, and that the adjudicator had not complied with the principles of natural justice

Issues and Findings

Had the Adjudicator acted in a manner that gave the impression of a possibility of bias?

Yes. For the purposes of a Part 24 application, the Adjudicator's actions could not be disregarded. In particular, in producing his own delay analysis, the Adjudicator appeared to have made good deficiencies within the Claimant's case.

Had the Adjudicator complied with the principles of natural justice?

No. The Adjudicator should have notified the parties of the approach he intended to follow regarding the delay analysis and allowed both parties an opportunity to comment.

Commentary

Once again, we see the courts refusing to grant summary judgment of an adjudication decision on procedural grounds. Here, the Adjudicator crucially failed to give notice of the approach he intended to adopt in his decision, although there was time for him to have done so. However, even had the Adjudicator allowed the parties the chance to comment, it seems that HHJ LLoyd QC would still not have granted summary judgment where the intended approach had the effect of making good deficiencies in the Claimant's case. This outcome sits rather uneasily with the express right of the Adjudicator to take the initiative in ascertaining the facts and the law. In this case, the Adjudicator would say that he did no more than that.

In his judgment, Judge LLoyd made a couple of interesting comments which may

reflect the attitude of the courts to adjudication after four years: firstly, he said it may be doubted that adjudication was intended for such a complex dispute as the one before him. Secondly, he suggested that if an Adjudicator finds that he cannot arrive at a decision reasonably and fairly within the time available, and an extension of time is not agreed, then the Adjudicator should refrain from making a decision and resign. Where both anecdotal evidence and research suggest that adjudications and the subject matter of adjudications are becoming more complex, it seems increasingly likely that the judges will continue to impose procedural requirements which make adjudication less rough and ready, and thereby less effective.

C & B Scene Concept Design Ltd v Isobars Ltd

Court of Appeal
Lord Justice Potter, Lord Justice Rix, Sir Murray Stuart Smith
Judgment delivered 31 January 2001

Facts

The appellant made an application to enforce an Adjudicator's decision relating to payment in respect of three interim applications concerning design and build works for the fitting out of a café bar on behalf of the respondent.

The contract incorporated the JCT Standard Form of Building Contract With Contractor's Design, 1998 Edition. Appendix 2 of the contract documents provided two separate alternatives relating to payment. Alternative A provided for interim payments to be made in accordance with predetermined stages of the works. Alternative B provided for interim payments according to elapsed pre-determined periods of time. The parties omitted to complete Appendix 2. Notwithstanding this, the Adjudicator decided that the contract did provide an adequate mechanism for payment. Valuation disputes arose in relation to the application for payment but the Adjudicator decided that the Respondent's failure to serve any notice of payment under clause 30.3.3 of the contract gave the Appellant an absolute right to payment for the sum set out in the application.

The matter came before Recorder Robert Moxon-Browne QC. The Respondent argued that the contract did not provide an adequate mechanism for payment and that therefore the Scheme applied. In these circumstances, by applying the wrong payment provisions, the Adjudicator had answered the wrong question. Recorder Moxon-Browne QC agreed with the Respondent and held that the Adjudicator had asked the wrong question. As the Scheme applied, the question the Adjudicator should have asked was what was a proper valuation in relation to each application. The Appellant appealed.

Issues and Findings

In considering the question referred to him in the light of the payment provisions of the JCT Standard Form of Contract With Contractor's Design as opposed to the Scheme, had the Adjudicator answered the wrong question?

No. The error was within the scope of the dispute agreed between the parties. The Adjudicator had answered the right question but in the wrong way. The Appellant was therefore entitled to enforcement of the Adjudicator's decision by means of summary judgment.

Commentary

This is only the second case concerning adjudication to reach the Court of Appeal and not surprisingly the Court of Appeal, in keeping with the approach they adopted in *Bouygues (UK) Ltd v Dahl-Jansen (UK) Ltd*, overturned the decision at first instance. The Court of Appeal's decision reaffirms the position that where

jurisdiction has not been exceeded, errors of fact or law by the Adjudicator will not prevent enforcement. Where, as in this case, the nature of the dispute was framed in wide terms – in effect, how much was the contractor entitled to under the contract – it was difficult for the Respondent to prove that in arriving at a figure, the Adjudicator had answered the wrong question.

It was not necessary for the Court of Appeal to address in this judgment the effect of the absence of withholding notices, so we will have to wait a little longer for a definite judicial opinion on this issue.

Farebrother Building Services Ltd v Frogmore Investments Ltd

Technology and Construction Court

His Honour Judge Gilliland QC

Judgment delivered 20 June 2001

Facts

Disputes arose between Farebrother and Frogmore with Farebrother claiming a substantial extension of time and a sum in the region of £900,000. Frogmore had a counter-claim in the region of £300,000. The adjudication was governed by the TeCSA Adjudication Rules. The Adjudicator awarded £600,000 to Farebrother. On the face of the Adjudicator's decision, it was not clear whether he had addressed and taken into Frogmore's counter-claim. By way of a defence to enforcement proceedings Frogmore argued that where the Adjudicator had failed to take account of an important matter of defence then the decision should not be enforced and in this particular case the decision of £600,000 should be reduced by the amount of the counter-claim.

Issues and Findings

What is the relevance of Rules 11 and 12 of the TeCSA Adjudication Rules to this issue?

In accordance with Rules 11 and 12 of the TeCSA Rules it would have been entirely for the Adjudicator to decide what matters were comprised within the Adjudication Notice which should then be taken into account in the Adjudicator's decision. Having made such a decision as to jurisdiction that decision is binding as the Adjudicator has the power to decide his own jurisdiction.

Commentary

This is the first case to consider the jurisdiction provisions of the TeCSA Adjudication Rules and the judgment demonstrates the benefits of the rules in question for those wishing to avoid jurisdictional wrangles and subsequent difficulties on enforcement. The Rules will not necessarily be to the liking of those who wish to keep as many options open as possible in terms of avoiding compliance with adjudicators' decisions.

Millers Specialist Joinery Company Ltd v Nobles Construction Ltd

In the Salford County Court
Technology and Construction Court
His Honour Judge Gilliland QC
Judgment delivered 13 August 2001

Facts

The Claimant made an application for summary judgment pursuant to CPR 24.2 in the sum of £16,005.96 in respect of certain invoices rendered between 26 June 2000 and 26 September 2000 in respect of joinery works. The Defendant opposed the application on the basis that there had been previous overpayment to the Claimant which, in effect, misled the claim.

The Claimant maintained that as the Defendant did not give any effective notices of intention to withhold payment under the invoices within the requisite time period the Defendant was not entitled to withhold payment of the invoices on the grounds given.

The Defendant maintained that because of the overpayment the sums in dispute were not sums which were "due under the Contract". Further, judgment in the Claimant's favour under CPR 24 would be a final judgment which could prevent the Defendant from raising its defence on the merits this was a good reason why the matter should be disposed of at trial and not summarily.

Issues and Findings

In the absence of valid notices to withhold in accordance with section 111 of the HGCRA, could the Defendant set off its own claims that the Claimant had been overpaid by way of a defence to an application for summary judgment?

No, in the absence of valid section 111 notices the Defendant was entitled to summary judgment in respect of sums due under the contract.

Did the Claimant's application for summary judgment deprive the Defendant of the right to issue separate proceedings in respect of the amount of the overpayment?

No, there had been no proceedings addressing the Defendant's right to recover any overpayment. All that had been finally decided was that the absence of the valid section 111 notice deprived the Defendant of the right to retain sums in respect of any previous overpayments.

Commentary

What is unusual about this decision is the fact that the Claimant took this point by way of application for summary judgment rather than by way of an adjudication. The result is much the same. Whilst the Claimant has the benefit of the release of the monies being withheld, the Defendant is still at liberty to pursue his own claims in respect of the overpayment by way of separate proceedings.

HHJ Gilliland QC confirms his view that section 111 notices are required in relation to abatement, thus following the approach of Judge Bowsher in *Northern Developments Ltd v J and J Nichol* and *Whiteways Contractors (Sussex) Ltd v Impresa Castelli Construction UK Ltd*. The judgments of these three are to be contrasted with the judgment of HHJ Thornton QC in *Woods Hardwick Ltd v Chiltern Air Conditioning* where he held that it is not necessary to have a section 111 notice for the purposes of an abatement. This is clearly an issue that requires determination by a higher court.

Re A Company (No. 1299 of 2001)

Chancery Division; Mr David Donaldson QC (sitting as a Deputy High Court Judge)
Judgment delivered on 15 May 2001

Facts

Cape Construction Ltd (CCL) was the main contractor in the construction of 4 houses for Landreach Ltd. Guaranteed Asphalt Ltd (GAL) was engaged as the subcontractor for the roofing works. The contract between the parties specified due and final dates for payments. There was an outstanding balance of £9,702.47 in respect of the first and second GAL valuations. No Notice of Intention to Withhold Payment was ever served by CCL in relation to either valuations.

After the final date for payment of the second valuation had passed, CCL was informed by Landreach that there were various items of defective works and a failure to use materials as specified. GAL

denied this. CCL terminated GAL's contract on 21 November 2000, and engaged other subcontractors to carry out the remedial works.

On 2 February 2001, GAL issued and served a statutory demand for £9,702.47 in respect of sums certified and threatened to wind-up CCL if the debt was not paid within 21 days. CCL refused to pay on the basis that it alleged that it had claims for set-off and/or abatement which would have extinguished the debt claimed in the statutory demand. CCL sought an injunction to restrain GAL from presenting a winding-up petition.

Issues and Findings

Was there an undisputed debt?

Yes, CCL's surveyor had certified the sums were due and because of the absence of a section 111 HGCRA notice.

Did the existence of a significant cross-claim entitle CCL to an injunction to restrain GAL from presenting a winding-up petition?

No. CCL could have established its claims by commencing a cross-adjudication as soon as it became aware of the problems with the works, and on this basis the Companies Court declined to apply *Seawind Tankers Corporation v Bayoil SA* [1999] 1 WLR 147.

Commentary

The decision of Mr David Donaldson QC represents a significant development, if the Companies Court follows it. Absent a withholding notice, a party that refuses to pay is vulnerable to a statutory demand and winding-up petition. This emphasises the importance of such notices. Further, where there are cross-claims by way of set-off and/or abatement which have arisen outside the period for serving a withholding notice, payment can only be withheld in such circumstances provided a cross-adjudication is commenced immediately. It will not be sufficient to merely allege a cross-claim.

RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd

Court of Appeal
Lord Justice Auld, Lord Justice Ward and Lord Justice Robert Walker
Judgment delivered 8 March 2002

Facts

DM was the mechanical and electrical sub-contractor to David Patton (Ballymena) Ltd in connection with the refurbishment of the Holiday Inn in Lime Street, Liverpool. RJT were consultants to the hotel.

In or about April 2000, DM asked the appellant at a meeting if RJT would complete the design of some of the mechanical engineering works, and the appellant agreed that they would do so for £12,000. The dispute between the parties concerned the performance of that particular agreement.

DM commenced adjudication proceedings pursuant to the HGCRA against RJT, in which it claimed damages in excess of £858,000 for alleged professional negligence on the part of RJT. RJT claimed that its engagement by DM was not an agreement in writing for the purposes of the HGCRA. The Adjudicator, having investigated the issue of jurisdiction, indicated that he considered the agreement between the parties, although oral, had been evidenced in writing and was therefore caught by the HGCRA. RJT applied to the Court seeking a declaration that the agreement was not an agreement in writing for the purposes of s.107 of the HGCRA.

HHJ MacKay at first instance held that the extensive documentary evidence in this particular case concerning the parties, the

nature of the work and price was sufficient to bring it within the ambit of s.107. RJT appealed.

Issues and Findings

Where there is an oral agreement between the parties, is it necessary for the purposes of s.107 of the HGCRA for there to be some recitation of the terms of agreement?

Yes, the whole agreement has to be evidenced in writing (Lord Justice Ward and Lord Justice Robert Walker). The terms of the agreement material to the issue or issues giving rise to the reference should be clearly recorded in writing (Lord Justice Auld).

Commentary

Lord Justice Auld and Lord Justice Robert Walker adopted the same approach as that of Judge Bowsher in *Grovedeck Ltd v Demolition Ltd*, finding that for the purposes of s.107 of the HGCRA all the terms of any oral contract must be evidenced in writing thus significantly narrowing Judge MacKay's finding at first instance. Lord Justice Auld also allowed the appeal but his position was that only the terms of the agreement material to the issues in dispute in the adjudication needed to be recorded in writing. Whilst a minority view, this is a more pragmatic position. It makes good sense to insist that all material terms are evidenced in writing so as to assist the adjudicator in his task, but it seems unnecessary to insist that potentially numerous terms unrelated to the issues in dispute should also be recorded in writing. Lord Justice Ward said he hopes the finding will not lead to too much jurisdictional wrangling and that adjudicators will take a robust approach. This somewhat misses the point. Adjudicators may well take a robust approach but ordinarily, as they cannot decide their own jurisdiction, the issue is whether or not the courts will adopt a robust approach to enforcement proceedings.

Sindall Ltd v (1) Abner Solland, (2) Grazyna Solland, (3) Solland Interiors (a Firm) and (4) Solland Interiors Ltd

Technology and Construction Court

His Honour Judge Humphrey LLoyd QC

Judgment delivered 15 June 2001

Facts

The Claimant entered into a contract with the Defendants for the renovation of a property in Mayfair for a contract price of £7.8 million. The contract incorporated the JCT Intermediate Form of Contract. Progress of the renovation works fell behind and in September 2000 the Claimant applied for extensions of time which were referred to adjudication.

A series of disputes arose. Delays occurred and by the end of November 2000 the contract administrator gave the Claimant a notice of default of clause 7.2.1 of the contract stating failure on the part of the Claimant to proceed regularly and diligently with their works. The contract administrator's allegations were strenuously denied by the Claimant but notwithstanding this on 21 December 2000 the Defendants determined the Claimant's employment under the contract. The legality of this action was again strongly contested by the Claimant.

On 11 January the Claimant wrote to the contract administrator asking for a further award of an extension of time. The contract administrator requested further information which was provided by the Claimant under cover of a letter requesting a formal response to the request within 7 days. The contract administrator then asked for further copies of the claim and on the next day the Claimant commenced

adjudication proceedings seeking the following redress:-

- Declaration that the determination was wrongful.
- Declaration that the Claimant was entitled to an extension of time to the date of determination.

The Adjudicator found in favour of the Claimant on both points.

The Claimant then commenced proceedings in the Court to enforce the Adjudicator's decision by way of reclaiming liquidated damages and other matters. However, the Defendants contended that the Adjudicator acted without jurisdiction in deciding that the Claimant was entitled to a further extension of time on the basis that as at the date of service of the adjudication notice there was in fact no dispute between the parties in relation to the question of the extension of time.

Issues and Findings

Whether a dispute arose on the basis of the Claimant's letter of 11 January 2001 enclosing further information in support of the claim for an extension of time requesting a response within 7 days?

No, on the facts of this case the contract administrator should have been given sufficient time to make up its mind before the inference can be made that the absence of a useful reply means that there is a dispute.

Did the Adjudicator have jurisdiction in relation to this dispute?

Yes, the dispute before the Adjudicator concerned the issue of the determination of the Claimant's employment. An integral part of this dispute concerns the question of time within which the works should have been completed and thus this necessarily involved a consideration of the Claimant's entitlement to an extension of time.

Commentary

The issue in this dispute raises a matter of key importance to adjudication and for those parties anxious to try and secure payment at the first available opportunity. It is well established that a party should be given adequate time to properly consider any claim and this case confirms that imposing a 7-day deadline for the consideration of a reasonably detailed claim for an extension of time would not be reasonable.

However, on the facts of this case, that particular issue was not fatal to the Claimant's case as the question of the Claimant's entitlement to an extension of time was inextricably linked to the real issue in dispute; namely the legality of the Defendants' termination of the Claimant's employment.

Following His Honour Judge Thornton in *Fastrack Contractors Ltd v Morrison Construction Ltd*, His Honour Judge Lloyd adopted a like definition of the word "dispute" to encompass all matters that are contentious between the parties at the relevant time. This is in keeping with the Judge's comments to the effect that the courts tried to adopt a pragmatic approach to adjudication as opposed to a "legalistic" approach.

Watkin Jones & Son Ltd v Lidl UK GmbH

Technology and Construction Court
His Honour Judge Moseley QC
Judgment delivered on 21 December 2001

Facts

The Claimant entered into a contract with the Defendant incorporating the JCT Standard Form of Building Contract With Contractor's Design 1998 for the

construction of a retail store in Bangor, Wales. On 8 May 2001 there was a meeting between the parties to discuss progress towards agreeing a final account. Further meetings were held to try and progress the final account. Practical completion occurred on 22 June 2001 and on 17 July 2001 the Claimant made an application for an interim payment.

Shortly thereafter two files of supporting documents were delivered by the Claimant labelled "Final Account" with an introductory page headed "Draft Final Account". The Defendant made no payment and gave no section 110 notice in respect of the application of 17 July but it did make a request for further information relating to the draft final account. On 21 August 2001 the Claimant commenced adjudication proceedings in respect of sums outstanding pursuant to the interim application. The Defendant promptly challenged the jurisdiction of the Adjudicator, denying that there was a dispute on the basis that application number 11 was in fact a final account application which was not due for payment. The Defendant had been misled into believing that the application was an application relating to the final account and as at the date of the notice of adjudication issues in dispute had not yet been identified

Issues and Findings

Was there a dispute for the purposes of section 108(1) of the HGCRA?

Yes, it is not necessary either to refuse to answer or to reject a claim. Passive failure to admit suffices to constitute a dispute.

In failing to value the Claimant's application, had the Adjudicator failed to answer the right question?

No, the Adjudicator considered the application for payment, held it was an application for an interim payment, considered the terms of the contract and concluded that the Claimant was entitled to be paid the sum for which it had applied.

Commentary

The main point of interest to emerge from this case is the meaning of the word "dispute" where Judge Moseley expresses the view that Judge Thornton's definition in *Fastrack Contractors Ltd v Morrison Construction Ltd* is not consistent with the views of the Court of Appeal in *Halki Shipping Corporation v Sopex Oils Ltd* (1998). In following the Court of Appeal in *Halki*, Judge Moseley confirms a wider definition of the word "dispute" than that previously adopted by HHJ Thornton. Once again, the consequences of the failure of a party to provide a section 110 notice under clause 30.3.5 of JCT Standard of Building Contracts With Contractor's Design 1998 had expensive consequences.

Watkin Jones & Son v Lidl UK GmbH

Technology & Construction Court
His Honour Judge Humphrey LLoyd QC
Judgment delivered 25 February 2002

Facts

Following the decision of HHJ Moseley QC in favour of the Claimant, the Defendant then commenced its own adjudication proceedings by issuing a notice of adjudication in which it characterised as a dispute the following:

"The dispute relates to the properly calculated sum which ought to have been included in Watkin Jones's application number 11 dated 17 July 2001…"

The Claimant commenced proceedings for a declaration that the Adjudicator did not have jurisdiction on the basis that, given the Defendant's failure to provide a s.110 notice in accordance with clause 30.3.3 of the contract and in the light of the Adjudicator's decision, there was no dispute between the parties.

Issues and Findings

Were the Defendants entitled to commence adjudication proceedings in respect of the proper valuation of application number 11?

No, the issue forming the subject matter of the notice of adjudication concerned alleged differences about payment in respect of application number 11. That issue had already been addressed by the previous adjudication and accordingly no such differences existed.

Commentary

HHJ LLoyd QC decided that the Claimant was entitled to an injunction restraining the Adjudicator from continuing on the basis that there was no dispute. The judge decided that the issue of the Claimant's entitlement to payment in respect of interim payment application number 11 had already been resolved by the previous adjudication. As HHJ Moseley QC pointed out in his judgment, when the first Adjudicator reached his decision he considered the application for payment, the relevant terms of the contract and on that basis came to the conclusion that the contractor was entitled to the payment for which he had applied. Accordingly, in commencing adjudication proceedings on the question of a detailed valuation of the interim application the Defendant was referring the same question to a subsequent adjudication

ADJUDICATION EXTRA

In ***Chamberlain Carpentry & Joinery Ltd v Alfred MacAlpine Construction Ltd,*** HHJ Seymour QC had to consider arguments being made by MacAlpine to resist enforcement. The Chamberlain Notice of Adjudication listed eight heads of claim. Thus MacAlpine argued that Chamberlain had sought to refer not a single dispute but a number of disputes. HHJ Seymour QC (just as HHJ LLoyd QC had in *McLean v Swansea* – see Issue 18) accepted that it is possible to contemplate a substantial dispute with a number of different elements. Here it was plain that the dispute referred by Chamberlain was how much it was due to be paid by MacAlpine.

MacAlpine had included its own adjudication rules as part of the contract. These included that the referring party (provided it was not MacAlpine when each party would bear their own costs) should be responsible for all of the costs incurred by all of the parties in the adjudication on a full indemnity basis. Thus one of Chamberlain's requests, following these rules, was that the Adjudicator make an assessment of the costs incurred by MacAlpine. MacAlpine said this was a separate dispute. The Judge disagreed saying that requesting an assessment of costs was a natural consequence of the referral.

It is of interest that in considering the interpretation of the Notice, the Judge referred to the guidance from Lord Hoffman in the case of *ICS v West Bromwich Building Society*. Lord Hoffman stated: "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties…the meaning of a document is what the parties using those words against the relevant background could have reasonably been understood to mean." Here it was clear that Chamberlain were referring a dispute as to how much it should be paid and that, on no sensible interpretation, were they seeking any form of declaration.

Finally, MacAlpine suggested that, since the Adjudicator had to go "hunting through" the material presented to him by Chamberlain to find out which the relevant interim application was, the dispute had not been identified with sufficient clarity. This was given short shrift, although of course

any documentation should be submitted to an adjudicator in as "user-friendly" a way as possible.

In ***Diamond v PJW Enterprises Ltd***, Lady Paton, in Scotland, had to consider an adjudication concerning a professional negligence claim. PJW employed Diamond as contract administrators on a refurbishment contract in Glasgow. During the course of the works a dispute arose between them which resulted in the termination of Diamond's appointment. PJW employed others in Diamond's place, brought a claim for professional negligence against Diamond and then referred that claim to adjudication.

The Adjudicator found against Diamond who resisted paying, claiming that the Adjudicator did not have the power to award damages and that an appointment as a contract administrator was not a construction contract as defined by the HGCRA. Lady Paton held that Diamond's contract administration services qualified as surveying work thereby falling within the HGCRA. By agreeing to carry out contract administration services, Diamond had entered into an agreement to do surveying work.

It is interesting that although Lady Paton expressed doubts about the merits of the decision, she concluded that she could not interfere with that decision. Lady Paton recognised the potential difficulties caused by the short time limits imposed by adjudication but stated:

"*There is nothing in the 1996 Act…in precedent or principle, to suggest that an adjudicator seeking to resolve a dispute…is not entitled to reach conclusions about the manner in which a professional person has carried out his or her duties in the course of the construction contract - and that includes conclusions as to whether there might have been any professional negligence. …while therefore, it may one on view seem startling that a professional person acting as an adjudicator should be invited to rule within 28 days on the important and often difficult and delicate question as to whether a fellow professional has failed in his or her duty to such extent that there has been professional negligence, yet it seems that a proper construction of the statutory language… permits this very result – although importantly, a 'provisional interim' result.*"

Thus Lady Paton has provided judicial confirmation that there is nothing to stop a claim of professional negligence being made in an adjudication.

In ***Earls Terrace Properties Ltd v Waterloo Investments Ltd***, HHJ Seymour QC considered Earls Terrace's claim for a declaration that the adjudication commenced by Waterloo should be restrained on the basis that the agreement, as amended by a variation agreement, was not a construction contract within the definition of the HGCRA.

By an agreement dated 4 December 1996, Waterloo had agreed to act as a developer for Earls Terrace. The agreement was later amended by a deed of variation dated 20 July 1998. The 1996 agreement came within the definition of a construction contract. However, it also pre-dated the operative date of the HGCRA, 1 May 1998. The deed of variation was entered into after 1 May 1998, the effective date of the HGCRA. However, the deed of variation merely amended the fee due to the defendant, and deleted one sub-clause in the main agreement. Thus the variation was not a contract for construction operations.

The key question here was whether making the deed of variation on 20 July 1998 (not in itself a construction contract), but which varied the terms of the main agreement of 4 December 1996 (which was a construction contract, but not one to which the HGCRA applied because the agreement pre-dated

the operative date of the HGCRA) would have the effect of bringing the entirety of the agreements within the HGCRA?

The Judge held that whilst it was possible that a variation to a construction contract made before 1 May 1998 could amount to a construction contract and therefore come within the HGCRA, here the deed of variation merely modified the fee provisions and did not bring the earlier agreement within the scope of the HGCRA. Thus the adjudication that had been commenced was void and of no effect and the Adjudicator had no jurisdiction to act.

In ***Edmund Nuttall Ltd v R J Carter Ltd,*** HHJ Seymour QC refused to enforce the decision of an adjudicator since there was no jurisdiction. When Nuttall commenced adjudication proceedings, the notice included a claim for an extension of time based on a claim document prepared in May 2001. When the Referral Notice was served, it included a delay analysis prepared by an expert on behalf of Nuttall, which made a claim for an identical extension of time. However, the justification for the extension was different to that put forward in the May claim.

The question the Judge had to answer was not whether there was a dispute between Nuttall and Carter as at the date of the Adjudication Notice, but whether the dispute upon which the Adjudicator adjudicated was that which was the subject of the Adjudication Notice. The Judge rejected the submission that the dispute should be identified by reference, at least principally, to what was being claimed. Nuttall suggested that it was enough that the extension of time being sought was always the same, and irrelevant that the facts and arguments relied upon in the expert report were significantly different from the facts and arguments relied upon in the previous claim.

The Judge said: *"the whole concept of adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments which they have previously rehearsed amongst themselves. If adjudication does not work in that way there is the risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible."*

Here, as the Adjudicator had considered the expert report, the Judge ruled that he had considered and made decisions upon something, which had not been referred to him for a decision. The decision was made without jurisdiction and was therefore unenforceable.

In a postscript to the *Carter v Nuttall* decision, HHJ Bowsher QC was asked to consider a request by Carter that the appointment of the Adjudicator should be revoked. Between July 2000 and November 2001 there were three adjudications between Carter and Nuttall, and the same Adjudicator was appointed. Then, in December 2001 there was a fourth adjudication. It was this fourth adjudication which came before HHJ Seymour QC. That decision was taken to the Court of Appeal and it is understood that the matter was settled before the Court of Appeal made its decision.

In the interim, Carter gave notice of adjudication of disputes that covered some of the same ground as the dispute already decided. Carter specifically requested that the same adjudicator should not be appointed. Despite this request, the same adjudicator was appointed. Carter suggested that he was not the man to decide the dispute because to quote the judgment

his "*mind has been poisoned by deciding the dispute without jurisdiction*". Carter suggested that adopting the usual test, a fair-minded and informed observer would conclude there was a real danger that the tribunal was biased, and the Adjudicator had a "mindset" to decide the dispute against Carter regardless of the evidence.

HHJ Bowsher said that he did not consider he had jurisdiction to revoke the appointment of Mr Richards on the basis that there were legitimate reasons which gave rise to doubts as to his impartiality. He also said that, "*since I do not find that there are legitimate reasons giving rise to doubt to the impartiality of Mr Richards, I decline to make any declaration which would have the effect of disqualifying Mr Richards on the ground of lack of impartiality*".

HHJ Bowsher QC stressed throughout that this was an unusual case, which indeed it was. However, it seems clear that the Judge felt that there was no question as to the impartiality of the Adjudicator who was appointed so he was not prepared to entertain the application further. It remains possible that in different circumstances a court might entertain such an application.

In the case of ***JT Mackley & Co. Ltd v Gosport Marina Ltd,*** HHJ Seymour QC had to consider an attempt to refer a dispute under an ICE contract to arbitration. Previously, there had been two adjudications under the contract which had been favourable to Mackley. Gosport, the Employer, sought to arbitrate the disputes.

However, clause 66(6) of the ICE Conditions states that a decision of the engineer was a condition precedent to the entitlement of a party to a contract to refer a dispute to arbitration. Here there had been no reference of the dispute to the engineer, who had had no part in the adjudication.

HHJ Seymour held that the requirement for a decision of the engineer under clause 66(6) applied even where a party was seeking to challenge the decision of an adjudicator. References to arbitration had to be made in accordance with the relevant arbitration clause.

The Judge stated that the form of words of section 108:

"*makes it plain…that arbitration is only available as a means of challenging the decision of an adjudicator if the relevant contract so provides or an ad hoc arbitration agreement is made. Where it is sought to rely on an arbitration clause in the relevant contract, it seems to me to be obvious that the ability to do so, and the terms upon which such may be done, fall to be determined under the relevant arbitration clause.*"

Under the terms of this contract, a reference to the engineer had to be made before any reference to arbitration could be contemplated.

In ***Parsons Plastics Ltd v Purac Ltd,*** the Court of Appeal considered an appeal from the judgment of HHJ Kirkham. Parsons had been successful in an ad hoc adjudication carried out in accordance with the terms of the subcontract and not pursuant to the HGCRA. Six days after the Adjudicator's decision was given and before paying any money pursuant to that decision, Purac served a withholding notice pursuant to the contract. Purac claimed that the costs to complete the works exceeded the sum owing under the adjudication decision. The Court of Appeal, agreeing with the Judge, held that under the terms of this particular contract it was open to Purac to set off against the Adjudicator's decision any other claim they had against Parsons, as long as that claim had not been determined by the Adjudicator.

OTHER CASES

Baxall Securities Ltd and Norbain SDC Ltd v Sheard Walshaw Partnership (SWP)

Court of Appeal: Brooke Hale LJJ and David Steel J
Judgment delivered 22 January 2002

Facts

SWP were engaged on RIBA terms for the construction of an industrial unit in Stockport. Amongst other things, SWP were responsible for roof drainage and for the work of a specialist subcontractor (who subsequently became insolvent) employed to design and supply the roof and guttering. Baxall were tenants of the unit. They did not have any contract with SWP.

The unit was damaged by two separate floods due to the inability of the drainage system to cope with heavy rainfall. Baxall alleged that, notwithstanding the lack of a contractual relationship, SWP owed them a duty of care in tort as occupiers as SWP had designed and supervised the construction of the premises. Overflows which had been specified had not been installed and the drainage was under-designed and of insufficient capacity.

At first instance, HHJ Bowsher QC found that SWP were not liable in tort for the first flood since it had been caused partly by blockages and partly by the absence of overflows which was a latent defect. However, he found that SWP were liable in part for the second flood since in part it was caused by the shortfall in design capacity which was a patent defect. Both parties appealed.

Issues and Findings

Did SWP owe a duty of care in respect of latent defects to the subsequent owners or occupiers with whom they had no contract?

Yes, in respect of latent defects where there was no reasonable possibility of inspection. The Court of Appeal agreed with the Trial Judge.

Was SWP liable to Baxall in respect of the first flood?

No, the first flood was caused by a combination of blockages of the drains for which SWP was not responsible, together with the absence of overflows. The Court of Appeal agreed with the Trial Judge.

Was SWP liable to Baxall for the second flood?

No, the Court of Appeal disagreed with the Trial Judge. The sole effective cause was the absence of overflows, which was something that could have been discovered upon reasonable inspection and so was a patent defect.

Commentary

The judgment provides a useful summary on the issue of the proximity required to establish a duty of care culminating in *Murphy v Brentwood District Council* (CILL 1990, p. 604), which confirms a duty on contractors towards subsequent owners to avoid causing physical injury or damage to other property. Here, the Court of Appeal agreed with His Honour Judge Bowsher QC in extending this duty of care to architects (and it is assumed other similar professionals).

The Court of Appeal also agreed with the Trial Judge's comment that actual knowledge of the defect, which caused the damage, or equally the existence of a reasonable opportunity for inspection, which would have discovered that defect, will usually be sufficient to breach the chain of causation. Thus a defect is not latent if it amounted to a defect in the design or workmanship, which was discoverable with the benefit of such third party advice as a party could be expected to

take, whether or not the advice was either sought or taken.

Here, the Court of Appeal held that the effective cause of both floods was the absence of overflows. This was something that could have been detected and should have been detected at the date of the survey carried out prior to purchase. Therefore although the architects had made an error over the provision of overflows, the chain of causation had been broken and they were not liable to the Claimant.

Belgravia Property Company Ltd v S & R (London) Ltd and another

Technology and Construction Court
His Honour Judge Humphrey LLoyd QC
Judgment delivered 18 July 2001

Facts

Belgravia entered into a contract with the Second Respondent, Taylor Woodrow Management Ltd ("TWML") for the renovation of 37 Chesham Place and 2 Lowndes Place. The contract incorporated the JCT Form of Management Contract, 1987.

Clause 4.27 stated:

"If the Works Contractor shall feel aggrieved in regard to any amount certified by the Architect under clause 4.2 of the Management Contract Conditions, and included in a direction in respect of the Works as referred to in clause 8.3.2 of the Management Contract Conditions, or by his failure so to certify or direct, then, subject to clause 1.11, the Management Contractor shall allow the Works Contractor to use the Management Contractor's name and if necessary will join with the Works Contractor in arbitration proceedings or litigation at the instigation of the Works Contractor in respect of the said matters complained of by the Works Contractor."

Clause 1.11 stated:

"1.11 The Management Contractor will so far as he lawfully can at the request of the Works Contractor obtain for him any rights or benefits of the provisions of the Management Contract so far as the same are applicable to the Works and not inconsistent with the express terms of the Works Contract but not further or otherwise. Any action taken by the Management Contractor in compliance with any aforesaid request shall be at the cost of the Works Contractor and may include the provision by the Works Contractor of such indemnity and security as the Management Contractor may reasonably require."

S&R carried out plastering work for TWML under the JCT Works Contract/2, 1987 Edition. S&R considered that the architect undervalued its Works and on 21 January 2000 gave notice of arbitration to TWML in respect of its claim for £156,347. On 4 May 2000 S&R's solicitors asked TWML's solicitor to confirm that under clause 4.27 the Works contract TWML would join in such proceedings against the Employer. TWML responded by requesting an indemnity and security in accordance with clause 1.11. S&R contended that clause 1.11 did not apply to an action under clause 4.27.

On 21 June S&R wrote to Belgravia under clause 4.27 requesting in the name of TWML that Belgravia concur in the appointment of an Arbitrator. Belgravia did not accept the letter was a valid notice and raised the following issue.

It was a precondition to the use of TWML's name that S&R should indemnify TWML in respect of any costs that may be incurred as a result of its name being used. TWML was entitled to refuse its consent to use of its name. S&R refused to provide such an indemnity.

As S&R had refused to indemnify TWML, TWML had refused to allow S&R to use its name to commence arbitration proceedings. S&R therefore had no right to commence arbitration proceedings in TWML's name against Belgravia.

Notwithstanding this, S&R applied to have an Arbitrator appointed. Belgravia objected to his jurisdiction and made an application under section 32 of the Arbitration Act 1996 to the Court to decide whether the Arbitrator had jurisdiction.

Issues and Findings

Was S&R entitled to bring arbitration proceedings in its own name against Belgravia in view of clause 4.27?

No. S&R could not bring proceedings against Belgravia themselves.

Was S&R obliged to bring proceedings against Belgravia in the name of TWML?

Yes.

As S&R was so obliged, was TWML required to give its consent to the use of its name?

Yes, provided the Works Contractor observed clause 1.11 and both told the Management Contractor of its intention and satisfied the Management Contractor's reasonable requirements as to indemnity and/or security.

Was TWML entitled to require security or request an indemnity in respect of any costs which might arise under use of its name?

TWML was entitled to require that S&R should indemnify them for any liability that TWML might incur as a result of the use of its name in the proceedings.

Conclusion

As HHJ LLoyd QC makes clear in his judgment, there has been relatively little judicial guidance to date on name borrowing under the JCT Management Contract. The clarity of his judgment is to be welcomed. The questions posed by this case are exactly those which can cause the most difficulty.

This is particularly so given the potential for a Works Contractor to attempt to assert its right to adjudicate a dispute it may have, for example, over the amount certified under an interim certificate. Just as with arbitration, the Works Contractor will need to borrow the Management Contractor's name to adjudicate against the Employer subject to the provision of adequate security in accordance with clause 1.11. His Honour Judge LLoyd QC's guidance will apply equally to arbitration and adjudication.

Whilst one can understand the apparent reluctance of His Honour Judge LLoyd QC to comment on the form in which any indemnity (which must be provided by the Works Contractor) might take, his suggestion that parties adopt a route similar to the provision of security for costs under section 726 of the 1985 Companies Act, now embodied in rules 25.12 and 25.13 of the CPR, provides, at the least, a useful starting point.

Blyth & Blyth Ltd v Carillion Construction Ltd

Outer House Court of Session
Opinion of Lord Eassie
(Opinion delivered on 18 April 2001)

Facts

THI Leisure Ltd ("THI") engaged Blyth & Blyth, a firm of consulting engineers, in respect of the design for the construction of a leisure development at Edinburgh. THI entered into a contract with Carillion for

the design and construction of the development, and under the contract Carillion assumed responsibility for the design services provided by Blyth & Blyth. Section 6 of Blyth & Blyth's terms and conditions of engagement with THI contained provision whereby THI was empowered to instruct and require Blyth & Blyth to enter into a novation agreement with Carillion and THI for the design services provided by Blyth & Blyth. On 29 June 1998 a novation agreement was entered into by THI, Blyth & Blyth and Carillion. The Novation Agreement contained the following clause:-

"4. The liability of the Consultant under the Appointment whether accruing before or after the date of this Novation shall be to the Contractor and the Consultant agrees to perform the Appointment and to be bound by the terms of the Appointment in all respects as if the Contractor had always been made as a party to the Appointment in place of the Employer.

"Without prejudice to the generality of clause 3 of this Novation the Consultant agrees that any services performed under the Appointment by the Consultant or payments made pursuant to the Appointment by the Employer to the Consultant before the date of this Novation will be treated as services performed or payments made by the Contractor and the Consultant agrees to be liable to the Contractor in respect of all such services and in respect of any breach of the Appointment occurring before the date of this Novation as if the Contractor had always been named as a party to the Appointment in place of the Employer."

Disputes arose between Blyth & Blyth and Carillion in relation to Carillion's payment of Blyth & Blyth who duly issued proceedings for the recovery of their fees. However, Carillion claimed against Blyth & Blyth for alleged breaches of contractual duties in respect of work carried out pursuant to the original engagement by THI occurring before the date of the Novation Agreement. By way of example, Carillion alleged that Blyth & Blyth advised upon a quantity of steel bar reinforcement which was significantly less than the amount ultimately required. The issue of the duty owed by Blyth & Blyth to Carillion in respect of services provided to THI prior to the Novation Agreement came before Lord Eassie.

Issues and Findings

Under the Novation Agreement, could Carillion pursue an action against Blyth & Blyth in respect of breaches of duty by Blyth & Blyth committed prior to the Novation Agreement in respect of duties at that time owed to the employer?

No. The employer, the beneficiary of the services in question, had suffered no losses from the alleged breaches of duty and accordingly Carillion could not recover their own losses to arise from such breaches.

Commentary

In entering into a design/build contract with the employer Carillion assumed responsibility for the design work carried out by Blyth & Blyth on behalf of the employer. No doubt so far as Carillion were concerned their understanding of the intent of the Novation Agreement was that they would have redress against Blyth & Blyth in the event of any deficiencies in the pre-novation services provided by Blyth & Blyth causing losses to Carillion under building contract.

Lord Eassie's opinion no doubt came as something of an unpleasant surprise for Carillion and others in the industry who have entered into similar types of arrangements which are not uncommon. Here, Lord Eassie was not prepared to extend the scope of Blyth & Blyth's obligations in respect of the pre-novation

services to cover losses suffered by Carillion in circumstances where the employer had neither expressed any dissatisfaction with those services nor suffered any loss. (What is the solution?)

Durabella Ltd v J Jarvis & Sons Ltd

Technology and Construction Court

His Honour Judge Humphrey Lloyd QC

Judgment delivered 19 September 2001

Facts

Durabella Ltd ("Durabella") entered into a subcontract with J Jarvis & Sons Ltd ("Jarvis") for the provision of hardwood flooring in 36 flats, which Jarvis was constructing for Galliard Homes Ltd ("Galliard") pursuant to a letter of intent.

In court proceedings between Galliard and Jarvis following the termination of Jarvis's employment under the letter of intent, Jarvis claimed payment on a *quantum meruit* basis in respect of its works, including the flooring works. Galliard alleged that the flooring works, amongst others, were defective and raised counter-claims in respect of those works. Jarvis maintained that the flooring works had been properly carried out. The proceedings were settled by Tomlin Order. There was no breakdown of the sum that Galliard agreed to pay. But at Jarvis's direction, the agreement recorded that no value was included in the settlement figure for the Durabella works and that the agreed figure also took into account Galliard's counter-claim in respect of those works.

In separate proceedings brought against Jarvis under the subcontract, Durabella claimed payment for its flooring works less amounts already paid on account. Jarvis resisted payment on the principal ground that the works had not been properly carried out and counter-claimed for damages including sums said to have been paid to Galliard in the settlement. Jarvis also sought to rely upon a "pay when paid" clause in Jarvis's standard contract terms.

Issues and Findings

Had Jarvis been paid by Galliard for all or part of the Durabella works?

Jarvis had not met the burden of showing that it had not been paid in respect of this work. The settlement agreement with Galliard had no evidential value as it had been imposed by Jarvis's solicitors against the weight of evidence of Galliard's position in the litigation.

If Jarvis had not been paid, was the "pay when paid" clause effective?

No, Jarvis would not have been able to rely on the clause in any event because the reason for non-payment was its own conduct, which brought its employment to an end, and its own breach of contract, in failing to pursue all means available to obtain payment. The clause was not unreasonable, however, for the purposes of the Unfair Contract Terms Act 1977.

Commentary

In the only recent English authority on the validity of "pay when paid" clauses, HHJ LLoyd QC declined to find such a clause unreasonable for the purposes of the Unfair Contract Terms Act 1977, notwithstanding the enactment of s.113(1) of the HGCRA 1996 (the Act itself did not apply to the contract in issue). The Judge did however observe that such a clause will only be effective so long as the payment machinery is operating and the contractor has fulfilled its obligation to pursue payment from the employer. It would seem that "pay when certified" clauses are similarly qualified.

Fence Gate Ltd v NEL Construction Ltd

Technology and Construction Court

His Honour Judge Thornton QC

Judgment delivered 5 December 2001

Issues and Findings

Did the Arbitrator's award of 14 February 2001 contain errors of law within the meaning of section 69 of the Arbitration Act 1996?

Yes, the Arbitrator erroneously took into account factors that he should not have taken into account and he failed to take into account factors that should have been taken into account. In particular he failed to consider a proportionate or other intermediate award of costs in favour of FGL.

As a result of the errors made by the Arbitrator, is it reasonable and proportionate to interfere with the costs award?

Yes, the award the Arbitrator made was fundamentally flawed by the errors of law. Given the extent of the errors and the significant potential effect on FGL's costs recovered, it was appropriate that the award should be set aside.

Should the Court vary the award or remit the award to the Tribunal, in whole or in part, for reconsideration under section 69(7) of the Arbitration Act 1996?

On the facts of this case remission would be inappropriate since it would have the potential for lack of impartiality and would incur additional costs and delay. Accordingly the appropriate course was for the Court to vary the award.

Commentary

This judgment is something of a rarity as it involves a consideration of the powers of an Arbitrator to award costs. It is also a judgment of some importance as it provides guidance as to the principles which an Arbitrator should use in determining the costs and further guidance as to appeals under section 69 of the Arbitration Act 1996.

In a consideration of the issues of costs Judge Thornton finds that the Arbitrators are to use their powers defined by section 61 of the Arbitration Act 1996 and any additional powers, such as those contained in Rule 13 of CIMAR, that the parties agree that the Arbitrator should have. It is therefore no longer appropriate to imply a duty that an Arbitrator must act "judicially" in the exercise of his cost powers. In these circumstances Judge Thornton points out that the case law concerned with the CPR will ordinarily have no relevance for Arbitrators considering cost issues. Likewise on questions of appeal it is not for the Court to consider whether or not the Arbitrator acted judicially. The Court's function is simply to ensure that the Arbitrator has acted in accordance with the powers given to him by the Act and the parties. The judgment contains further consideration of the somewhat perplexing question of drawing a distinction between questions of law and questions of fact in the context of an arbitration appeal and, in particular, the issue as to whether an issue of law arises where it is argued that there was no evidence to support a crucial finding of fact. Here, Judge Thornton confirms that a question of law can arise when an award has been based upon a finding of fact, which on the face of the award and the incorporated documentation, was firstly, not supported by evidence and secondly, a finding that no reasonable Arbitrator could have reached.

Frank Cowl & Ors v Plymouth City Council

Court of Appeal

Woolf LCJ, Mummery & Buxton LJJ

Judgment delivered 14 December 2001

Facts

The Claimants were residents in a residential care home owned and run by Plymouth City Council ("Plymouth"). They had sought judicial review of a decision by Plymouth to close their home and one other. Permission to apply for judicial review was granted, but at the substantive hearing, the judge refused to quash the closure decision, partly on the basis that the decision was made in principle only, and the assessment of the Claimants' needs and care plans which Plymouth were required to carry out did not therefore have to precede it.

In an attempt to forestall court proceedings, Plymouth had written to the Claimants offering to put their complaint before a panel chaired by an independent person. The Claimants, who were legally aided, rejected this "alternative remedy" on the grounds that it would not fulfil all the functions of a judicial review, notably to make a decision which was binding on Plymouth. In view of his other findings, the judge did not determine this issue, but said that he considered it unfortunate that the offer to use the complaints procedure had not been accepted. The Claimants appealed to the Court of Appeal.

Issues and Findings

Did the statutory complaints procedure, proposed by Plymouth as an alternative to judicial review in the courts, qualify as an acceptable "alternative remedy"?

Yes. Insisting on an alternative remedy which would fulfil all the functions of the court process was too narrow an approach. Another alternative process could have been mediation.

Commentary

Alternative dispute resolution methods come in many forms, some of which replicate the judicial process in producing binding and enforceable decisions, whilst others merely facilitate the negotiation process and aim to deliver an agreed settlement between the parties. In the construction industry adjudication and arbitration are familiar forms of the first type of process, whilst mediation and early neutral evaluation are examples of the second, generally less well- known process. The parties to construction contracts are in a different position from the parties in this case, in that the HGCRA 1996 gives either party to a construction contract the right to insist on a particular alternative dispute resolution process (adjudication) which does produce a decision that is binding, and standard form contracts prescribe another similar process (arbitration) where adjudication fails to settle matters. Nevertheless, should the matter ultimately end up in front of the courts, the parties would do well to take note of the very strong backing given to non-binding methods of alternative dispute resolution, in this case by the author of the Civil Procedure Rules, Lord Woolf. Lawyers would also do well to beware of considering only adjudication and arbitration as alternative processes to litigation where the parties are unable to resolve the dispute by negotiation.

Hong Huat Development Co. (Pte) Ltd v Hiap Hong & Co. Pte Ltd

Singapore Court of Appeal – Civil Appeal No. 85 of 1999

Judges Chao Hick Tin JA, LP Tehan JA and Tan Lee Meng J

Judgment delivered on 21 March 2000

Facts

This decision of the Court of Appeal of Singapore (on appeal from the High Court) concerned an application for leave to

appeal the decision of an arbitrator under a contract for the construction of a six-storey shopping centre in Singapore. The Appellants, Hong Huat Development Co. (Pte) Ltd, engaged the Respondents, Hiap Hong & Co. Pte Ltd, as contractor and appointed an architect to administer the contract.

The Respondents commenced arbitration proceedings alleging the late issue of interim payment certificates, failure to certify the release of retention upon practical completion and expiry of the defects liability period, and failure to issue a final certificate. The Respondents sought to hold the Appellant liable to pay interest on the monies they alleged to be due under the various certificates.

There was evidence before the Arbitrator that the Appellants knew of the consistently late issue of certificates and also some suggestion that the Respondents had acquiesced in or contributed to the delays through the improper submission of claims. The Arbitrator made no finding, however, as to whether the Appellants knew that the certificates had been wrongfully withheld. Rather, he concluded that as the employer, the Appellants were liable for any breach on the part of the architect of his certification functions.

Issues and Findings

If they did not know of the architect's breaches of his duty to certify, might the Appellants nevertheless be liable for damage caused by those breaches?

No, an employer is not expected to warrant the performance of the architect where he has no knowledge that the architect is failing to perform.

Commentary

This decision provides a recent restatement of the law following the principles laid down in the 1947 decision of the House of Lords in *Panamena Europea Navigacion v Frederick Leyland*. By implication, an employer may be obliged to act to ensure that a certifier is carrying out his functions properly, where the employer becomes aware that he is failing to do so. The employer does not however warrant the due performance of those duties in circumstances where he is unaware of the certifier's failure to perform.

Any such liability of the employer is premised upon the implication of a contract term, in order to give business efficacy to the contract. The comments of the Singapore Court of Appeal serve as a reminder that the implication of any such term will ultimately depend upon all of the terms and circumstances of the particular contract.

John Doyle Construction Ltd v Laing Management (Scotland) Ltd

Outer House, Court of Session
Lord MacFadyen
Opinion delivered 18 April 2002

Facts

Laing Management (Scotland) Ltd ("Laing") were the management contractors on a project concerning the construction of new corporate headquarters for Scottish Widows in Edinburgh. John Doyle Construction Ltd ("John Doyle") were contracted to carry out a number of separate work packages. The work was delayed and John Doyle brought an action seeking an extension of time of 22 weeks and ascertainment of a claim for loss and expense.

The action began in mid-1998 and there were various procedural motions. The motions, which came before Lord MacFadyen, concerned the relevancy and specification of aspects of the John Doyle pleadings. In particular, Laing said that John Doyle's claim for loss and expense

was a global claim and sought an order that it be struck out.

Issues and Findings

Was John Doyle entitled to advance a global claim for loss and expense?

In principle, yes. John Doyle had averred that despite their best efforts it was not possible to identify causal links between each cause of delay and disruption and the cost consequences of these.

Would proof that an event played a part in causing the global loss combined with a failure to prove that that event was one for which Laing was responsible be enough to undermine the logic of the global claim?

In theory, yes.

Was it sufficient here to undermine John Doyle's claim?

No, just. Causation must be treated in a common sense manner. It would have been wrong to exclude at a preliminary stage the possibility that the evidence properly led at trial would lead to a satisfactory basis for an award of some lesser sum than the full global amount claimed. Equally, the question of how each of the concurrent causes ought to be viewed in deciding whether or not they all involved liability on the part of Laing was a matter best left for consideration at trial.

Commentary

Although Lord MacFadyen refused the application to strike out the global claim, it is clear from the judgment that it was a close- run thing. Lord MacFadyen specifically stated that advancing a global claim for loss and expense was a "risky enterprise". Indeed, the SCL draft Protocol for Determining Extensions of Time and Compensation for Delay and Disruption discourages such claims.

Laing supported their case with extracts from various cases, textbooks on construction law and cases from the United States, which provides a valuable starting point for anyone who has to deal with a global claim. The global claim pleaded here depended on two key items, first that John Doyle were not responsible (to any material extent) for any increased cost in respect of which the global claim was advanced and second, that Laing were responsible for all of the factors which contributed to the increased costs. Thus, if one of the events relied upon by Doyle in relation to the global loss was the responsibility of Doyle (or perhaps not the responsibility of Laing) then the whole global claim would have been undermined. Laing argued that since one of the events pleaded by Doyle was a factor for which Laing was obviously not responsible, the global claim must fail.

Lord MacFadyen agreed that the logic of a global claim required that all the events which contributed to causing the global loss must be events for which Laing were liable. Therefore, if any material contribution to the causation of the global loss was made by something for which Laing bore no legal responsibility then the global claim must fail.

However, Lord MacFadyen then said causation must be treated with "common sense". Following an examination of the facts at trial, even though the global claim might fail, there may be in the evidence a sufficient basis to find causation between individual losses and events.

Equally, it may be possible to make a rational apportionment of part of the global loss to the causative events for which Laing was held to be responsible. Therefore, the global claim was allowed to proceed. Doyle were relying on concurrent causes of delay and disruption. It may be that Laing was responsible for one of these concurrent causes.

Alternatively, and this is something which must provide some comfort to those left with no alternative but to proceed on a global basis, Lord MacFadyen recognised that it was possible that the evidence led at trial would persuade the court to award a sum lesser than the full global claim. However, that would still depend on the degree of proof John Doyle were able to provide.

Paul Thomas Construction Ltd v Hyland and another

Technology and Construction Court

His Honour Judge Wilcox

Judgment delivered 8 March 2000

Facts

The Defendants had employed the Claimants as building contractors. There was a dispute over the quantification of the final account. The Defendants offered to have a form of adjudication but the Claimants refused unless the Defendants paid the entire cost of it. The Claimants issued proceedings in the High Court, marked as TCC business, for a modest sum. They made unsuccessful applications under parts 24 and 25, and at the conclusion of those applications the Judge asked the Claimants to justify their conduct in issuing the proceedings.

Issues and Findings

Were the Claimants justified in issuing the proceedings?

No, the Claimants had conducted themselves in an unreasonable manner and in breach of the TCC pre-action protocol; and in the circumstances the appropriate sanction was for the Claimants to pay the Defendants' costs of the action to date on an indemnity basis.

Commentary

This judgment shows the importance of complying with the TCC pre-action protocol; and of being reasonably open to suggestions of alternative dispute resolution procedures. By CPR1.4(2)(e) the court must encourage the parties to use ADR if appropriate, and 44.3(5)(a) provides that the court may take into account the conduct of a party before proceedings are issued and in particular whether the parties followed any relevant pre-action protocol.

Royal Brompton Hospital National Health Service Trust v Hammond & Others and Taylor Woodrow Construction (Holdings) Ltd

House of Lords
Lord Bingham of Cornhill, Lord Mackay of Clashfern, Lord Steyn, Lord Hope of Craighead and Lord Rodger of Earlsferry
Judgment delivered 25 April 2002

Facts

The Royal Brompton Hospital National Health Trust ("the Employer") employed Taylor Woodrow ("TWL") as main contractor in relation to major building works carried out at the Royal Brompton Hospital. Watkins Grey International ("WGI") were engaged as architects and contracts administrators under the contract. During the course of the works TWL made numerous applications on a variety of grounds for extensions of time and for the payment of loss and expense. WGI granted extensions of time totalling 43 weeks and 2 days to the date of Practical Completion on 22 May 1990. The Employer paid £5.2 million in respect of loss and expense but, notwithstanding this, TWL commenced arbitration proceedings claiming an additional £17 million.

The arbitration was ultimately settled on terms that the Employer pay TWL the sum of £6.2 million in settlement of all issues and liability. Thereafter the Employer

commenced proceedings in court against WGI. The Employer's claims relevant to the issues reported were as follows:

- WGI were negligent in failing to give the Employer adequate advice in relation to the possible consequences in terms for claims of extensions of time and loss and expense by TWL in relation to an instruction to lay a certain proprietary damp-proof membrane.
- WGI were negligent in the granting to TWL of extensions of time amounting to 43 weeks and 2 days.

WGI issued Part 20 proceedings to recover a contribution from TWL under s.1(1) of the Civil Liability (Contribution) Act 1978. In respect of the allegations being made by the Employer, WGI in the third party notice alleged as follows:

- If WGI was negligent and therefore TWL was not entitled to loss and expense and was liable for the deduction of liquidated damages concerning the instruction to lay a proprietary damp-proof, then TWL was liable to the Employer in respect of the same damage.
- If WGI was negligent in granting extensions of time to TWL, and therefore TWL was not entitled to loss and expense and was liable for the deduction of liquidated damages, then TWL was liable to the Employer in respect of the same damage.

TWL applied to strike out the Part 20 claim on the grounds that WGI had no arguable case. The matter came before Judge Hicks QC, who held that TWL was not liable in respect of the same damage as WGI. WGI appealed to the Court of Appeal. The Court of Appeal held that TWL's breach consisted of the failure to deliver the building on time, whereas the damage caused by WGI occurred at the time of the certification of the extension and was the impairment of the ability of the Employer to obtain financial recompense in full from TWL. Accordingly, it was not a claim in respect of the same damage. The Architect then appealed to the House of Lords.

Issues and Findings

Were WGI and TWL liable in respect of the "same damage" under s.1(1) of the Civil Liability (Contribution) Act 1978?

No, the damage caused by TWL's failings under its contract and the secondary damage of a handicap in arbitration or settlement negotiations (caused by negligent advice in respect of the contractor's claims and entitlements) were not the "same damage" for the purposes of the Act.

Commentary

This decision of the House of Lords confirms that the ambit of the Civil Liability (Contributions) Act 1978 may not be as wide as many people think. Under s.1(1) of the Act the party seeking contribution from a third party must show a liability in respect of the same damage and the meaning of the words "same damage" forms the subject matter of this decision.

Lord Steyn confirmed that the expression should be given its natural and ordinary meaning and rejected any interpretation giving an enlarged meaning based on some purposive interpretation or test of proximity contended for by the Architect. Accordingly, the word "damage" in s.1(1) of the Act means the actual harm in question which gives rise to the liability. Here, the Employer's claim against the contractor concerned the late delivery of the building. The Employer's claim against the Architect further compromised the Employer's position as a result of the negligent grant of the extension of time. Accordingly, the harm or damage was not the same and on this basis the House of Lords unanimously rejected the Architect's appeal.

INDEX

ADJUDICATION

ADJUDICATION EXTRA

OTHER

STAFF DIRECTORY

Partners

Simon Tolson
stolson@fenwickelliott.co.uk
Mobile number: 07831 746586

Tony Francis
tfrancis@fenwickelliott.co.uk
Mobile number: 07770 731573

Richard Smellie
rsmellie@fenwickelliott.co.uk
Mobile number: 07770 537042

Jean Elliott
jelliott@fenwickelliott.co.uk
Mobile number: 07770 642487

Dr Julian Critchlow
jcritchlow@fenwickelliott.co.uk
Mobile number: 07899 891005

Chris Hough
chough@fenwickelliott.co.uk
Mobile number: 07990 515016

Victoria Russell
vrussell@fenwickelliott.co.uk
Mobile number: 07939 083466

Christopher Whittington
cwhittington@fenwickelliott.co.uk
Mobile number: 07768 892128

Jeremy Glover
jglover@fenwickelliott.co.uk
Mobile number: 07760 175672

Matthew Needham-Laing
mneedham-laing@
fenwickelliott.co.uk
Mobile number: 07760 175664

Consultant

Robert Fenwick Elliott
rjfe@fenwickelliott.co.uk

Partnership Manager

Neil Elliot
nelliot@fenwickelliott.co.uk
Mobile number: 07774 708880

Associates

Ted Lowery
tlowery@fenwickelliott.co.uk

Susannah Bailey
sbailey@fenwickelliott.co.uk

Jon Miller
jmiller@fenwickelliott.co.uk

Nick Gould
ngould@fenwickelliott.co.uk

John Denis-Smith
jdenissmith@fenwickelliott.co.uk

Karen Gidwani
kgidwani@fenwickelliott.co.uk

Assistants

Peter Webster
pwebster@fenwickelliott.co.uk

Trina Peters
tpeters@fenwickelliott.co.uk

Trainee Solicitor

Leigh Child
lchild@fenwickelliott.co.uk

Litigation Executives

Eddie Farren
efarren@fenwickelliott.co.uk

Stephanie Jones
sjones@fenwickelliott.co.uk

Secretaries

Sharon Allbright
sallbright@fenwickelliott.co.uk

Andrea Elliott
aelliott@fenwickelliott.co.uk

Caroline Harper
charper@fenwickelliott.co.uk

Marcia Lawrence
mlawrence@fenwickelliott.co.uk

Rachel Munro
rmunro@fenwickelliott.co.uk

Karyn Osgathorpe
kosgathorpe@fenwickelliott.co.uk

Janet Short
jshort@fenwickelliott.co.uk

Lisa Somers
lsomers@fenwickelliott.co.uk

Natalie Taylor
ntaylor@fenwickelliott.co.uk

Lisa Twinn
ltwinn@fenwickelliott.co.uk

Anne Wheston
awheston@fenwickelliott.co.uk

Rebecca Yardley
ryardley@fenwickelliott.co.uk

Assistant to Partnership Manager

Nicola Camp
ncamp@fenwickelliott.co.uk

Information Technology

Simon Cooper
scooper@fenwickelliott.co.uk

Reception

Helen Stanton
hstanton@fenwickelliott.co.uk

Melanie Ludlow
mludlow@fenwickelliott.co.uk

Administration Assistant

Mark Heaviside
mheaviside@fenwickelliott.co.uk

Clerks

Danny Swain
dswain@fenwickelliott.co.uk

Daniel McDonald
reception@fenwickelliott.co.uk