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TCC considers test in application for stay of execution of adjudicator's decision

Anrik Limited v A S Leisure Properties Limited (as yet unreported) 8 January 2010, TCC
This decision introduces the possibility that an application for a stay of execution of an adjudicator's decision may, in some circumstances, require investigation into the merits of the underlying claim. **Jonathan Lewis** represented the successful Claimant.

A S Leisure Properties Limited ("AS") applied for a stay of execution of an order for summary judgment in respect of an unsatisfied Adjudicator's decision. The underlying dispute before the Adjudicator was whether the parties had entered into an enforceable contract and, if so, whether Anrik Limited ("Anrik") was entitled to damages under that contract. To avoid any jurisdictional issues, the parties entered into an ad-hoc adjudication agreement.

The Adjudicator decided that there was an enforceable contract and awarded Anrik damages. AS refused to pay but conceded that Anrik was entitled to summary judgment. AS applied to stay the execution of that Judgment and issued a claim in the TCC for a declaration that there was no enforceable contract. AS claimed that there was a real risk that Anrik would be unable to repay the Judgment sum in the event that it was ordered to do so at the end of those proceedings because that there had been a significant deterioration in its financial position between the date of the alleged construction contract and the date of the Adjudicator's decision.

Anrik relied on *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC), where it was held that, even if it was probable that a party would not be able to repay the Judgment sum if so ordered, the court should not usually make an order for a stay of execution where its financial position was the same or similar to that at the date of the relevant contract. Anrik argued that "*relevant contract*" for these purposes was the contract which gave rise to the Judgment debt which, in the instant case, was the ad-hoc adjudication agreement, and not the alleged underlying contract.

Mr Justice Edwards-Stuart accepted Anrik's submissions. He held that whilst the "*relevant contract*" per *Wimbledon* would normally be the construction contract (which would in most cases expressly include an adjudication agreement), in the present case it was the ad-hoc adjudication agreement that had created the contractual mechanism for the creation of the Judgment debt. The Judge found that there had been no change in the financial position of Anrik between the date of the ad-hoc adjudication agreement and the hearing of AS's application for a stay of execution. AS's application was therefore dismissed.

Interestingly, the Judge held (albeit *obiter*) that, if he had been of the view that the Adjudicator's decision was unarguably correct, then, in the exercise of his discretion, he would not have granted a stay of execution regardless of any significant change in financial position. This appears to introduce a threshold test to be satisfied by an applicant for a stay. No previous decision supports the imposition of such a test, which would require an investigation into the merits of the underlying dispute, resulting in protracted applications. Such a threshold does not sit easily with the consistent decisions of the TCC and Court of Appeal that the Courts should simply enforce adjudicator's decisions irrespective of whether the decision was right or wrong.

Mr Justice Ramsey hands down landmark IT judgment

BSkyB Ltd & ors v HP Enterprise Services UK Ltd (formerly EDS Ltd) & ors [2010] EWHC 86 (TCC)
The TCC has recently handed down a landmark judgment in the field of IT law. Whilst not directly relevant to construction practitioners, this judgment reflects the growing reputation of the TCC. **Alex Charlton QC** and **Matthew Lavy** represented Sky in its titanic (and successful) 7 year fight against EDS.

In a ruling handed down on 26 January 2010, Mr Justice Ramsey found that EDS had deceitfully induced Sky into a £54 million contract for new CRM call centre technology. The Judge found that EDS's head of the CRM practice had been dishonest in his bid to win Sky's business. Sky succeeded in proving that EDS had made an actionable misrepresentation in order to induce it into a compromise agreement after the project had failed. Sky was also successful in proving that EDS was in breach of contract for the duration of its tenure as systems integrator with damages calculated by the Judge at £53 million. Further hearings will take place shortly to conclude quantum and other matters.

The case was one of the largest ever to come to trial. It involved over 500,000 documents, 70 witnesses and 110 days in Court, heard over a full judicial year. The 468-page judgment is a landmark decision in IT law representing the fullest judicial scrutiny of IT contracting.

No right to set-off a cross-claim where adjudication was contractual

RWE Npower Plc v Alstom Power Ltd [2009] EWHC B40
This judgment covers a range of interesting issues, but perhaps its most significant conclusion is that a responding party is unlikely to be entitled to set-off a cross-claim against an adjudicator's decision where the adjudication is contractual rather than statutory. **Sean Brannigan QC** represented the successful Defendant.

This was a case where the relevant contract was not a 'construction contract' as defined by the HGCRA 1996; the right to adjudicate was derived from a deed of variation to the relevant contract which referred to the Scheme for Construction Contracts 1998 ("the Scheme").

The Defendant was engaged under several contracts to carry out repair and maintenance works at the Claimant's power station. The Defendant brought forward a series of claims, and three adjudications took place. The third adjudication concerned the Defendant's claim for an extension of time and extra costs in respect of repair works to the boilers (the boiler contract). The Claimant challenged the adjudicator's jurisdiction on the grounds that there was no dispute because the Defendant's claim was submitted in correspondence conducted on a without prejudice basis; hence reliance on this evidence was in breach of the rules of natural justice. The Claimant also argued that some of the sums claimed by the Defendant in this third adjudication related to work carried out under a separate contract (the valves work), hence the adjudicator had no jurisdiction to determine this claim (which point the Defendant conceded in correspondence).

The adjudicator made no ruling on the jurisdictional challenge but proceeded instead to make an award which was (in part) in the Defendant's favour (no award was made in respect of the valves claim). The Claimant did not comply with the adjudicator's award, and instead issued proceedings in the TCC, which resulted in this trial of two preliminary issues. The preliminary issues were: (1) whether the adjudicator's decision in the third adjudication was unenforceable on the grounds that there was no dispute, alternatively that there was more than one dispute because the valves claims related to a separate contract; and (2) whether the Claimant was entitled to set-off against the adjudicator's decision its claim for liquidated damages arising out of alleged delay by the Defendant (on the basis that the HGCRA did not apply to the contract).

In respect of the first issue, the Defendant conceded that the Notice of Adjudication had included a claim that, correctly interpreted, was a claim under a separate contract; but argued that this error did not invalidate the Notice because the Notice was clearly stated to be a referral in respect of one contract (the boilers contract) only. HHJ Havelock-Allan QC agreed with this analysis, finding that the adjudicator had jurisdiction to determine whether the valves claim fell under the boiler contract.

Further, the Judge found that the adjudicator's reliance on the without prejudice correspondence as evidencing the crystallization of the dispute was not a breach of the rules of natural justice. He held that the correspondence was only privileged in so far as it referred to settlement negotiations; the privilege did not extend to the fact that a claim had been submitted and no agreement had been reached. The Judge therefore held that the adjudicator's decision was enforceable.

In respect of the second issue, the Judge held that the Claimant was not entitled to set-off its liquidated damages claim against the adjudicator's decision. Where the parties have agreed a contractual adjudication by reference to the Scheme, they are generally taken to have agreed to import the Parliamentary intention underlying the Scheme into the contract (in the absence of contrary wording). The Judge held that this Parliamentary intention is well known in the construction industry and the parties appreciated that they were adopting a regime that required adjudicators' decisions to be honoured without resort to the set-off of cross-claims.

The Claimant's application for permission to appeal was refused.

Adjudicators' decisions on their own jurisdiction will only exceptionally be binding

Supablast (Nationwide) Ltd v Story Rail Ltd [2010] EWHC 56 (TCC)
This decision of Mr Justice Akenhead suggests that the circumstances in which an adjudicator will be found to have made a binding determination on his own jurisdiction remain limited. **Lynne McCafferty** appeared for the successful Claimant.

During adjudication proceedings, the Defendant ("Story") challenged the adjudicator's jurisdiction on the grounds that the referral related to two separate sub-contracts, one for grit blasting & scaffolding in connection with refurbishment works on a viaduct; the other for steelworks at the same viaduct. The Claimant ("Supablast") argued that there was only one sub-contract which had subsequently been varied by the addition of steelworks to the scope of works, and that both parties had always treated their relationship as being governed by one sub-contract. The adjudicator agreed with Supablast and proceeded to make an award requiring Story to pay a sum of money to Supablast.

The issue came up again in the ensuing enforcement proceedings. Supablast relied on the decision of Mr Justice Akenhead in relation to similar facts in *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC), arguing that the present case was similarly one where "*substance and jurisdiction overlap*" such that it was within the adjudicator's jurisdiction to decide whether there was one sub-contract which was subsequently varied, or two separate sub-contracts.

Mr Justice Akenhead found for Supablast and enforced the award. He held that it was clear that there was only one sub-contract and that, in any event, the parties' conduct was such that there would be an estoppel by convention whereby the parties proceeded on the basis that there was only one sub-contract. He also held that this was a case where substance and jurisdiction overlapped and the adjudicator was acting within his jurisdiction in deciding that the steelworks were to be treated as having been instructed as a variation to the single sub-contract.

The interesting aspect of this judgment, however, is that, whilst the Judge followed his earlier decision in *Air Design*, his judgment downplayed the significance of that earlier decision. In *Air Design* the Judge had held that the "*over-riding*" consideration in his ruling was that the adjudicator had jurisdiction to make a binding determination on the contractual formation issue. In the present case, on the other hand, the overwhelming focus of the Judge's decision was on the contractual formation point: the Judge held that "*It is not necessary to decide if the adjudicator had jurisdiction to decide whether or not there were one or two Sub-Contracts because it is clear that there was only one Sub-Contract*".

Air Design has been the subject of a great deal of commentary, and it had been suggested that the decision indicated a greater readiness by the Court to find that decisions by adjudicators on their own jurisdiction were binding. Mr Justice Akenhead's decisions in the present case and in *Camillin Denny Architects v Adelaide Jones* [2009] EWHC 2110 (TCC) suggest that the significance of *Air Design* may have been overstated. In *Camillin*, Akenhead J stated that "*I am not convinced that [Air Design] is authority for any proposition other than that there*

may be cases in which adjudicators properly appointed have jurisdiction to resolve jurisdictional issues if and to the extent coincidentally those issues are part of the substantive dispute referred to adjudication". So whilst *Air Design* remains binding law, it should be approached with caution.

Adjudicator has jurisdiction to determine admissibility of evidence

Cynthia Jacques and Elise Jacques Grombach (t/a C&E Jacques Partnership) v Ensign Contractors Limited [2009] EWHC 3383 (TCC)
This was a claim for enforcement of an adjudicator's decision which raised issues of natural justice and the admissibility of evidence. **Alex Hickey** represented the successful Claimant.

Two sisters ("the Employer") engaged Ensign to develop a property. The parties engaged in several adjudications. In the fourth adjudication, the dispute was whether Ensign should repay some of the money previously paid because of defects in the works. The adjudicator (Mr Sutcliffe) ordered Ensign to repay a relatively modest sum (£28,764). Due to jurisdictional issues, the parties agreed to treat this decision as void and not binding, and it was not enforced.

The Employer subsequently referred a fifth dispute, relating to similar issues as the fourth, to a different adjudicator (Mr Jensen). In its response, Ensign attached great importance to passages in Mr Sutcliffe's decision. Mr Jensen wrote to the parties informing them that he would not be taking into account Mr Sutcliffe's decision, which he considered to be irrelevant, but would be basing his decision on his own view of the evidence and submissions. Ensign replied that Mr Jensen's failure to "*even read*" Mr Sutcliffe's decision was a breach of the rules of natural justice. Mr Jensen ordered Ensign to repay the more substantial sum of £96,868. Ensign refused to pay, and the Employer sought an order enforcing the award.

Mr Justice Akenhead held that the rules of natural justice had not been breached, and ordered that Mr Jensen's decision be enforced. The Judge held that, whilst an adjudicator must consider defences properly put forward, an adjudicator has jurisdiction to decide what evidence is admissible and, indeed, what evidence is "*helpful and unhelpful*". The Judge found that even if the adjudicator's decision to disregard evidence as inadmissible or of little or no weight was wrong in fact or in law, that decision was not impugnable as a breach of the rules of natural justice. He distinguished between a failure by an adjudicator to consider a substantive (factual or legal) defence on the one hand, and, on the other hand, an actual or apparent failure or omission to address all aspects of the evidence which go to support that defence. The latter would not be a breach of the rules of natural justice, the Judge found, because - given the deliberately speedy nature of adjudication - it is not practicable for every aspect of the evidence to be meticulously considered.

The Judge noted in particular that Mr Sutcliffe's decision was agreed to be null and void, so Mr Jensen's decision to ignore it was neither irrational nor perverse; and that Ensign had had the fullest opportunity to revise its submissions following the ruling to disregard the earlier decision.

This decision confirms that it will be a rare case in which a breach of the rules of natural justice is made out, and that adjudicators have considerable leeway in determining what evidence to take into account in reaching their decisions.

Principles for transfer of proceedings from Chancery Division to TCC

NATL Amusements (UK) Ltd & ors v White City (Shepherd's Bush) Ltd [2009] NPC 116
We reported in Construction Newsletter Issue No. 4 on *Collins & ors v Drumgold & ors* [2008] EWHC 584 (TCC), where the TCC issued much-needed guidance on the procedure and relevant principles for transfer of an action into the TCC, in that case from the County Court. In the present case, the TCC considered an application for transfer to the TCC from the Chancery Division. **Ben Pilling** represented the Defendants, who succeeded in their application for transfer.

The Defendants were the developers of Westfield Shopping Centre ("Westfield"). The Claimants entered into an agreement for a lease of a multi-screen cinema to be constructed by the Defendants at Westfield. The Claimants eventually rescinded the agreement on grounds of the Defendants' alleged non-compliance with the plans. The Claimants subsequently issued proceedings in the Chancery Division. The issues in the case were

two-fold: the primary issues concerned whether there had been a valid recission or accepted repudiation of the agreement; and it was common ground that the secondary issues related to TCC business. The Defendants applied to the TCC (in accordance with CPR 30.5(3)) to have the proceedings transferred to the TCC pursuant to CPR 30.5(2).

Mr Justice Akenhead granted the transfer application. He found that CPR 30.5(2) gives the TCC jurisdiction to transfer proceedings from the Chancery Division to the TCC in the exercise of its discretion to secure the just disposition of the case in accordance with the Overriding Objective. He held that, in exercising such discretion, the appropriateness of the courts to and from which transfer is sought to deal with the disputes between the parties is a highly material factor. In making its determination the Court must adopt a "*pragmatic approach*" to ascertaining where and within what areas of judicial expertise and experience the "*bulk or preponderance*" of the issues lies. If there is little or only an insignificant difference between the two venues, the discretion will generally be exercised in favour of the status quo, to reflect the fact that a claimant is entitled to issue proceedings in whatever division it thinks fit. Expedition and costs savings are material factors.

In the present case, the Judge ordered transfer on the basis that the very large bulk of the complex factual issues between the parties related to building and engineering and the practice of parties involved in design, construction and development. He held that the primary issues (which included the question of whether and if so to what extent estoppel or waiver can validate transactions) were not such as "*are peculiarly or exclusively within the normal or common boundaries of Chancery business*" and were common across the Divisions and within the specialist lists of the QBD.

TCC stays court proceedings pending payment of earlier adjudication award

Anglo Swiss Holdings Ltd & others v Packman Lucas Ltd [2009] EWHC 3212 TCC
In this case the TCC granted a stay of proceedings pending payment of an adjudicator's decision, and expanded on the rationale of excluding claims that had previously been adjudicated from the obligation to comply with the Pre-action Protocol. **Michael Taylor** represented the successful Defendant.

Packman Lucas Ltd ("Packman"), an engineering consultant, brought adjudication proceedings against Anglo Swiss Holdings Ltd ("ASH") for unpaid fees. ASH argued that no fees were due and that, in fact, they had overpaid Packman. The Adjudicator held that, in the absence of any notice of intention to withhold payment, it was not open to ASH to argue that no sums were due or that there had been overpayment. He therefore declined to consider the arguments about overpayment and ordered ASH to pay Packman.

ASH did not pay, and Packman succeeded in obtaining Judgment (by default) in enforcement proceedings. ASH continued to refuse to pay, and issued proceedings in the TCC to recover the overpayment from Packman. Packman applied for these proceedings to be stayed on two grounds: (1) pending payment of the Judgment; and (2) ASH had failed to comply with the Pre-action Protocol.

Akenhead J granted the application for a stay on the first ground. He held that the power and discretion in the CPR to stay any proceedings should be used "*sparingly and in exceptional circumstances*". Those exceptional circumstances included bad faith, and where the claimant has acted particularly oppressively or unreasonably. In the present case he held that, in issuing proceedings without honouring the Judgment, ASH was attempting to obtain an unfair advantage over Packman by (a) ignoring the contractual and statutory requirement to honour adjudicators' decisions until the final resolution of the underlying disputes and (b) avoiding the 'pay now argue later' approach adumbrated by the HGCRA. He found that this would alter the commercial balance between the parties. He also found that ASH was acting in bad faith because it was putting forward claims which it either knew were *"significantly exaggerated*", or (at the very least) in respect of which it had no knowledge of the merits.

As to the second ground for the application, Paragraph 1.2(iv) of the Protocol provides that a claimant shall not be required to comply with the Protocol to the extent that the proposed proceedings relate to "*the same or substantially the same issues*" as had been the subject of recent adjudication. Packman argued that this exclusion did not apply in the present case, and ASH ought to have complied with the Protocol, because its claim related to overpayments which the Adjudicator had refused to consider. Akenhead J rejected that submission. He commented that part of the logic for this exclusion was that, in the adjudication process, the

parties will have exchanged information about their claims or defences along the lines of the Letter of Claim and Response called for in the Protocol, and therefore it would be "*unnecessary and burdensome*" to repeat that process. He found that the parties had exchanged evidence and argument on the issue of overpayment, albeit the Adjudicator had concluded that it was unnecessary to decide that point.

This decision is therefore a robust reinforcement of the principle of 'pay now, argue later'.

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