Construction

successful, commercial, forward looking

Construction Newsletter
Issue No. 13

TCC grants injunction to stop adjudication proceedings

Mentmore Towers Ltd & ors v Packman Lucas Ltd [2010] EWHC 457 (TCC)
In this case, the TCC continued its robust reinforcement of the adjudication mantra: 'pay now, argue later'. The Claimants ("Mentmore") issued adjudication proceedings, which were not materially different from claims that, earlier this year, had been stayed pending payment of an adjudicator's decisions (see [2009] EWHC 3212 (TCC) featured in Issue No. 11). Edwards-Stuart J granted an injunction restraining the fresh adjudications and adopted the reasoning in Akenhead J's previous judgment. **Michael Taylor** again represented the successful Defendant ("Packman").

In the earlier action, Akenhead J had held that the Court's discretion to stay proceedings under the CPR should be used *"sparingly and in exceptional circumstances"*. He found that such exceptional circumstances arose on the facts, for two reasons. First, Mentmore was attempting to obtain an unfair advantage over Packman by ignoring the contractual and statutory requirement to honour adjudicators' decisions until the final resolution of the underlying disputes. This behaviour was judged *"unreasonable and oppressive"*. Secondly, Mentmore was acting in bad faith by 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.

Mentmore did not meet any of the conditions to lift the stay imposed by Akenhead J, and, instead, issued fresh adjudication proceedings. The only difference between the stayed claims and the fresh adjudication proceedings was quantum, which had been reduced by 50% following expert reappraisal.

Packman applied for an injunction to restrain the fresh adjudication proceedings, asking the Court to exercise its discretion under s.37 of the Senior Courts Act 1981 on the grounds that Akenhead J had previously stayed the same claims. Mentmore accepted the Court had the power to do so, but said that the power should not be exercised in the circumstances of the case. It placed heavy reliance on s.108 of the HGCRA, which allows parties to refer a dispute to adjudication *"at any time"*.

Edwards-Stuart J granted the injunction on the basis that:

(a) There was no difference in principle between granting a stay of a claim and granting an injunction to prevent the pursuit of an adjudication. They are different processes to the same end. The same criteria should be applied in each case (although their application might have different outcomes in the context of litigation or adjudication).

(b) For all the reasons that Akenhead J had granted a stay of the litigation (save for bad faith which was no longer present given the expert's more considered view of quantum), the adjudications should be injuncted.

This decision may lead to an increase in injunction applications to prevent adjudications. It is unclear whether this will meaningfully restrict parties' right to adjudicate. Few cases will involve such exceptional circumstances; here, Mentmore's actions were twice described by the Court as *"unreasonable and oppressive*", and Akenhead J found bad faith. Mentmore's application for permission to appeal was refused.

Enforcement of adjudicator's decision refused where adjudicator failed to consider set-off

***Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC)**
This was one of those rare cases where enforcement of an adjudicator's decision was refused by the TCC. Mr Justice Coulson stressed that, if an adjudicator deliberately fails to address a material issue raised by the defendant, his decision is likely to be unenforceable. **James Bowling** represented the successful Defendant.

The Claimant ("Pilon") applied for summary judgment to enforce an adjudicator's decision relating to the failure by the Defendant ("Breyer") to satisfy an interim application for payment for certain batches of works. Breyer claimed to be entitled to set off sums it said constituted an over-payment in relation to earlier batches. The adjudicator concluded that he did not have jurisdiction to consider Breyer's argument in relation to the alleged over-payment because the notice of adjudication was limited to specific batches of works. Breyer claimed this amounted to a breach of natural justice and refused to pay the award.

Mr Justice Coulson held that the adjudicator's decision on his own jurisdiction was not binding. Parties may ask an adjudicator to investigate the issue of jurisdiction and state his conclusion. But unless they have also agreed to be bound by his decision it will not be determinative and the challenger can defeat any subsequent enforcement proceedings by showing a respectable case that the adjudicator had reached an erroneous conclusion as to jurisdiction. There must be an express or implied agreement between the parties that the adjudicator's decision on jurisdiction is to be binding. In the present case, Breyer had made clear that jurisdiction was in dispute from the outset.

The Judge accepted Breyer's argument that the adjudicator had taken an erroneously restrictive view of his own jurisdiction, which amounted to a material breach of natural justice. Where an adjudicator deliberately chooses not to address the essence of the dispute before him, by declining to consider the defence and/or legitimate counterclaim, he will usually be deemed to have answered the wrong question entirely. However, that approach is not automatically applicable just because the adjudicator deliberately chose not to have regard to a particular sub-issue, no matter how trivial. Mr Justice Coulson said he was "*a little uneasy*" about the decision in *Quartzelec v Honeywell* (covered in Issue 6) as being not "*obviously compatible*" with the general rules as to enforcement. He warned it is wholly illegitimate for a defendant to comb through the decision to try and find some aspect of the dispute which the adjudicator did not expressly address in order to resist enforcement.

The adjudicator must attempt to answer the question referred to him, which may consist of sub-issues. If he has endeavoured generally to do so, his decision is enforceable. If he fails to address an issue because he has taken an erroneously restrictive view of his jurisdiction that may make his decision unenforceable either on grounds of jurisdiction or natural justice. The failure must be deliberate. And the breach must be material. A factor which may be relevant is whether the claiming party has brought about the error.

Mr Justice Coulson held this was not a case in which the decision was severable. However, he acknowledged that it may soon be time for the TCC to review whether, where there is a single dispute, if it can be shown that a jurisdictional or natural justice point is worth a fixed amount which is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered.

Although this award was not enforced, the judgment shows that the TCC is taking an increasingly hard line against attempts to prevent enforcement on jurisdictional grounds. The doubt expressed about *Quartzelec* will make it difficult for respondents to rely on failures by the adjudicator to consider trivial sub-issues. Pilon's strategy of limiting the scope of the referral notice then telling the adjudicator he did not have jurisdiction to consider Breyer's defence was specifically criticised.

Court of Appeal refuses to rescue contractor's 'pay when paid' clause

Shepherd Construction Ltd v William Hare Ltd [2010] EWCA Civ 283
This case emphasises that any clause seeking to exclude or limit liability (such as a 'pay when paid' clause) will be construed very strictly against the party seeking to rely on it. The Court will be reluctant to rescue such a clause from poor drafting. **Sean Brannigan QC** represented William Hare Ltd ("WHL"), one of the successful respondents.

At first instance, Coulson J decided that the insolvency of Trinity Walk Wakefield Ltd ("Trinity"), the developer, was insufficient to trigger the terms of a 'pay when paid' clause in the subcontract between the main contractor, Shepherd Construction Ltd ("SCL"), and its steel fabrication and erection subcontractor, WHL. This was the first notable decision on such clauses, which are outlawed by s. 113 of the HGCRA except in cases of upstream

insolvency.

The clause defined Trinity's insolvency by reference to four possible events. On the facts, the relevant event was *"on the making of an administrative order against it under Part II of the Insolvency Act 1986"* (i.e. by order of the court). By the Enterprise Act 2002, however, the Insolvency Act 1986 had been amended to include both administration through court order and two 'self-certifying' routes. Coulson J held the 'pay when paid' clause did not apply upon Trinity's 'self-certified' administration as the express wording of the clause required a court order.

On appeal, SCL relied heavily on principles of construction derived from the speeches of Lord Hoffmann in *ICS v West Bromwich Building Society* [1998] 1 WLR 896 at 913 and *Chartbrook Limited & another v Persimmon Homes Limited & another* [2009] 1 AC 1101 at paragraphs 14 and 15, which relate to the limited circumstances where the court can be persuaded *"something must have gone wrong with the language"* and adjust a contractual clause accordingly.

Although it was admitted that the clause was workable without alteration, SCL argued that a reasonable person would have appreciated that something had gone wrong with the drafting and that the words of the amending legislation were intended to be inserted. It was suggested this was a sufficiently strong case to depart from the express wording of the clause (i.e. ignore the word 'order') and correct an apparent mistake.

Waller LJ, giving the only reasoned judgment, dismissed the appeal and praised Coulson J's judgment as *"a model of clarity"*. He was *"very doubtful"* that the principles which SCL relied upon were applicable. Waller LJ considered it incumbent on a main contractor to draft the clause in accordance with insolvency as defined by legislation. If he mis-drafted the clause, the judge saw *"no reason why, however obvious it was that he had mis-drafted the provision, the principles identified by Lord Hoffmann would come to his rescue."* This position was reinforced by the fact that the clause remained workable.

This case reiterates *"the dominant principle"* that clear wording is required when a party seeks to rely on a clause to relieve itself of legal liability.

Principles for transfer of proceedings from the Mercantile Court to the TCC

CFH Total Document Management Ltd v (1) OCE (UK) Ltd (2) National Australia Group Europe Ltd [2010] EWHC 541 (TCC)
This judgment clarifies the principles to be applied when the Court considers an application to transfer proceedings, particularly where the transfer sought is from the Mercantile Court to the TCC. **Alex Charlton QC** represented the Second Defendant, a group comprising several well-known high street banks.

The claim arose out of a contract for provision of software by the Claimant to enable the banks to chart customers' history for the purposes of the OFT bank charges litigation. The claim was started in Mercantile Court in the Bristol District Registry.

The Second Defendant applied to the TCC for the action to be transferred to the TCC in London. It did so on three grounds: (a) the dispute's subject matter was peculiarly within the experience of the TCC judges in London; (b) the size, complexity and importance of the case justified a listing before a High Court Judge; and (c) London was the most convenient and expeditious forum for dealing with the case, both in terms of the trial and case management.

Mr Justice Edwards-Stuart considered that the application engaged both CPR 30.2 (as an application to transfer from a district registry to the RCJ) and CPR 30.5 (as an application to transfer from one specialist list to another specialist list). This made the appropriate court for the application uncertain. Under CPR 30.2, the application must be made to the district registry in which the claim is proceeding, whereas CPR 30.5 allows an application to a judge dealing with the claims in the specialist list in either location. Edwards-Stuart J clarified that, in this case, the requirements of both rules could only be met if the application was made to a judge of the Mercantile Court in the Bristol District Registry. Edwards-Stuart J nevertheless entertained the application, stating a refusal to do so after hearing all the parties would be inconsistent with the overriding objective.

As for the relevant principles to be applied on an application for transfer, the judge agreed with Akenhead J's judgment in *NATL Amusements (UK) Ltd & ors v White City (Shepherd's Bush) Ltd* [2009] NPC 116 at paragraphs 33 and 34 (covered in Issue No. 11). Edwards-Stuart J stated that *"the suitability of the court, in terms of the expertise of its judges, to deal with the subject matter of a particular claim is the single most*

important consideration." He recognised that it was *"essential"* in many types of case that the trial judge understands the practices, subject matter and terminology of the trade and industry concerned. Where differences between the suitability of different courts are less marked, however, he considered that secondary factors such as expedition and costs may become decisive.

Applying these principles to the facts, the judge distinguished the case from one where the software did not work, and where the court is being invited to investigate why. Such cases, he stated, required a trial judge with considerable understanding of the technical issues. Here, however, only a reasonable understanding of the nature of the work was needed. Accordingly, the TCC was merely an appropriate court, not the only or most appropriate one. Turning to the less important considerations of cost and convenience, he considered the balance was *"probably only marginally*" in favour of London. This was insufficient to justify depriving the Claimant of its chosen venue.

The question of whether the case should be listed before a High Court Judge was considered a matter best reserved to the Mercantile Judge in Bristol. It was open to the Mercantile Judge to transfer the case to the district registry's TCC list and then to refer the case to the Judge in Charge of the TCC list in London for a decision on case management and trial (in accordance with para 3.7.5 of the TCC guide). If merited, a High Court Judge assigned to the TCC could then sit in the Bristol District Registry. Edwards-Stuart J reiterated that it will be generally more appropriate for a High Court Judge to case manage or try a case at a Regional Centre than to transfer the case to London.

TCC trial proceeds despite an Interim Order under the Insolvency Act 1986

(1) Miss Selby Hall (2) Mr Philip Shivers v Mr Jan Van Der Heiden [2010] EWHC 537 (TCC)
In this case, Coulson J refused to allow a Defendant's Interim Order pursuant to s.252 of the Insolvency Act 1986 to upset a trial. He held that it was open to the High Court to allow the trial to continue, even though it had not granted the Interim Order. **George Woods** appeared for the successful Claimants.

This was a building claim brought by employers against their contractor for damages arising from breach of contract. Without warning, the Claimants were informed on the last working day before the trial that the Defendant had applied for an Interim Order under s.252 of the Insolvency Act 1986 to give him protection from his creditors and to assist him in promoting an Individual Voluntary Arrangement as an alternative to bankruptcy. The Interim Order was granted later that day by Swindon County Court. The Claimants sought to clarify the situation, but the Defendant and his representative proved uncommunicative.

The Claimants attended the TCC on the first day of trial and sought permission pursuant to s.252 of the Insolvency Act 1986 to continue the proceedings. The Defendant and his representative had been notified of trial (it had been fixed for 5 months) and of the Claimants' determination to continue. The Defendant and his representative failed to attend.

The Defendant's representative had asserted in correspondence that, for proceedings to continue, the Claimants had to make their application to the court that made the Interim Order. Coulson J considered this proposition and rejected it on the bases that: (a) there was nothing in the Insolvency Act 1986 which indicates that, if an interim order is made by a county court, the High Court is in some way excluded from exercising any jurisdiction under section 252; (b) directly applicable case law, including the decision of Court of Appeal in *Clarke v Coutts & Co* [2002] EWCA Civ 943, makes plain that he had the necessary jurisdiction; and (c) properly construed, the Insolvency Act 1986 itself provides the necessary jurisdiction.

Alternatively, Coulson J commented that it would be entirely consistent with the overriding objective to simply transfer the aspect of the bankruptcy proceedings which is related to the trial from Swindon County Court to the TCC in order to allow the trial to continue. This could be done using Rule 7.11 of the Insolvency Rules, which provides the High Court with a general power of transfer.

Coulson J considered that the Claimants' application was overwhelming on the merits. The costs expended by the Claimants in preparation for trial made an adjournment financially disastrous for them. Meanwhile, the Defendant and his representative's conduct amounted to *"a manipulative, last-minute, high-stakes attempt to avoid the consequences of [the trial]."*

The two-day trial proceeded without the Defendant present or represented. Coulson J (in [2010] EWHC 586 (TCC)) found for the Claimants.

No breach of natural justice where late submissions are not considered in detail

AMEC Group Ltd v Thames Water Utilities Ltd [2010] EWHC 419 (TCC)
This was a claim for enforcement of an adjudicator's decision which raised issues of jurisdiction and natural justice. Coulson J adopted a pragmatic approach, finding that adjudicators are not bound to respond to every detail of a late submission. **Anthony Speaight QC** represented the Defendant ("Thames Water").

The Claimant ("AMEC") was engaged as contractor by Thames Water to carry out construction and maintenance work under a Framework Agreement. It was common ground that this was not a construction contract. Each item of work was carried out under a separate contract, leading to over 300,000 contracts being placed under it. The Framework Agreement provided a universal payment mechanism and incorporated the ICE Adjudication Procedure 1997.

AMEC referred to adjudication a dispute over its entitlement to an aggregated claim for measured works and Thames Water's entitlement to withhold money. The adjudicator decided in favour of AMEC, who then sought enforcement by way of summary judgment.

Coulson J gave judgment for AMEC. Whilst the decision adds little to general adjudication principles, the judge made some interesting observations.

After consideration of the authorities, he stated that there was no difference in principle between the status of a contractual and statutory adjudication. In terms of presentation, he suggested that: *"at least in general terms, the greater the detail that a defendant invites the court to consider in resisting an application of this kind, the less likely it must be that it is the kind of "plain case" necessary to avoid enforcement."*

Coulson J held that the adjudicator had jurisdiction to deal with the dispute referred to him. He found that a single dispute arose under the Framework Agreement, not (as Thames Water argued) multiple disputes under distinct individual works contracts. The Framework Agreement was sufficiently widely drafted. Thames Water's submission that each contract had its own dispute resolution provision was commercially unreal. It would prevent an aggregate claim, which would be replaced instead by *"hundreds of separate adjudications, each for a trifling sum, each arising under an individual works contract"*.

Thames Water's natural justice challenge was on three grounds: (a) the dispute was too big and too complex to be properly resolved in adjudication; (b) the adjudicator failed to have regard to Thames Water's further response (which had been served just over two days before he had to complete his final decision); and (c) the adjudicator failed to have regard to the entirety of Thames Water's cross-claims/set off in respect of certain street works.

The Judge held that none of these grounds amounted to a breach of the rules of natural justice. He stated that size/complexity will not of itself be sufficient to found a complaint based on breach of natural justice. In relation to Thames Water's further response, he held that *"in an adjudication with a tight timetable, an adjudicator is not obliged to consider in detail a second round submission or pleading, served very late in the adjudication process. His overriding obligation is to complete his decision within the time limit."* Coulson J observed that (unless the contract or the relevant adjudication rules expressly permit it) parties have no entitlement to respond to every submission put in by the other party. Regardless, he found that the adjudicator did in fact have regard to the further response.

Editor: Lynne McCafferty
Lmccafferty@4pumpcourt.com