Construction Newsletter
Issue No. 2

Adjudication: Oral variation to contract will not affect right to adjudicate when the adjudication agreement is contractual

Treasure & Son Ltd v Martin Dawes [2007] EWHC 2420 (TCC)
Michael Taylor was instructed for the Claimant in one of the first cases to come before Mr Justice Akenhead, an adjudication enforcement in which a number of jurisdictional challenges were raised.

Mr Dawes had engaged Treasure to carry out extensive refurbishment works at his home pursuant to a construction contract that incorporated the JCT Standard Form of Prime Cost Contract (1998 Edition with Amendments 1 and 2). Mr Dawes paid Treasure some £14million, but - after completion of the works – refused to pay a further £1.5million claimed by Treasure to be outstanding. Of that sum, nearly half related to work carried out after practical completion. The dispute was referred by Treasure to adjudication, and the adjudicator ordered that Mr Dawes pay Treasure approximately £1million. The adjudicator's decision was unsigned, although it was sent to the parties by cover of a signed letter.

Mr Dawes refused to pay, and Treasure applied for summary judgment. During the enforcement proceedings it was argued on behalf of Mr Dawes that the adjudicator lacked jurisdiction because (a) the work alleged to have been completed after practical completion was carried out pursuant to an oral variation to the written contract and (b) the adjudicator had not signed his decision. Mr Dawes also argued that, if his defence failed, there should a stay of execution due to Treasure's financial position.

Mr Justice Akenhead granted summary judgment. He found that there had been no oral variation to the contract but held that, in any event, where, as here, there was a contractual agreement to adjudicate (as opposed to a statutory right to adjudicate), the entitlement to adjudicate was not affected by the fact that the terms of the original contract had been orally varied. Mr Justice Akenhead's decision is also of interest because he expressly disapproved of HHJ Bowsher QC's decision in *Grovedeck Ltd v Capital Demolition Ltd* [2000] EWHC 139 regarding the interpretation of section 107(5) of the HGCRA 1996. Section 107(5) provides that failure to deny an agreement in writing alleged in written submissions constitutes an agreement in writing to the effect alleged. Mr Justice Akenhead disagreed with HHJ Bowsher's view that section 107(5) is ambiguous, and therefore ruled that in construing section 107(5) it was not permissible to consider Parliamentary debate pursuant to *Pepper v Hart* [1993] AC 593. Accordingly, he found that Mr Dawes had failed to deny the oral variation contended for by Treasure in written submissions during the adjudication proceedings, and hence Mr Dawes' Response constituted an agreement in writing under section 107(5).

Further, it was held that the adjudicator's failure to sign his decision did not affect its validity as a matter of contractual interpretation. The contract simply provided that the adjudicator had to produce "*his decision*", and there was no suggestion the decision was not his own. Lastly, Mr Justice Akenhead rejected Mr Dawes' application for a stay of execution on the basis that Treasure was not insolvent, was a long-established company, and its accounts showed a reasonably substantial turnover.

Arbitration: When procedural defects in the establishment of an arbitral tribunal will justify a jurisdictional challenge to the award

Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 1148
Anthony Speaight QC and **Kate Livesey** recently succeeded on an appeal to the Court of Appeal relating to the appointment of arbitrators. Although this case concerned an IT contract, the Court of Appeal's

decision on section 67 of the Arbitration Act 1996 is of general interest to those referring construction disputes to arbitration.

Sumukan had entered into a contract with the Commonwealth Secretariat to create a prototype website for the government of Namibia. The contract included a term providing for disputes to be referred to the Commonwealth Secretariat Arbitral Tribunal ("CSAT") for settlement by arbitration in accordance with CSAT's "Statute" (a set of terms agreed upon by Commonwealth Governments). In 2003, a contractual dispute was referred to CSAT as to title to the prototype website. The Tribunal handed down an Award in April 2005 ruling that title to the prototype website rested with the Commonwealth Secretariat.

Sumukan challenged the Award under ss.67, 68 and 69 of the Arbitration Act 1996. Sumukan's challenge under s.69 failed before the Court of Appeal in an earlier decision ([2007] 2 Lloyds Rep 87). Lord Justice Toulson sitting in the Commercial Court later dismissed Sumukan's challenges under s.67 and s.68 (2007 1 Lloyds Rep 370), and Sumukan appealed against his decision. **Anthony Speaight QC** and **Kate Livesey** were instructed for Sumukan before the Court of Appeal, who allowed Sumukan's appeal under s.67, finding it unnecessary to determine the arguments in relation to s.68.

The facts relevant to the Court of Appeal's determination under s.67 are as follows. It transpired, upon disclosure provided by the Commonwealth Secretariat after the Award was handed down, that CSAT's President had not been appointed in accordance with the appointment procedure in the Statute, having been appointed by the Secretary General without any prior consultation with Commonwealth Governments. The Commonwealth Secretariat argued that (a) the failure to consult was a procedural defect of a kind that should not invalidate the Tribunal's jurisdiction and (b) Sumukan should be precluded by s.73 from challenging the Tribunal's jurisdiction because it could with reasonable diligence have discovered the facts relating to its challenge prior to the handing down of the Award.

Allowing Sumukan's appeal, the Court of Appeal held that if arbitrators were to be selected from a panel, and if there was a procedure for the appointment of the panel aimed at guarding against any apparent lack of independence, a substantial failure to comply with that procedure should affect the jurisdiction of the Tribunal itself. Sumukan was *prima facie* entitled to have the agreed procedure for appointment of any arbitrator complied with. Non-compliance having been established, it was for the Commonwealth Secretariat to show that the failure to comply was inconsequential in some way. The Court of Appeal held that there was no room for applying in the arbitration field the common law *de facto* doctrine which, in some circumstances, validates the acts of an apparent and reputed judge. Where one party had failed to abide by the procedure required for appointing the President it lay ill in his mouth to seek to rely on any *de facto* principle. Further, it was held that it would be wrong to construe s.73 so as to hold that Sumukan could with reasonable diligence have discovered facts that it neither knew nor believed nor had grounds to suspect. Sumukan was entitled to assume that the Commonwealth Secretariat would not suggest a particular Tribunal unless the procedures had been complied with.

This decision, which is to be reported, is the fourth in a line of reported decisions generated by Sumukan's challenge to CSAT's Award in its proceedings against the Commonwealth Secretariat. The three judgments of this unanimous decision set out the principles which will determine whether procedural defects in the establishment of an arbitral tribunal will justify a jurisdictional challenge to the award – a topic on which there is little English authority. It is also the first case to consider the possibility that the doctrine of a "judge *de facto*" could be extended into a theory of an arbitrator *de facto*.

Payment provisions in JCT Form of Contract to be considered by House of Lords

Reinwood Ltd v L Brown & Sons Ltd [2007] EWCA Civ 601
In Issue No. 1 we reported on this Court of Appeal decision on the relationship between clauses 24 (damages for non-completion), 25 (extension of time), 28 (the two-stage mechanism of determination by the contractor for "specified default" by the employer) and 30 (certificates and payment) of the standard JCT Form of Contract. **Alexander Hickey**, who represented the contractor at first instance and before the Court of Appeal, has obtained permission to appeal this decision to the House of Lords. The House of Lords is due to hear this appeal early in the New Year.

Canary Wharf Tower Crane Litigation Settled

The catastrophic collapse of a tower crane at Canary Wharf shortly on Sunday 21 May 2000 caused death and personal injury and extensive property damage both to the construction site on which the tower crane stood (Docklands Site 2, better known today as the HSBC Tower) and neighbouring properties. **James Cross QC** acted for the various owners of neighbouring properties damaged by the collapse, and their insurers, in pursuing substantial claims for damages for negligence against the owners and operators of the crane (Hewden Tower Cranes Limited) and against the crane's German designers and manufacturers (Wolffkran GmbH).

The crane collapsed while it was being "climbed" (or "self-climbed"), an operation by which the height of a tower crane is increased so that it keeps pace with the height of the building under construction. (In this case, the crane was being climbed over 100 m above the ground.) The operation involved the use of a climbing frame (or climbing gear) which was able to lift the whole of the top of the crane away from the mast below to a height sufficient to allow a new mast section to be put in and attached. The focus of the litigation was the causation of the collapse and, in particular, the reasons why the guide wheels on the climbing frame became disengaged from the mast.

Due to be tried next May 2008 by HHJ Peter Coulson QC in the TCC in London, at the same time as the trial of Hewden's own separate multi-million pound claims against Wolffkran for damages arising out of the collapse, this long-running litigation has recently been settled following a recent mediation in which **James Cross QC** was actively involved.

Editor: Lynne McCafferty,
Lmccafferty@4pumpcourt.com