Construction

successful, commercial, forward looking

Construction Newsletter
Issue No. 4

Severability of Adjudicators' Decisions

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)
Obiter comments in this recent decision of Mr Justice Akenhead have challenged received wisdom on whether an adjudicator's decision is severable for the purposes of enforcement. Until now it was considered reasonably well-established law that, if an adjudicator was in breach of natural justice or exceeded his jurisdiction, his decision would be unenforceable in its entirety, and it would be impossible to sever the good from the bad. However, in this case Mr Justice Akenhead held that a decision *could* be severable if two or more disputes have been determined and the challenge only goes to one of those disputes. This controversial decision calls into question the established law on adjudication enforcement.

The Defendant had engaged the Claimant to carry out demolition and piling works under a JCT contract. A number of disputes arose over the Claimant's entitlement to extensions of time. In adjudication proceedings, the Claimant claimed *inter alia* an EOT during a 13 week period together with loss and expense (including prolongation costs relating to piling works). **Sean Brannigan** was instructed by the Defendant. The Defendant argued that the losses claimed could not be recovered because there were no material piling works during that 13 week period, and any prolongation costs were incurred during a later period. The adjudicator awarded the Claimant prolongation costs for the later period, concluding that he was not bound by the 13 week EOT application when determining the period for which prolongation costs were recoverable.

The Defendant refused to pay the award, and the Claimant sought to enforce the adjudicator's decision. The Defendant contended that the adjudicator had exceeded his jurisdiction and failed to comply with the rules of natural justice by resolving an issue relating to delay during a period other than the 13 week period identified by the Claimant, and failing to give the Defendant a reasonable opportunity to make submissions and adduce evidence in relation to the costs incurred in this later period.

In a decision handed down on 27 February 2008, Mr Justice Akenhead reviewed the case-law on natural justice breaches by adjudicators, and concluded that any breach must be material and more than peripheral. The breach will be material if the adjudicator has failed to bring to the parties' attention a particular point which is either decisive or of considerable importance to the outcome of the dispute, and is not irrelevant or peripheral. This is a question of degree. There will be no breach if one party has argued a point and the other party has not responded.

Mr Justice Akenhead gave judgment for the Claimant. Enforcing the adjudicator's award, he found that the logical consequence of the Defendant's defence on delay was a recognition that there might be different losses during a later period. It would offend reason that the Defendant could argue that the losses were incurred in a later period, but avoid the liability for those later losses. The adjudicator was not limited to considering a loss and expense claim for 13 specific calendar weeks. Mr Justice Akenhead concluded that here was no breach of the rules of natural justice because the Defendant had sufficient opportunity to address the adjudicator on the quantum ramifications of there being a delay finding which reflected its own assertion that any prolongation occurred during a later period.

The most interesting aspect of this judgment, however, is the obiter comments Mr Justice Akenhead made on the question of whether parts of an adjudicator's decision could be enforced and other parts not, where the adjudicator's want of jurisdiction or breach of natural justice related only to one part of the decision. He noted that there was relatively little authority on this point, but cited Keating on Construction Contracts (8th ed.) para 17-045 which stated that in cases of breach of natural justice the whole decision will be unenforceable, and it would not be possible to sever good from bad. Mr Justice Akenhead held that this was incorrect. Considering a paper by Peter Sheridan and Dominic Helps ([2004] 20 Const. LJ 71), Mr Justice Akenhead found obiter that if a decision properly addressed more than one dispute, a successful challenge on grounds of jurisdiction or natural justice on the part of the decision which deals with one dispute will not undermine the validity and enforceability of the part of the decision which deals with the other(s), unless the decision is simply not severable in practice, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted.

TCC issues guidelines on transfer of proceedings from County Court

Collins & ors v Drumgold & ors [2008] EWHC 584 (TCC)
The TCC has issued much-needed guidelines on the procedure and relevant principles for transfer of an action into the TCC. There was previously no reported authority on this point. In a judgment dated 12 March 2008, Mr Justice Coulson ordered the transfer of an action from the County Court to the TCC, emphasising that the complexity of the factual and legal issues, and not the value of the claim, was the key consideration. **Lynne McCafferty** was instructed for the applicant, the Second Defendant.

This was a claim in the county court (worth around £300,000) for loss and damage arising from alleged heave damage to several properties as a result of allegedly defective foundations. On 3 January 2006 the owners of the properties brought claims under the Defective Premises Act 1972, breach of contract and negligence against the contractor (D2), the architect, the consulting structural engineer, and the conveyancing solicitors who dealt with the sale of one of the properties. There were various stays to enable the parties to comply with the pre-action protocol, and the litigation was protracted due to the Claimants' failure properly to particularise its claim, which resulted in various amendments to the pleadings and the issue of further information.

D2 applied to the TCC for an order transferring the claim from Cambridge County Court to the TCC under Section 41(1) of the County Courts Act 1984. The application was made in accordance with CPR rule 30.5(3), which requires that an application for the transfer of proceedings to or from a specialist list must be made to a judge dealing with claims in that list. The other Defendants supported the application. The Claimants resisted the application and, although they declined to attend the application hearing in the interests of saving costs, they set out their reasons in correspondence to the Court. One of the objections initially raised by the Claimants was that the application ought to have been made to Cambridge County Court.

Mr Justice Coulson confirmed that D2 had followed the correct procedure by making the application on notice to the TCC. He found that, of the matters set out in CPR 30.3(2) which a court hearing an application for transfer must consider, those of most relevance to the TCC were (a) financial value; (b) convenience; (c) availability of specialist judge; (d) complexity of facts, legal issues, remedies or procedures involved; and (e) the importance of the outcome to the public. Considering these factors, Mr Justice Coulson held that the TCC's general approach would be to identify in the first instance whether the claim was appropriate for transfer to the TCC by reference to paragraph 2.1 of the practice direction to CPR Part 60, which sets out the types of claim which are suitable for the TCC. If the claim was appropriate, the TCC would consider whether the financial value and/or complexity of the claim meant that the case should be transferred to the TCC in accordance with the overriding objective. He noted that "financial considerations can be of some importance, but what will often be critical is the view that the court takes of the complexity of the issues in the action itself…the more complex the dispute, the greater must be the benefit of transferring the action to the TCC". He observed that questions of convenience were unlikely to be of great significance if the county court and the relevant TCC were not far apart geographically.

Granting D2's application, Mr Justice Coulson found that the present case was a "prime example" of the sort of work habitually undertaken in the TCC, and noted that this was a complex case involving interrelated issues of law, geotechnics, and standards of care and professional duty. He considered it to be "overwhelmingly a case for transfer". Although the court must bear in mind that High Court cost levels will be higher than those in the county court, Mr Justice Coulson noted that seven experts had already been instructed, and considered that a

specialist court like the TCC ought to be able, with careful case management, to reduce costs. He also considered that the timing of the application should be taken into account, and accepted that although the proceedings had been extant for some time, in fact pleadings had only recently closed and neither witness statements nor expert reports had yet been exchanged. In those circumstances he ruled that the application had not been made too late.

This judgment is useful because it sets out, for the first time, the particular factors the TCC will take into account when considering an application for transfer, and the relative importance of those factors.

Court will adopt pragmatic and commercially realistic approach to pre-action protocol

Orange Personal Communications Services Ltd v Hoare Lea [2008] EWHC 223 (TCC)
This was the Defendant's application for a stay of proceedings pending the implementation of the pre-action protocol process. **Rachel Ansell** was instructed by the Defendant. Mr Justice Akenhead ruled that the Court should adopt a pragmatic and commercially realistic approach to such applications.

The Claimant engaged Kier Regional Ltd (represented by **Jeremy Nicholson QC** in separate proceedings) to carry out fitting-out works at its premises. Kier subcontracted the provision of an air conditioning system to Haden Young Ltd. The Claimant retained the Defendant to design the M&E engineering works (including, apparently, the air con system). Following the flooding of the building, the Claimant brought an action against Kier and Haden Young, claiming that the flood was caused by Haden Young's failure to install a compression joint in the air con system properly. In their defence, Kier and Haden Young claimed that the flood was caused by a design fault. Accordingly, although the Claimant's primary case was that Kier and Haden Young were responsible for the flood, the Claimant issued the present proceedings against the Defendant (fearful of a possible limitation defence, without following the pre-action protocol).

The Defendant applied for a stay of proceedings on the basis of the Claimant's non-compliance with the pre-action protocol. The Claimant argued that the protocol process would be a waste of time because its claim against the Defendant was contingent on the Claimant failing in its claim against Kier and Haden Young, hence there was little chance of resolution.

In a judgment dated 12 February 2008, Mr Justice Akenhead held that the court should adopt a pragmatic approach to an application for a stay, particularly where Part 20 proceedings (or Part 20 type proceedings) were under consideration, in accordance with the overriding objective. Whilst the norm must be that parties do comply with the protocol, the court should avoid slavish application of protocols if such application would undermine the overriding objective. The Court must ultimately look at non-compliance in a pragmatic and commercially realistic way, because non-compliance could always be compensated in costs. Following the guidelines outlined by Mr Justice Jackson in *Alfred McAlpine Capital Projects Ltd v SIAC Construction (UK) Ltd* [2006] BLR 139, Mr Justice Akenhead dismissed the Defendant's application on the basis that the protocol process at this stage would not be sufficiently productive to justify a stay. He took into account the fact that the Defendant had already been supplied with information and extensive disclosure relating to the other proceedings. However, Mr Justice Akenhead ordered the Claimant to pay its own and part of the Defendant's costs of the application because the Claimant should have notified the Defendant of the claim earlier.

Editor: Lynne McCafferty
Lmccafferty@4pumpcourt.com