Construction

successful, commercial, forward looking

Construction Newsletter
Issue No. 6

Adjudicators may be able to make a binding ruling on their jurisdiction after all

Air Design (Kent) Limited v Deerglen (Jersey) Limited [2008] EWHC 3047 (TCC)
It has long been accepted as a fundamental principle that adjudicators do not have the ability to give binding rulings on their own jurisdiction. However, this recent decision in the TCC throws that orthodoxy into question. **Alexander Hickey** was instructed for the successful Claimant.

Akenhead J was faced with a familiar problem in this case. The responding party argued that a dispute under more than one contract had been referred to the adjudicator and that therefore he had no jurisdiction to decide the disputes in the Referral Notice. The judge found, however, that, as a matter of fact, the alleged separate contracts were no more than variations to the original agreement. Accordingly there was only one agreement, and the adjudicator had jurisdiction. In that respect the decision was uncontroversial.

However, Akenhead J made two further findings, which are potentially of huge significance. First, he decided that resolution of the dispute referred to the adjudicator "*necessarily involved*" a consideration of whether there was more than one contract. The judge's view was that it was therefore within the adjudicator's jurisdiction to decide (as he did) that there was one contract as varied. The judge said that this was a case "*where substance and jurisdiction overlap*" – so that there could not be a subsequent challenge if the adjudicator decided, wrongly, that there was only one contract. The judge said that: "*I have therefore formed the view that the Adjudicator did have jurisdiction to rule on all the matters which he did decide in his Decision. Whether he was right or wrong to find or make the assumption that there was effectively one contract which was varied ... is immaterial.*"

Secondly, and perhaps even more importantly, in giving his reasons as to why the adjudicator had jurisdiction, the judge relied on the adjudication clause in the contract, which (as is usual) said that "*a dispute or difference*" under the contract could be referred to the adjudicator. He said that those wide words should be construed in the same way as the House of Lords construed such a provision in an arbitration clause in *Fiona Trust v Privalov* [2007] UKHL 40 - that is, so as to cover "*any dispute arising out of the relationship into which they have entered or purported to enter*" – so they were wide enough to give the adjudicator jurisdiction to decide if there was one varied contract or several contracts.

The decision marks an important step forward in adjudication jurisprudence and provides what appears to be an important – and potentially very wide ranging – exception to the usual rule that an adjudicator does not have power to give a binding ruling on his jurisdiction. It is consistent with the TCC's approach of enforcing adjudication decisions save in all but the most exceptional of cases.

Adjudicator erred in refusing to consider defence raised for first time in Response

Quartzelec Ltd v Honeywell Control Systems Ltd (not yet reported) 18.11.08, TCC (HHJ Davies)
This was one of those exceptional cases where an adjudicator's decision was not enforced by the TCC. The Court refused enforcement on the basis that the adjudicator's failure to consider a discrete ground of defence amounted to a significant jurisdictional error and a breach of the requirements of natural justice. Further, the court commented that it would not have severed the adjudicator's decision to enforce the part apparently unaffected by the discrete ground of defence. **Sean Brannigan** represented the successful Defendant.

The Claimant referred to adjudication a dispute concerning the Defendant's refusal to pay sums for a variation to the contract, claimed in an application for payment. At the time of the application the Defendant had not given reasons for refusing to pay the sum requested, nor had it issued a withholding notice. In its Response the Defendant argued for the first time that it was entitled to deduct a sum for another variation omitting part of the works from the sums claimed in the application. The Claimant argued that this new ground of defence was outside the scope of the dispute and hence not within the adjudicator's jurisdiction. The adjudicator agreed with the Claimant on the basis that this defence had not "*been in play prior to the Notice of Adjudication*".

In the ensuing enforcement proceedings before HHJ Stephen Davies, the Defendant resisted enforcement on the grounds that the adjudicator misconstrued his jurisdiction by declining to consider the discrete ground of defence raised by the Defendant; as a result the adjudicator acted in breach of the rules of natural justice. The Claimant argued on the other hand that the adjudicator was right to consider he had no jurisdiction; but argued in the alternative that, in any event, the adjudicator's decision on the discrete ground of defence could be severed, and the unaffected part of the decision enforced. The Claimant relied on *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), on which we reported in Issue 4.

The judge accepted the Defendant's contention, also in reliance on *Cantillon*, that it is open to the responding party to raise any defence to the claim, and that the adjudicator should not have restricted himself to arguments "*in play*" at the time of the original claim. He therefore dismissed the claim, holding that the adjudicator made a significant jurisdictional error which amounted to a breach of natural justice and rendered the decision unenforceable.

The judge went on to consider the Claimant's alternative severance argument *obiter dicta*. He rejected that argument, citing with approval the decision of Akenhead J in *Cantillon* that a decision could only be severable if two or more disputes have been determined and the challenge only goes to one of those disputes. HHJ Stephen Davies found that there was only one dispute in the present case hence the decision could not be severed in any event. He distinguished between a dispute and the various issues which needed to be resolved as part of the process of deciding that dispute.

The judge noted that it may seem unfair that the Defendant should avoid having to pay anything to the Claimant because the adjudicator failed to consider a defence that was worth much less than the sum claimed. However, he commented that as a general principle it is difficult if not impossible for the court on enforcement proceedings to be completely confident that the adjudicator's decision on an issue which at first blush appears to be discrete might not have been affected had he properly dealt with the offending issue. This decision confirms that the extent to which the court can sever adjudicator's decisions is limited to cases where more than one dispute was referred to adjudication.

TCC clarifies that High Court judges will hear cases in the District Registries

Neath Port Talbot County Borough Council v Currie & Brown Project Management Ltd & Anr [2008] EWHC 1508 (TCC) [2008] 1 BLR 464

In this case Mr Justice Ramsey responded to the recent trend which has seen parties seeking to transfer their proceedings from District Registries to the TCC in London so that the TCC's High Court judges might hear their cases. Ramsey J refused an application to transfer proceedings from Bristol to London, clarifying that, in appropriate cases, the High Court judges, as well as the Senior Circuit Judges, can and will manage and try issues away from London. **Sean Brannigan** was instructed by the Defendants.

The Defendants applied by letter to the London TCC for transfer of the case from the Bristol District Registry to the London TCC, and the classification of the case as "HCJ" so that it would be managed and tried by a High Court judge. It was accepted by the Defendants that such an application ought normally to have been brought by an application notice to the Bristol District Registry. Nevertheless, Ramsey J exercised his discretion to hear the application as he was sitting in the Bristol District Registry at the time.

Ramsey J clarified that high value and complex cases should not be moved to London merely in order that they could be heard by a High Court Judge. He stated that cases could be classified as "HCJ" or "SCJ" by principal

TCC judges sitting in the District Registries. The appropriate judge would both manage and try the case in the District Registry that was most convenient for the parties. Ramsey J commented that the only factor that should affect the decision whether to transfer cases to London is where it would be more convenient or fair for the hearings to be held there.

TCC confirms that Part 8 claim for declaration on jurisdiction can be issued before adjudication proceedings are commenced

Vitpol Building Service v Samen [2008] EWHC 2283 (TCC)
The TCC confirmed in this decision that it has jurisdiction to hear a Part 8 claim concerning the existence and terms of a contract where that decision will determine whether the claimant has the right to adjudicate, even where the Claimant had not yet referred the underlying dispute to adjudication and the parties had almost completed the pre-action protocol process in relation to that dispute. **Alexander Hickey** was instructed by the Claimant.

The Claimant was engaged by the Defendant to convert a hotel into a family home. During the course of the works, the Defendant instructed the Claimant to vacate the site. A dispute arose over this instruction. The Claimant alleged that it was agreed at a meeting that the JCT Intermediate Form would be incorporated into the contract; the Defendant disputed this. Unless it could prove such incorporation the Claimant would not have a right to adjudicate the dispute because under s.106 of the Housing Grants, Construction and Regeneration Act 1996 it had no statutory right to adjudicate as the works were for a residential occupier. The Claimant and Defendant embarked on, and had almost completed, the pre-action protocol process in relation to the dispute when the Claimant commenced proceedings under Part 8 of the CPR, seeking a declaration that the parties had incorporated the JCT Intermediate Form into the contract.

At the first CMC in these proceedings, the Defendant argued that the court had no jurisdiction to hear the case because Paragraph 9.4.1 of the TCC Guide only permitted applications for declaratory relief after the *commencement* of adjudication proceedings. Mr Justice Coulson dismissed this argument, holding that the TCC Guide did not define the TCC's jurisdiction. He held that the TCC Guide could not shut out a *bona fide* dispute between the parties about the existence and/or terms of a contract. The Claimant was entitled to have that dispute resolved in advance of any subsequent adjudication, despite the advanced stage of the pre-action protocol process.

Mr Justice Coulson also rejected the Defendant's argument that the Part 8 procedure was inappropriate because there was a dispute of fact. The judge stressed that where oral evidence was needed in such a case, the court would be able to adapt its procedures and directions to accommodate it, even under Part 8 proceedings.

This judgment confirms that, if a jurisdictional challenge is anticipated, then the claimant can bring proceedings in the TCC under Part 8 for a declaration in advance of referring the dispute to adjudication. This course of action has the advantage that the claimant would know at an early stage whether it had a right to adjudicate, and any uncertainty over the existence and terms of the contract would be resolved prior to embarking on adjudication. This would avoid the delay and costs associated with a later challenge to jurisdiction by the respondent in enforcement proceedings.

Further commentary on the Multiplex Litigation

We have reported on several hearings in the litigation of *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd & anr*, in which **Alice Sims** was instructed as one of the junior counsel team for Multiplex (see Issues 3 and 5). **Jeremy Nicholson** and **Laura Crowley** have reviewed and commented on the Multiplex litigation in recent articles in Legal Week and Construction News. An edited version of the article in Legal Week appears below:

Repudiation with tears

On 29 September 2008 Mr Justice Jackson gave judgments on outstanding issues and legal costs in the protracted litigation between Multiplex and Cleveland Bridge ("Cleveland").

This dispute has received much media coverage. It arose from the project to construct the new Wembley Stadium, which involved more than 20,000 tonnes of steelwork. The steelwork was to an innovative and complex design, in order to achieve an unobstructed view from every seat, and a roof which opens and closes. It includes the now famous arch, which is the largest single roof structure in the world.

In 2002 Multiplex, the project main contractor, engaged Cleveland under a sub-contract based on JCT Dom 2 to carry out the steelwork, including completion of design, fabrication, and erection.

What followed is a familiar tale of a difficult contract ending in tears, repudiation, and litigation. Problems soon arose: Cleveland blamed Multiplex and the civil & structural engineers for delays, deficiencies and changes in design information; Multiplex blamed Cleveland for delays in the works. Supplemental contracts were agreed, but disputes continued. In June 2004, Cleveland succeeded in lifting the arch, whereupon Multiplex gave notice removing all remaining erection works. Cleveland treated this as a repudiation of the sub-contract and stopped work. Multiplex then engaged another sub-contractor to finish the steelwork, at lower cost than contracted for with Cleveland.

However this was only the start of the dispute. In 5 adjudications, Cleveland succeeded in obtaining payment of £5.95 million. Both parties started proceedings in the TCC, which were consolidated. There were 2 trials and appeals to the Court of Appeal covering 11 preliminary issues: with successes and failures for both parties, but, crucially, a finding in favour of Multiplex that Cleveland had repudiated the sub-contract.

Less determined litigants would then have settled. Instead, Multiplex upped its claim, and Cleveland fought on. The action came to trial earlier this year. It involved, essentially, drawing up a final account: assessing the damages owed by Cleveland for repudiation and defects, and the sums owed by Multiplex for work done. Multiplex failed to prove that Cleveland's repudiation caused any delay to the project; or any loss, because the gains from the repudiation exceeded the losses; but succeeded on other issues, including defects, and valuation of work. The overall result was an order for Cleveland to pay Multiplex approximately £6.15 million including interest – taking the parties back almost to where they were before the adjudications.

But the costs were the real sting in the tail, for both parties. They had together run up costs of some £22 million. The judge ordered Cleveland to pay only 20% of Multiplex's costs of the action. Since Multiplex's costs far exceeded the sum of £6.15 million ordered to be paid, it was an expensive result. And the dispute overall was a costs disaster for both parties.

The costs would have been even more if the parties had not agreed a 'chess clock' limit of the trial to 3 months. As a result, some of the evidence, issues and consequences were not properly ventilated. The judge dealt with this problem in an innovative and sensible way. Whilst he was writing his judgment, he held a number of post-trial hearings, at which points were clarified, argued, and sometimes agreed, and he received further written submissions.

The judge was very critical of both parties for their approach to the dispute – and especially their failure to do more to settle after the preliminary issues. Millions of pounds could have been saved if the parties had agreed figures once those issues of principle had been decided. Both parties ignored encouragement to settle, and threw away golden opportunities to do so on favourable terms. He criticized Multiplex for increasing its claims to an unrealistic level, and pursuing unsuccessful claims. He criticized Cleveland for failing to make offers, despite recognizing that it would be the paying party.

What lessons can be drawn from this saga? At least four emerge:

- Ending a major construction contract unilaterally involves high risks. It may well be hard to predict which party will ultimately be held to have acted lawfully. And the issue may well involve protracted and expensive proceedings.
- Statements of case should be drafted by barristers or solicitors with litigation skills and experience. Statements of case produced by clients or claims consultants can be an expensive mistake, in not targeting the right issues, using unhelpful material, and persuading the court against rather than in favour of the client's case.
- Assessment of a final account by a court should be a last resort. If there are disputes about details of valuations or losses, parties should resolve them by negotiation, mediation, or expert determination. And issues should be resolved in part if they cannot be resolved in whole.

- Costs protection is crucial. In major disputes like this, a party needs to step back from the details, suppress emotions, realistically assess merits and risks, and make appropriate protective offers. The assessment and offers then need to be kept under constant review. All of this is easy to suggest, and much harder to do during the trench warfare of a major dispute. But it needs to be done.

Editor: Lynne McCafferty
Lmccafferty@4pumpcourt.com