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"Pleadings are not playthings"

Upton McGougan Limited v Bellway Homes and others [2009] EWHC 1449 (TCC)
In this case Mr Justice Coulson considered the claimant's application to debar the defendants from relying on parts of an expert report on the grounds that they did not relate to the issues that were pleaded in the defendants' counterclaim. **James Cross QC** and **Lynne McCafferty** represented the successful claimant.

The claimant provided civil engineering services to the defendants including a bulk earthworks cut and fill assessment. The defendants alleged in their counterclaim that the claimant had negligently failed to determine the correct site level, which resulted in excess spoil being removed from site. The particulars of breach were limited to a failure to take account of the existing topography of the site and two specific sources of spoil. The defendants pleaded that this breach was evidenced by the empirical fact that circa 100,000m^3 spoil was removed from the site.

The defendants' liability expert painted an entirely different picture. His report comprised two parts. The first part outlined an ideal cut and fill exercise, and identified a large number of specific deficiencies in the exercise carried out by the claimant (none of which had been pleaded). The second part was a hypothetical assessment to determine the volume of spoil that would be generated as a result of the claimant's site levels being implemented. The claimant contended that the entirety of part one should be struck out, and also sought to strike out all specific allegations of breach contained in part two of the report that were not pleaded in the counterclaim.

Mr Justice Coulson granted the claimant's application, accepting that part one and much of part two of the report were outside the scope of the defendants' pleaded case. He delivered a judgment underlining the importance of accurately and properly pleading the particulars of breach alleged in cases of professional negligence. He observed that it is not acceptable for allegations of negligence to be advanced only in witness statements or expert reports, rather it is the statements of case that must define the dispute between the parties. The scope of pleadings and their overlap with expert reports will always be a matter of fact of degree. Whilst expert discussions may contain greater detail than the parties have pleaded, there must be a clear issue in the pleadings before the experts are able to consider it. Ultimately a balancing act must be performed between a defendant's right to know the allegations of fault made against him, and the need to avoid excessive particulars. Coulson J cited Saville LJ's remark in *British Airways Pensions Trustees Ltd v McAlpine* 72 B.L.R. 26 that "*pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing*".

This is a significant judgment because it is rare for parties to be debarred from relying on expert evidence. In practical terms, the eventual outcome of this hearing was to force the defendants to seek permission (which was forthcoming) to amend their counterclaim in order to bring it in line with the report.

Summary enforcement proceedings are an inappropriate forum to determine whether jurisdiction is granted by a contract formed by implication through a course of dealing. Moreover, where an Adjudicator fails to deal in terms with an aspect of a counterclaim, that can be sufficient to justify declining to enforce the decision

Rupert Cordle v Vanessa Nicholson [2009] EWHC 1314 (QB)
The defendant successfully resisted the claimant's application for the enforcement of an adjudicator's decision on the grounds that (a) the parties did not agree a contract that provided for adjudication and (b) the

adjudicator failed to consider the defendant's counterclaim. **Sean Brannigan QC** appeared for the successful defendant.

The main issue before the court was whether there was a triable issue in relation to the defendant's case that the parties did not agree a contract which provided for adjudication. The claimant submitted that a contract arose by implication from the course of dealing between the parties.

Teare J agreed that a contract can be implied by a course of dealing between the parties, notwithstanding the difficulty of analysing the case precisely in terms of offer and acceptance. However, he said this would require a detailed analysis of that course of dealing, both in terms of written and oral exchanges, and that it would be difficult to carry out that analysis on a summary procedure such as an application for summary enforcement. He also noted that there were parts of the defendant's evidence not accepted by the claimant. For those reasons, he held there was an issue to be tried and the order for summary enforcement was refused.

A further reason given by Teare J for declining enforcement was that the adjudicator failed to deal in terms with the defendant's counterclaim for remedial works.

Successful challenge to adjudicator's decision on natural justice grounds

Primus Build Limited v Pompey Centre Ltd & anr [2009] EWHC 1487 (TCC)
This was one of those rare cases where the Court declined to enforce an adjudicator's decision on grounds that the adjudicator had breached the rules of natural justice. **Lynne McCafferty** appeared on behalf of the claimant.

The Defendants ("Pompey") engaged the Claimants ("Primus") to provide construction management services in relation to the construction of a hotel and office building in Portsmouth. The office building element of the project was later omitted from the scope of Primus's work on the express agreement that Primus would be entitled to be compensated for the loss of profit. The profit claims put forward by Primus were rejected by Pompey.

Primus's claim for loss of profit was based on the 3% construction and management fee percentage identified in the contract. Pompey took a number of points in opposition to the claim, submitting that the 3% fee did not represent Primus's actual loss of profit caused by the omission. Pompey demanded that Primus disclose details of the actual profits made on the project; Primus resisted this request. Eventually Primus disclosed its financial accounts with its Reply; both parties submitted (although for different reasons) that these accounts were irrelevant to the calculation of the profit lost by Primus. Notwithstanding this, the adjudicator awarded Primus loss of profit calculated at a rate of 1.3%, which was a figure that he had calculated from the profit to sales ratio identified in Primus's accounts. It was not a percentage that was expressly identified in the accounts.

Coulson J noted that, in calculating an alternative basis for loss of profit, the adjudicator was doing something very similar to what the adjudicator did in *Balfour Beatty v Lambeth* and for which he was criticised, namely "*filling in the gaps in the referring party's case without any reference to the other side*". He commented that it is a fine line for an adjudicator between wanting to help the parties on the one hand, and making one side's case for them, on the other. He held that if the adjudicator believes that there is a legitimate alternative course which has not been considered or put forward by the referring party, he should give the parties notice of this alternative course and obtain submissions from them. Coulson J commented in particular that this principle must apply *a fortiori* in circumstances where the adjudicator has been told by both parties to ignore the document from which the alternative approach is to be derived. He found that the breach of natural justice was material and significant because, without it, Primus would have recovered nothing.

This judgment is notable because it is rare for natural justice challenges to succeed. This decision develops the jurisprudence on the adjudicator's duties. It also illustrates that, despite the best efforts of the parties to present a fully argued and coherent case, the adjudication process can come unstuck if the adjudicator deviates into a tangent without seeking the parties' input.

Coulson J also expressed concern about the costs the parties incurred in both the substantive adjudication process and in the enforcement proceedings. This has been a recurring theme in Coulson J's judgments on enforcement of late. He noted that the parties' legal fees were likely to be greater than the amount in dispute.

He questioned whether this represented value for money given that the adjudicator's decisions is only temporarily binding. He commented: "*the adjudication process is in danger of revisiting some of the inefficiencies and injustices of the past*".

Judge entitled to take account of new evidence introduced during cross-examination of expert

Penny and Anr v Digital Structures Ltd [2009] EWCA Civ 144
The Court of Appeal dismissed an appeal against the judgment of HHJ Walton in this surveyor's negligence case. **Michael Taylor** was instructed for the successful respondent.

Prior to purchasing a residential barn conversion, the appellants obtained a RICS Homebuyer valuation and survey, which assessed the significance of defects in the south gable wall. The respondent's survey report indicated that the property was structurally sound, and did not suggest any defect in the roof support. After moving in, the appellants instructed a second structural engineer in contemplation of undertaking further works. They were advised that the roof was on the "*point of catastrophic collapse*". HHJ Walton dismissed the appellants' subsequent action in negligence against the respondent on the basis that the roof was in fact adequately supported when surveyed by the respondent.

The appeal was brought on three grounds. First, the appellants contended that they were not given a reasonable opportunity of dealing with the evidence of the respondent's expert at trial. Secondly, the appellants submitted that the judge was wrong to conclude the roof was adequately supported when inspected by the respondent. Thirdly, the appellants said the judge was wrong to conclude that the respondent was not negligent in failing to advise the appellants of the inadequacies of the roofing support.

All three grounds of appeal were rejected. Waller LJ observed that the judge had appreciated the case being made on both sides. His finding that the support for the roof was adequate was based on evidence given by the respondent's expert. Waller LJ rejected the appellant's contention that there was a serious procedural error in that the judge had permitted the respondent's expert to introduce evidence during cross-examination that was not contained in his written report without giving the appellant's expert a chance to deal with it. Waller LJ observed that counsel for the appellant made no protest at the evidence being given by the respondent's expert and did not suggest that it should be ignored. Thus, there was no procedural irregularity in admitting the evidence or in the judge relying on it in his judgment.

Court imposes costs penalty on party who withdrew from mediation

Roundstone Nurseries Limited v Stephenson Holdings Limited **[2009] EWHC 1431 (TCC)**
There is no shortage of decisions where costs penalties have been imposed on a party that unreasonably refuses to mediate. However this decision takes matters a step further by imposing a costs penalty where a party agrees to mediate but withdraws from the process shortly before it is due to take place, albeit that the decision to withdraw was made in good faith. **Thomas Crangle** appeared for the successful claimant.

The claimant ("Roundstone") commenced proceedings against the defendant ("Stephenson") close to the expiry of the limitation period and without first complying with the Pre-action Protocol. The parties agreed a consent order staying the claim pending compliance with the pre-action protocol and intended to incorporate mediation within that process. A date for the mediation was arranged and a mediator and facilities were booked.

A little over 1 month before the mediation was due to take place, Stephenson wrote to Bridge Greenhouses Limited ("Bridge"), who Stephenson intended to join to the proceedings as a Third Party, asking Bridge to attend the mediation. Bridge had been identified by Stephenson as a potential Third Party to the proceedings approximately 9 months previously. Bridge required the early provision of certain documentation as a condition of its attendance at the mediation. That documentation was not provided by the time required by Bridge. Bridge therefore declined to attend the mediation. Stephenson then withdrew from the mediation. By this time mediation bundles had been prepared and position statements exchanged.

Mr Justice Coulson determined that the mediation formed part of an agreed pre-action protocol process as

opposed to a standalone ADR process. Accordingly the costs of the mediation could be recovered in principle as being costs incidental to the proceedings. The Judge also concluded that Stephenson was wrong to withdraw from the mediation at such short notice and ordered Stephenson to pay the costs thrown away as a result of its withdrawal from the mediation.

The judgment makes clear that whether or not the court has jurisdiction to impose a costs penalty will depend on the type of mediation process that is agreed upon by the parties. Where the mediation is part of a pre-action protocol process, and there is no agreement that each party will bear its own costs of the mediation, the costs of the mediation are likely to be costs incidental to the proceedings and will therefore come within the Court's jurisdiction to award costs under section 51 of the Supreme Court Act 1981.

Where, however, the mediation is part of a stand-alone ADR process, or the parties have agreed that each party will bear its own costs of the mediation, those costs are unlikely to be within the Court's jurisdiction and accordingly, the Court will be unable to impose a costs penalty.

Practical completion certificate not a binding expert determination because vitiated by an error in determining the scope of the works

Menolly Investments 3 SARL & anr v Cerep SARL [2009] EWHC 516 (Ch)
Mr Justice Warren considered here whether a certificate of practical completion was a valid expert determination for the purposes of a share sale agreement. **David Friedman QC** led the team instructed for the successful Defendant.

Cerep's ability to obtain payment of £150 million under a share sale agreement made with Menolly depended on whether a certificate of practical completion, under a building contract made by Cerep as employer, was a binding expert determination under the share sale agreement. The building contract was on amended JCT with Contractor's Design 1998 terms and provided for sectional completion. Menolly contended that a certificate issued in relation to Section 1, on which Cerep relied, was invalid, principally because there had been a failure to provide "level access" to retail units as required by a planning condition and disability legislation. Cerep responded that (a) the building contract did not require level access, (b) in any event the practical completion certificate was a valid and binding expert determination under the share purchase agreement and, alternatively, (c) Menolly was estopped from taking the point or had waived its right to do so, there being an understanding that any dispute concerning level access would be dealt with by way of financial compensation.

In order to decide whether the certificate of practical completion was a binding expert determination under the share purchase agreement Warren J applied the three questions set out by Lloyd LJ in *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1. The first question is what has the agreement entrusted to the expert. The second is whether that is what he has decided. The third is whether he has made a mistake which vitiates his decision.

When considering those questions Warren J made important observations about what amounts to a "manifest error" and what, if any, evidence other than the certifier's decision is admissible to prove manifest error. He observed that a certifier would not be entrusted with certifying that practical completion had been achieved for a building which "*simply does not exist yet*", such as where an entire planned floor is missing. By contrast, he might be entrusted with certifying a house as practically complete if it were merely missing a porch. The difference was one of fact and degree.

Warren J held that the true construction of the building contract was not a matter entrusted to the expert. He also held that on its true construction the building contract did require the provision of level access. The expert's view to the contrary was incorrect. Further, Warren J found as a fact that the expert would not have certified practical completion had he held the correct view.

Thus the expert's decision about practical completion was not binding. He was not authorised to decide issues of construction and what he had decided was based on an incorrect construction. This vitiated his decision which was therefore invalid.

But it was Cerep who won the war. The issue of level access was not raised until late in the day. The parties had been anticipating practical completion of Section 2 for a considerable period. Throughout that period Menolly had conducted itself on the assumption that Section 1 had achieved practical completion. Menolly had thereby represented to Cerep that practical completion had been achieved, and that the absence of level access did not prevent the issue of a valid certificate for Section 1. As a result Warren J ruled that Menolly was either estopped from relying on the absence of level access as a ground for disputing the validity of the certificate or had waived the need for the provision of level access. Menolly was also estopped from asserting that a valid certificate in relation to Section 1 had not been given. The parties had proceeded on the basis of a common assumption which prevented such an assertion.

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