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Mr Justice Jackson publishes his decision in the Wembley case

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd & anr [2008] EWHC 2220 (TCC)
Mr Justice Jackson published his decision in the long-running dispute concerning the steelwork sub-contract for Wembley stadium on 29 September 2008. His decision was widely reported in the media. **Alice Sims** is instructed as junior counsel for Multiplex.

We reported in Issue 3 that the Court of Appeal had overturned in part Jackson J's decision on a preliminary issue.

The trial of the remaining issues in this case (which related to quantum) subsequently came before Mr Justice Jackson. Multiplex (the main contractor engaged to construct Wembley stadium) claimed damages against CB (the steelwork sub-contractor) for breach of contract. During the course of the project, the scope of CB's work had been reduced under a supplemental agreement. Multiplex had eventually employed another sub-contractor to complete the fabrication of the steelwork. The trial concerned the quantum of (a) the sums owed by Multiplex to CB for work done and materials supplied; and (b) the damages owed by CB to Multiplex for defective work and repudiation of the contract. The overall outcome was that Mr Justice Jackson ordered CB to pay Multiplex a total of £6.1 million in respect of overpayments and damages for breach of contract.

Mr Justice Jackson held that if a contractor repudiated a contract at a time when the employer had already resolved to remove some of the contractor's obligations, and had already engaged an alternative contractor to perform those obligations, then the court should disregard the contractor's failure to perform those obligations when assessing damages. The Judge found that Multiplex would have engaged an alternative sub-contractor to complete the design and engineering of the steelwork regardless of CB's repudiation, and hence Multiplex would have incurred the costs of engaging the alternative sub-contractor in any event.

One of the procedural issues that arose was that Multiplex argued that the evidence given by one of CB's factual witnesses was inadmissible because he purported to give expert and opinion evidence, notwithstanding no permission had been granted to admit expert evidence on the issues he covered. Mr Justice Jackson admitted parts of the evidence, noting that the witness was a highly qualified and experienced engineer who was involved in the Wembley project for many months. The Judge observed that the practice in the TCC was to allow factual witnesses to express technical and expert opinions, and that in construction litigation an engineer who was giving factual evidence could also proffer statements of opinion provided they were reasonably related to the facts within his own knowledge and experience.

Adjudicator's failure to consider late Response was breach of natural justice

CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC)
Mr Justice Akenhead declined to enforce an adjudicator's award on the basis that the adjudicator's refusal to consider the defendant's Response (under an honest, but mistaken, belief that he had no discretion to do so) due to late service amounted to a material breach of natural justice. **James Bowling** was instructed by the claimant (CJP); **Alexander Hickey** was instructed by the defendant (Verry).

CJP referred a dispute with Verry to adjudication. Verry served its response five hours after the agreed extended deadline. CJP argued that the adjudicator had no discretion to consider a response served after the deadline and that the decision should therefore be made on the basis of the referral alone; Verry disagreed.

The adjudicator agreed with CJP that he had no discretion to have regard to a response served even a few hours late. He therefore proceeded on the basis of the referral alone and, unsurprisingly, decided in favour of CJP. However, the adjudicator remarked that, had he had such discretion, he would have considered the response.

CJP sought to enforce the decision by applying for summary judgment. Mr Justice Akenhead concluded that the adjudicator had been wrong to find that he had no discretion to consider the response: although the applicable rules in Clause 38A of the DOM/2 sub-contract imposed a timetable for service of the response, Clause 38A gave the adjudicator the power to "*set his own procedure*" and he had "*absolute discretion*" to ascertain those facts and law he regarded as necessary.

The adjudicator erred because rather than exercise discretion one way or another he concluded wrongly that he had no discretion at all. His conclusion that he could not take the response into account was a material breach of natural justice because he thereby denied Verry a right to be heard. The extent of the breach was such that it "*must have been material*", the test for materiality being whether there was a real possibility that the adjudicator could have reached a different decision had the response been considered. The breach went to the fairness of the reference and so the Judge refused to enforce the adjudicator's award.

Marine surveyor negligent despite reliance on builders' assurances

Nicolle v Saunders Morgan Harris [2008] EWHC 1518 (TCC)
It is not often that cases involving marine surveyors come before the Courts; still less cases involving small vessels. In this case HHJ Wilcox was told by the defendant that it was common practice for marine surveyors to rely upon boat builders' assurances that newly built boats were safe. In circumstances where there was reason to think the builder had cut corners, the Judge held that, even if that were common practice, such reliance was nevertheless negligent in the circumstances of this case. The claimants, represented by **James Leabeater**, were accordingly awarded damages against the defendant.

The claimants entered into a contract with a Guernsey boat builder to purchase a 7.5m rigid inflatable boat ("RIB") with twin counter rotating Volvo D-3 160hp SX engines to use between the Isles of Scilly and the mainland. Because the claimants wished to use the boat for both personal and business use it had to be capable of being coded under the relevant Marine & Coastguard Agency (MCA) Code and also "CE Plated" in accordance with the Recreational Craft Regulations 2004. The claimants instructed the defendant marine surveyors to undertake a preliminary survey of the boat to see if it was capable of being coded.

Upon inspection, the surveyor advised that if it bore a CE plate then it was also codeable under the MCA code, because if the builder self-certified that the boat had been built in accordance with the Recreational Craft Regulations 2004; that also indicated that it had been built in accordance with relevant standards for the MCA Code.

The builder purported to complete the boat, and the claimants asked the defendant to inspect the boat upon handover. The defendant attended the inspection and failed to advise the claimants that it was inadequate. The claimants took delivery of the boat. Unfortunately it leaked on its first major voyage. Upon inspection by a different surveyor, it came to light that the boat did not have a proper CE plate; there was no information indicating how it had been built; and there was reason to think it had been built with insufficient structural strength. The claimants sued the defendant saying that had they been properly advised they would have refused to take delivery of the boat.

The defendant denied negligence and said that it had been reasonable to rely upon the builder's self-certification that the boat was safe. In any event the boat should be "drop tested"; if it was, and it passed, then it could be certified as safe for use. The judge rejected both arguments, holding it was negligent in the circumstances for the defendant to rely upon the builder's assurances that the boat was safe. He also accepted the claimants' evidence that a "drop test" was not appropriate for a RIB because it was not possible to see if the inside of the hull structure had safely passed the test.

In addition to damages, the claimants were awarded indemnity costs as a result of what HHJ Wilcox described as the defendant's refusal properly to address the issues in the course of the litigation.

Privy Council ruling on valuation methods in surveyor's negligence case

Mon Tresor & Mon Desert Ltd v Ministry of Housing & Lands & anr [2008] UKPC 31
The Privy Council recently handed down judgment in a land valuation appeal in which **Anthony Speaight QC** and **Kate Livesey** represented the Mauritian Government. The Government successfully defended an appeal by Mon Tresor & Mon Desert Ltd (a company in the Lonrho group of companies) against the reversal by the Supreme Court of Mauritius of a decision of the Board of Assessment in a compulsory purchase case.

The case concerned the valuation of a sugar plantation in Mauritius which the Government had acquired from the appellant in 2000 by compulsory purchase; in particular, the question whether the first instance Board of Assessment (in assessing the compensation to be paid to the appellant following the compulsory purchase) had appropriately adopted the 'residual' method of valuation so as to give effect to the development 'hope value' of the land.

The Privy Council held that the Supreme Court was entitled to reverse the decision of the Board of Assessment. The Board's calculation of value, based on the residual method, was flawed because it assumed the existence of a hypothetical developer of the land and disregarded evidence about the true cost and difficulty of developing the land. The Privy Council found that the residual method was an inappropriate means of assessing the value of the land. Instead the Board should have valued the land on the basis of existing use value together with a modest addition for 'hope value'.

The judgment will be of considerable interest to all involved in surveyor professional negligence work as it provides the first consideration at so high a judicial level of 'hope value', comparing the residual and comparable valuation methods. Baroness Hale's opinion says there is a sliding scale from 'comparable plus' to 'residual minus'.

4 Pump Court provides Adjudication Know-How Services

Members of 4 Pump Court are providing on-line adjudication know-how services to the construction and legal industries in conjunction with two leading subscription services. 4 Pump Court has been involved in many of the most important adjudication decisions over the past 12 years.

In Summer 2008, 4 Pump Court and LexisNexis launched Adjudication *KnowHow*, a website which provides up-to-the-minute online research and current awareness of this major form of dispute resolution. The website was written by **Sean Brannigan**, **Claire Packman**, **James Bowling** and **Alice Sims** in association with LexisNexis. The website provides practical guidance, expert commentary and details of recent court decisions in this rapidly changing area of the law.

In addition, **Lynne McCafferty** wrote (and updates) a practical guide to adjudication for the Practical Law Company (PLC), one of the UK's leading providers of legal know-how, transactional analysis and market intelligence for lawyers. Lynne's regularly-updated adjudication guide has been available as part of PLC's Dispute Resolution Service for two years. PLC is launching a Construction Service on 22 October 2008, and one of the key areas covered by the Construction Service is adjudication. The adjudication guide has been fully updated ready for the re-launch as part of this Construction Service.

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