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Adjudication: 'Ambush' and Severability Revisited

Bovis Lend Lease Ltd v The Trustees of the London Clinic [2009] EWHC 69 (TCC)
This is an important judgment on natural justice and severability of adjudicators' decisions from Mr Justice Akenhead. This judgment confirms that the courts will have little truck with complaints that the responding party was 'ambushed', and extends the application of severability (first outlined by Akenhead J in *Cantillon v Urvasco* - see Issue No. 4) beyond that originally envisaged. **Sean Brannigan** and **Lynne McCafferty** represented the Claimant in the substantive adjudication proceedings and in the enforcement proceedings.

Bovis was engaged to carry out a major refurbishment of a Central London property under a contract worth £11.5 million. There were extensive delays to the project; the Clinic deducted LADs for the full period of delay. Bovis alleged that these delays were caused in part by the failure of the Clinic's design team to produce a consistent and co-ordinated M&E design on time. Bovis issued a number of applications for extension of time and consequent loss & expense. The Clinic granted Bovis only 4 weeks of the 44 weeks extension sought and only £150,000 of the £3 million claimed by way of loss & expense.

Before referring this dispute to adjudication, Bovis served on the Clinic its Referral Notice in draft together with its supporting evidence (including witness statements and expert reports). Bovis asked the Clinic to pay up in 2 weeks failing which the dispute would be referred to adjudication. The Clinic asked for a further 4 weeks to consider the documentation; Bovis agreed. When the 6 weeks was up, the Clinic rejected the claim.

In the ensuing adjudication proceedings Bovis was awarded the full 44 weeks extension of time sought, together with reimbursement of LADs in the sum of £1.6 million and loss & expense of £1.8 million. The Clinic refused to pay, and in the enforcement proceedings challenged the adjudicator's decision on grounds that (a) the adjudicator had no jurisdiction to determine the loss & expense claim because no dispute over that claim had crystallised at the time of referral; and (b) there had been a breach of natural justice because the Clinic had insufficient time to deal with the claim.

Akenhead J rejected both those arguments and enforced the decision. On jurisdiction he held that the dispute over loss & expense had crystallised at the time of referral notwithstanding the quantum of the loss & expense claim in the draft Referral Notice differed from the quantum of the claim made shortly after the project was completed. He noted that it was an updated but not materially different claim. This decision confirms that the courts will continue to interpret 'dispute' broadly.

Akenhead J held that there had been no breach by the adjudicator of the rules of natural justice. The most important factor identified in his decision was that "not once" during the adjudication had the Clinic complained that it had insufficient time to prepare its Response or Rejoinder. The Judge also observed that the Clinic had only asked for 2 extra days to serve its Response; this extension was granted in full: it could not therefore be said that the adjudicator had failed to give the Clinic sufficient time. Further, whilst the Judge considered that there had been no 'ambush' here, he observed that in any event ambush is not a term of art, and the key factor was that sufficient time was requested, given and taken by the Clinic to respond. He emphasised that it is the adjudicator's conduct, not the referring party's conduct, which is crucial in natural justice considerations. This judgment confirms that a referring party can protect its position efficiently by providing the respondent with its evidence in draft in advance of referral and by acceding to requests for more time. The judgment also emphasises that, if a responding party needs more time, it should say so (notwithstanding the tight timescales of adjudication) and should explain during the adjudication proceedings why it has been prejudiced by lack of time.

This judgment is also of interest because Akenhead J made some significant (albeit *obiter*) comments on the severability of adjudicators' decisions, revisiting an issue he first addressed in *Cantillon v Urvasco* (see Issue No. 4). The Judge commented that:

- If he had upheld the natural justice challenge alone, the decision would not have been severable. A failure to give sufficient time to respond would have tainted the decision in its entirety.

- However, if he had instead formed the view that no dispute over the claim for loss and expense had crystallised, the decision would have been "*eminently severable*". The adjudicator's decision on the extension of time would have survived; the decision on loss and expense would have been set aside.

This is a significant, and startling, decision because in *Cantillon* Akenhead J held that only in cases where more than one dispute was determined could a decision be severed. In this case it was not suggested by the Clinic that Bovis had referred more than one dispute to adjudication. This case is therefore a departure from the principles outlined in *Cantillon*. This is the first post-*Cantillon* case in which the courts have considered severability in the context of a 'no dispute' argument. It appears that the rationale for this extension of the application of severability is that, had the Judge concluded that no dispute relating to the claim for loss and expense had ever crystallised, then that would leave only one claim / dispute on which the adjudicator had jurisdiction, i.e. the extension of time claim. In that scenario the judge would not be severing a decision relating to one dispute. Instead the judge would simply be severing a decision on a crystallised dispute from a decision on a claim over which the adjudicator never had jurisdiction.

This judgment therefore extends the scope of the *Cantillon* concept of severability far beyond what had previously been envisaged.

Adjudication: TCC refused to condemn 'Ambush'

The Dorchester Hotel v Vivid Interiors Ltd [2009] EWHC 70 (TCC)
This was another case in which the courts considered a complaint that the responding party had been ambushed. In this case Mr Justice Coulson confirmed that, whilst 'ambushes' by referring parties may be regrettable, the provisions of the Construction Act permit such conduct and the courts will intervene in adjudication proceedings only in exceptional cases. The responding party here was represented by **Alex Hickey**.

The responding party to an ongoing adjudication issued a Part 8 claim in the TCC for declarations under section 9.4 of the TCC Guide shortly after referral of this dispute, when it became clear that natural justice issues had arisen. This was a "kitchen sink" final account claim which was referred to adjudication at 4pm on 19 December 2008 together with 37 lever arch files of documentation, including new evidence and a different final account build-up from the final account discussed between the parties pre-adjudication.

The responding party sought a declaration that the timetable would lead to a breach of the rules of natural justice because it had insufficient time to have a fair opportunity to respond. The referring party had proposed an extended, but nevertheless tight, timetable for the response in the adjudication, but had not allowed the responding party the full extension of time it sought. The referring party opposed the claim for a declaration on the basis that the courts had no jurisdiction to interfere at this stage, and that the claim was premature.

Mr Justice Coulson rejected the argument that the courts had no jurisdiction to make a declaration at this stage. He decided that - in exceptional cases - the courts have the power to grant a declaration in respect of an adjudicator's jurisdiction in an ongoing adjudication, particularly if it considers that there has been or will be a breach of natural justice which will have a significantly prejudicial effect on the responding party. In support Coulson J cited *Vitpol Building Service v Samen* (see Issue 6) and *CJP Builders Ltd v William Verry Ltd* (see Issue 5) and observed that, if the parties in those cases had come to court during those adjudication proceedings (instead of during enforcement proceedings), the court could have given the same result earlier. However, he stressed that such intervention would be the exception rather than the rule, and wherever possible the adjudication process should be allowed to operate free from judicial intervention.

Coulson J refused to grant the declaration sought as he considered that he was not in a position to say at that stage whether there would or would not be a breach of the rules of natural justice. Although critical of the referring party's conduct, he observed that such conduct was not uncommon and, however regrettable, was permitted by the Construction Act. However, he noted that the referring party's conduct cast a shadow of

uncertainty over the adjudication proceedings, raising the distinct possibility of a future challenge to the adjudicator's decision on grounds of breach of natural justice and jurisdiction, and made it clear that the adjudicator would have to consider his duties carefully. Finally Coulson J reserved the costs on the basis that, if it came to enforcement, it might be that the respondent's points were vindicated; but if the adjudicator's decision was accepted by both parties, then the costs would follow the event.

So although its claim for a declaration was unsuccessful, nevertheless the responding party succeeded tactically in putting down a marker for the future and firing a warning shot across the referring party's bows. This decision confirms that it is only in exceptional cases that the courts will interfere with ongoing adjudications, but it also illustrates the tactical uses to which Part 8 proceedings can be put.

Adjudication: Stay of execution will not be automatically granted where claimant is subject to a CVA

Mead General Building Services Ltd v Dartmoor Properties Ltd [2009] EWHC 200 (TCC)
Mr Justice Coulson rejected an application for stay of execution in enforcement proceedings where the claimant was subject to a Company Voluntary Arrangement (CVA). **Lynne McCafferty** represented the Claimant.

Mead, a small family-run building contractor, was engaged by Dartmoor, a property developer, under a JCT Intermediate Building Contract to construct 26 flats and 2 retail units for the sum of £1.6 million. Mead succeeded in adjudication proceedings against Dartmoor for persistent non-payment of monies owed under the contract. The adjudicator ordered Dartmoor to pay Mead approx. £350,000.

By the time the adjudicator had published his decision, Mead had entered into a CVA due to financial difficulties. Dartmoor refused to pay the sums awarded on the basis that it intended to arbitrate the dispute and, if the adjudicator's decision were reversed, Mead would be unable to pay back the sums awarded due to its insolvency. Mead issued enforcement proceedings; Dartmoor sought a stay of execution. Mead adduced evidence which demonstrated that its financial difficulties were caused principally by Dartmoor's failure to pay the sums awarded by the adjudicator.

Mr Justice Coulson enforced the decision and rejected the application for a stay. He noted there were previously no reported cases on applications for stays where the claimant is subject to a CVA, and observed that this judgment will be the leading authority on that point.

In his judgment Coulson J distinguished between:

- On the one hand, cases where the claimant was either in insolvent liquidation – where the adjudicator's decision will not be enforced at all due to the operation of the insolvency rules (per *Bouygues UK v Dahl-Jensen*) – or in administrative receivership – where a stay of execution will usually be granted (as in *Rainford House v Cadogan*); and

- On the other hand, cases where the claimant was subject to a CVA, where the CVA will be a relevant factor in an application for a stay but will not of itself automatically lead the court to infer that the claimant would be unable to repay the sums paid out.

The Judge held that, when considering an application for a stay where the claimant is subject to a CVA, the court will have regard to the claimant's current trading position. The issues which Coulson J was particularly interested in during the hearing were: is the company trading at all, does it have ongoing work and future work lined up, is it taking steps to comply with the conditions of the CVA, and does the CVA supervisor think the company can trade out of its difficulties. A supportive statement from Mead's CVA Supervisor particularly impressed the Judge, who described this in his judgment as "important evidence".

The Judge also held that, in considering an application for a stay, the court will also take into account the factor identified in *Wimbledon v Vago*, namely whether the financial difficulties that led to the CVA were caused solely or significantly by the defendant's failure to pay the sums awarded by the adjudicator. Here Mead had very good evidence that the financial difficulties were caused by Dartmoor, not only from Mead's Managing Director but also, crucially, from Mead's accountant (who was independent). Again, this independent evidence was a factor which particularly militated in favour of refusing the stay.

This judgment confirms that, short of insolvent liquidation or administrative receivership, financial difficulties on the part of the claimant will not automatically entitle the defendant to a stay of execution. This decision is likely to be of considerable importance in the current economic climate.

The Wembley Litigation Rumbles On

We have reported in recent editions on the litigation of *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd & anr* (see Issues 3 and 5). In Issue 6 we included an edited version of an article by **Jeremy Nicholson** and **Laura Crowley** commenting on the Multiplex litigation, which had been published in Legal Week and Construction News.

There have been some further developments in the Wembley stadium saga. Jeremy and Laura chart these developments in an upcoming article, set out below:

Wembley saga – what's next?

Disputes over the Wembley Stadium project rumble on, despite excoriating judgments in the Technology & Construction Court by Mr Justice Jackson in September 2008, shortly before he was promoted to the Court of Appeal.

Earlier in 2008, the judge said that managing the litigation between Multiplex and Cleveland Bridge was a Herculean labour, like slaying the Hydra – every time one head of the monster was chopped off, two new heads popped up. But the Hydra had to be slaughtered.

Unfortunately, that seems unlikely to happen anytime soon. The judge gave long and detailed judgments on outstanding issues and legal costs, refused permission to appeal to both parties, and strongly criticized both parties for not settling the dispute. Yet both parties seem determined to carry on the fight.

Both Cleveland Bridge and Multiplex – now renamed Brookfield Construction (UK), following takeover of the Multiplex group by Brookfield Asset Management in January 2008 – have sought permission to appeal from the Court of Appeal. The applications are being considered. They seem unlikely to be met with much enthusiasm. The Court of Appeal has already dealt with two previous appeals in the litigation, and will not be keen to dive into the mass of complex facts and evidence which the judge had to consider. The judgment on outstanding issues depended largely on assessment of facts and evidence, which is usually hard to appeal, particularly from the Technology & Construction Court.

But both parties clearly want to try – if only to provide a basis for appealing the judgment on costs, which would be even harder to appeal on its own. This case to date has shown no shortage of ingenuity on either side in coming up with arguments.

Then the costs to be paid will have to be agreed or assessed by the court. With a total bill of around £22 million for both parties (including £1 million for photocopying alone), even with orders for payment covering only part of the total, there will be scope for plenty of arguments on that subject.

But Brookfield are not stopping there. Their next target is Mott MacDonald, who had prime responsibility for the steelwork design. In the litigation Cleveland Bridge blamed late information and variations on Mott MacDonald; who then received a letter of claim from Brookfield running to some 340 pages, making a wide range of allegations, including delays and deficiencies in design and other deficient performance of civil & structural engineering services, and claiming losses of over £253 million. This resulted in a lengthy pre-action protocol process. In November 2008, Brookfield issued proceedings against Mott MacDonald. They have said that they emphatically deny any liability for the losses and will vigorously defend any claim.

If the claim is pursued, the dispute could overtop even the long and expensive trench warfare with Cleveland Bridge. It has already spawned satellite litigation by Brookfield against the architects, Foster & Partners and HOK Sport, in which Brookfield is trying to compel them to provide access to their personnel to help in the proceedings against Mott MacDonald. This will be heard soon by Coulson J.

Meanwhile, Brookfield's holding company faces litigation in Australia. A large class action has been brought on behalf of shareholders, based on alleged delay in notifying the Australian Stock Exchange of likely reduction in forecast profits as a result of the problems with Wembley and other projects.

Brookfield have reportedly alleged against Mott Macdonald substantial damage to Brookfield's reputation in the UK as a result of the Wembley saga. Continuing litigation in the UK and Australia may not help in rehabilitating it.

Building the new Wembley was never going to be easy. It was a huge project, involving innovative and complex design, and steelwork alone weighing in at over 20,000 tonnes. It has resulted in one of the world's best stadiums. The project is over, bar the shouting. But that seems likely to go on for quite some time to come.

Members of 4 Pump Court speak at TECBAR Conference

Rachel Ansell and **Alex Hickey** delivered papers at TECBAR's Annual Construction Law Conference in Lincoln's Inn on 31st January 2009. Rachel gave a paper entitled "*Words of Wisdom from the TCC – An Update on Damages*", which covered an array of topics including reasonable settlement, the recovery of costs of management time, and reliance on expert assessment of the cost of repair/reinstatement. Alex delivered an update on adjudication entitled "*Weather Warning: Adjudication Hot-House Meets Depression – Precipitation Expected*". Their papers can be downloaded on the TECBAR website at www.tecbar.org under 'Past Events'; alternatively please contact Chambers to obtain a copy.

David Friedman QC to speak at RICS Conference

4 Pump Court is sponsoring a RICS Conference on Avoiding and Resolving Disputes in Engineering and Construction Contracts on 27 April 2009 at the Crown Plaza Hotel, London EC4. **David Friedman QC** is speaking on insolvency. In particular he will look at how outstanding money can be recovered when one party goes into insolvency, whether unpaid suppliers can remove materials from site, and who will be responsible for defective work carried out by an insolvent contractor. Other speakers at the Conference include the Hon Mr Justice Ramsey, Geoff Brewer of Brewer Consulting, and Simon Tolson and Jeremy Glover, both of Fenwick Elliott.

This Conference is aimed at solicitors and barristers who specialise in construction and engineering, together with quantity surveyors, building surveyors, adjudicators and arbitrators. More information can be found in the flyer attached.

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