



## CONSTRUCTION LAW UPDATE PAPER

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9 March 2007

### ARBRIX CONSTRUCTION GROUP - HILTON TEMPLEPATRICK, BELFAST

#### Introduction

At this late stage in the second day of your proceedings I am sure that the last thing you want to do is to hear from a lawyer in London telling you about important things that have happened in the law and to do so for an entire hour without a break!

My object is to update you on some key new construction law over the past 12 months.

I will try and keep this as dynamic and interesting as I can.

I plan to take you on a little voyage and in essence cover the following points:

- Some key law - and not all from adjudication!
- Some clarification from the men in wigs
- Say a word or two about the world getting smaller and the availability of law from the Commonwealth
- Briefly alert you to a major decision on time at large which has come from the Wembley litigation with which I have been directly involved

#### Some law other than from the world of Adjudication

I want to give you a flavour for some law that falls outside of adjudication which has tended to become the ubiquitous staple of the construction communities' legal database. I will number the paragraphs merely for structural reasons.

1 The first issue that I quickly want to deal with is the question of service by fax.

The case is *Construction Partnership UK Limited -v- Lead Developments Limited* (2006) CILL 2357 and is a Decision of His Honour Judge Gilliland QC.

The Contract in question was the JCT IFC 98 Form which requires under clause 7.1 that any Notice should be in writing and given by “actual delivery or special delivery or recorded delivery”. What in fact was tendered was a fax seeking to determine the Contract. It was curiously held that actual delivery means transmission by appropriate means so that the document is actually received. What is important is actual receipt. The Judge could see no objection to a document being sent by fax so long as its receipt was undisputed.

What is curious is that this Decision departs from traditional practice and seems to have taken a common sense view but in that, it is consistent with the Decision of *Bernuth Lines Limited -v- High Seas Shipping* (The Eastern Navigator)<sup>1</sup> which has been particularly helpful in recognising that communication by email is essentially no different from mail, fax or telex.

If a specific method of communication has not been agreed in the contract, there is no reason why a claim with the necessary supporting documents cannot be sent by email. The only problem is establishing that the email has actually been received. This is why I would normally recommend that claims should be sent by courier.

## Poor procurement advice

- 2 The next case I want to discuss with you concerns the question of mistaken advice on procurement which amounted to professional negligence - as if you did not know. Some of you will remember that we have established cases in such area such as *Nye Saunders & Partners -v- Alan Bristow* (1987) and *Pozzolanica Lytag Limited -v- Bryan Robson Associates* (1999)<sup>2</sup>; *George Fischer Holdings -v- Multi Design Consultants*

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<sup>1</sup> [2006] 683 LMLN 1

<sup>2</sup> [1999] BLR 267 Reference was made in that case to a 1992 Code of Practice for Project Management for Construction and Development. The Code listed typical duties to be performed by Project Managers, one of which included “arranging of insurance and warranties”. The court proceeded to interpret the meaning of this and held:

*“If a Project Manager does not have the expertise to advise his client as to the adequacy of the insurance arrangements proposed by the Contractor, he has a choice. He may obtain expert advice from an insurance broker or lawyer. Questions may arise as to who has to pay for this. Alternatively, he may inform the client that expert advice is required, and seek to persuade the client to obtain it. What he cannot do is simply act as a ‘post box’ and send the evidence of the proposed arrangements to the client without comment.”*

The Project Manager’s failure in that case to adequately advise the employer rendered him negligent.

*Limited and Davis Langdon Everest & Others (1999)*<sup>3</sup>; *Great Eastern Hotel -v-. John Laing Construction Limited (2005)*<sup>4</sup>.

- 3 The case I want to share with you is *Plymouth & South West Co-operative Society -v- Architectural Structure & Management Limited (2006)*<sup>5</sup>. In this case the Claimant Client succeeded in their action against the Defendant Architects (ASM) for professional negligence in failing to advise of a suitable contract strategy and failing to advise on cost saving opportunities during the Works. Plymouth Co-op retained the Defendant for all necessary architectural services and QS surveying services including procurement. It concerned a claim arising out of a two-stage process (not based on a design and build form of contract). Modest design progress had been made during the second stage and 87% of the works remained subject to provisional sums. Nevertheless, the Defendant architect advised the client to agree a JCT with Approximate Quantities form of contract, without advising of the decisions that the client still needed to take in order to complete the design.
- 4 Critically in this case Plymouth Co-op had stipulated that the costs should not exceed £5.5m. Plymouth Co-op was worried prior to actually letting the Contract and perhaps should have realised that it should not have proceeded because there was much of the design that was still uncertain at the time of Contract and much of the Contractor's Price.
- 5 There was ultimately an overspend of more than £2m and Plymouth sued ASM for professional negligence. It was alleged that most of these additional costs could have been avoided had the client been advised not to proceed without a sufficiently detailed design, rather than relying upon the bullish advice of ASM that the project could be completed on time and to budget, notwithstanding the preliminary nature of much of the design work. ASM were found liable for in excess of £1.3 million for having provided negligent advice. The court noted that ASM had failed to appreciate the overriding importance of the second-stage process<sup>6</sup> resulting in a fully detailed building project. A number of central points arise for the QS profession:

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<sup>3</sup> The landmark cases of *Copthorne Hotel v Arup [1997] 58 Con LR 105* and *George Fischer Holdings v Multi-Design Consultants [1998] 61 Con LR 55* arose from actions brought against quantity surveyors (amongst other parties) following significant cost overruns.

<sup>4</sup> [2005] CILL 2217 TCC. This was the first reported case on breach of obligation under a Construction Management Agreement. Our client successfully sued its Construction Manager in respect of failure to ensure that individual trade contract packages were workable and complete. The appropriate measure of damages was the increased cost caused by carrying out omitted works as variations. The case is notable for criticism of the failure of an expert witness to revise his opinion in the light of new information.

<sup>5</sup> CILL 2366

<sup>6</sup> Absent detailed design, it is impossible to ensure that competitive pricing is obtained from sub-contractors during the second-stage tender. I remark there are clear merits to having the main contractor involved at an early stage as well as the ability to start on site before the second stage of tendering is completed. These benefits do need to be taken into account against the necessity of retaining commercial competition during the preparation of the second stage tender and the clear message of the Plymouth and South West case is that early commencement is no substitute for detailed design and project planning.

- Firstly, the QS is required to show some initiative and advise the client of any potential cost-saving exercises where it is apparent that such savings may be made. Failure to do so may result in the QS having to make up the difference - and it will not necessarily be a bar to the recovery of damages where the claimant is prevented from demonstrating his loss in the absence of relevant documentation.
- Secondly, unless the QS can demonstrate that the client was advised as soon as it became obvious that a project has no real prospect of being completed at the estimated budget, he or she could find themselves financially exposed.
- Thirdly, the QS would be advised to adopt appropriate cost planning techniques so that buildings may be divided into their various functional elements and costs allocated accordingly. This avoids the QS bearing additional costs incurred where a project has overrun.

As a general comment in my experience disputes of this sort where negligent procurement is involved are common and unfortunately often lead to severe cost and time overruns on many projects. Sometimes Employers' simply fail to prosecute good cases against their consultants. Often in such scenarios the consultants in question end up having their fees pared back but that of course is not always an adequate remedy. Unusually here procurement advice, quantity surveying and design were with one pair of hands, more commonly the brief will be shared amongst a number of professionals and in such situations often each blames the other generating multi-partite litigation.

### **The Bounds of Mediation Privilege - can you use an Experts' joint statement prepared for the purposes of Mediation during subsequent legal proceedings?**

- 6 This point which I think is fairly unique in having been reported came up in a Decision of His Honour Judge Coulson QC in *Aird -v- Prime Meridian Limited (2006)*<sup>7</sup> which considered whether an Experts' joint statement prepared for the purpose of Mediation could be used during subsequent legal proceedings. The facts were at the simplest these, the Court action had been stayed at a CMC for mediation. Before the Stay became effective, the Court had ordered that the parties' architectural experts should meet on a without prejudice basis and put together a statement of contentious and non-contentious issues. The order for the meeting and joint summary did not spell out that it was for the purpose of a mediation only. The joint statement was duly produced.

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<sup>7</sup> [2006] EWCA Civ 1866

This is all fairly standard procedural fair and used frequently in similar situations.

In any event, the mediation did not settle the dispute, the Claimant sought to amend its case in ways that were said to be inconsistent with what their expert had signed up to at the experts' without prejudice meeting and contained within the experts' statement. The Defendants objected to the amendment on those grounds, asserting that the joint statement was not "without prejudice" but available to the Court like any joint statement following a Part 35.12 Experts Meeting. Alternatively, they argued that the inconsistencies were so "grotesque" as to forfeit privilege under the "unambiguous and impropriety" exception. His Honour Judge Coulson QC held that the statements following Part 35 meetings were normally available to a Judge and were not privileged, even though the Part 35 meeting itself was privileged however, on the facts of this case, the Judge said that the direction for the statement had intended to be covered by mediation privilege. Judge Coulson declined to find that the Claimants through their expert were guilty of "unambiguous impropriety" in the circumstances. He commented that the authorities only permit a use of this exception in the clearest possible circumstances, involving something "oppressive, dishonest or dishonourable" quoting Robert Walker LJ in *Unilever -v- Proctor & Gamble (2000)*<sup>8</sup>.

However, on 21 December 2006, the Court of Appeal reversed the Decision of His Honour Judge Coulson.

Thus the Order for the joint meeting meant what it said on its face and the Judge was obliged to interpret it objectively; he could not take into account one party's intention. The joint statement following the experts' without prejudice meeting was disclosable by virtue of CPR Part 35.12.

### **New kid on the block**

- 7 We have a new kid on the block in the form of a Construction Contract called the JCT Constructing Excellence Contract. The aim of this new contract is to promote collaborative and integrated working. It seeks to provide a single contract form to regulate all relationships involved in a project. The mantra is predicated on a joint mission of the entire project team to deliver the project which sounds a little too much perhaps like hug a tree and all that touchy feely stuff. By all events, it is another example of the increasing trend towards collaborative working contracts following NEC, with its X12 partnering option, and PPC2000. So how does it stack up against them?

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<sup>8</sup> WLR 2436 at p2445

- 8 Although the contract comes to the industry later than the others, this JCT baby will definitely be in the running. The NEC can be too process-heavy for some clients and teams. The Constructing Excellence contract avoids this and so could suit smaller design and build contracts. It avoids the complexity of the other contracts. Adopting the purchaser-supplier approach could be attractive to public sector purchasing departments, which can have a big say in contract selection. PPC2000 has been criticised for its multiparty approach and the potential legal problems this could cause. Constructing Excellence adopts a conventional two party contract arrangement and reserves its multiparty approach for cross-project incentives. This more traditional approach is likely to win it friends.

The main point to record at this early juncture in the contracts history is the aspirations of the Joint Contracts Tribunal. They believe that it is appropriate for the procurement of construction works and construction related services; for use throughout the supply chain including the provision of professional services; for use where participants wish to engender collaborative and integrated working; for use in partnering. The JCT also say it can be used whether or not the supplier is to design; where the Works are to be carried out in sections for target costs or lump sum contracts.

### **Reform of the HGCR Act**

- 9 The next issue that I would like to touch on although I am essentially sworn to secrecy with a number of other select folk in the adjudication world is the question of reform of the HGCR Act by the Legislative and Regulatory Reform Act 2006<sup>9</sup> and all I will say is this: that a little bird reliably informs me that Section 107 of the HGCR Act, the provision applicable only to agreements in writing is to go (sometime soon) and that the effect of this mooted amendment is to remove the requirement that a construction contract must be in writing for the Act to apply. Construction contracts which are agreed orally may now 'soon' be covered by the provisions of the Act as and when<sup>10</sup> we see the draft Order produced by the DTI legal boys.

### **Public access to Court documents**

- 10 My next stop is the change in the law that came in on 2 October 2006 giving public access to documents. This is all part of the move towards greater transparency which this Government has been preoccupied and it is now embodied in CPR Rule 5.4C. This new rule in the Civil Procedure Rules is provided to benefit non-parties so

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<sup>9</sup>On 8 January 2007, the Legislative and Regulatory Reform Act 2006 (LRA) came into force. It replaces the Regulatory Reform Act 2001. The new Act has been vilified by a stream of journalists and constitutional lawyers for seeking to marginalise Parliament.

<sup>10</sup> Do not hold your breathe this could be late May 2007.

it means the Media can now get access automatically to statements of case held on the Court file provided that it is in the public interest to do so. In other words, a positive step has to be taken to effectively remove that right by either one or other or both of the parties to the action making an application to the Court<sup>11</sup>.

There has been some controversy over the new Rule as it was apparent that the Rule had retrospective effect and applied to pleadings filed before 2 October 2006. As a result of Law Society's intervention<sup>12</sup> and its threat to obtain an interim declaration against the Department of Constitutional Affairs, the new Rule has now been held not to be retrospective and it has been agreed that CPR 5.4C will be amended to apply only to statements of case filed in proceedings on or after 2 October 2006. This change to CPR 5.4C will protect the privacy of thousands of clients who had previously made statements filed with the court, believing they would remain confidential.

## Fiat Lux

- 11 My next step is the question of rights to light or to any Latin scholars in the audience *Fiat Lux*. We have the first right to lights case that has become before the Court of Appeal in more than 20 years. It is called *Regan -v- Paul Properties Limited*<sup>13</sup> and its decided that interference with a right to light could not be compensated by a monetary payment. In other words, an injunction was the appropriate remedy.

The Contract involved a new five storey building in Brighton the construction of which would block light to the living room of a first and second floor maisonette. The maisonette enjoyed the benefit of an easement of light and its owner sought an injunction to take back the sky line of the top storey's penthouse flat so that it could restore an adequate amount of light. The effects of the injunction would have been to reduce the marketability of the penthouse flat from about £470,000 to nearer £300,000. The High Court agreed that the construction of the new building amounted to an unreasonable interference with light but refused the Claimant an injunction. It went to appeal at the beginning of September last year and the Court of Appeal overturned the High Court Decision and granted a mandatory injunction preventing the developer from completing construction of the building which was

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<sup>11</sup> This means that particulars of claim, defence and any Part 20 claim can be obtained without the need for court permission. As far as any other document is concerned, the court's permission is still required. Subject to that permission, a non-party can obtain any other document filed by any party, or any communication with the court (whether with the parties or another person).

<sup>12</sup> The Law Society commenced judicial review proceedings against the DCA, after successfully securing an injunction preventing the changes having retrospective effect.

<sup>13</sup> [2006] WLR (D) 259

going to cause the loss of light to Mr Regan's home. The injunction even extended to the removal of some works that had already been carried out by the developer.

I pause to remark that this is just the type of case which demonstrates that when it comes to such hallowed rights as light and quiet enjoyment etc, one sees the courts stepping in a proactive manner and not treating damages as an adequate remedy. It is easy to dismiss rights of light because of their intangible nature but it is important to remember that a right to light is an easement that can be created in the same way as a right of way and could have serious consequences for a proposed development.

## The Big Fight

- 12 Most of the bellicosity in the construction industry still starts and by and large finishes through adjudication. Some cases go beyond that and indeed some disputes have to go through adjudication before they can actually get to another process as we shall see<sup>14</sup>. However, adjudication is not the only watering hole of the dispute industry. We are now regularly experiencing some of the fastest moving High Court TCC procedures in the land not to mention DAB's and Project Mediation. Trials measured in weeks and not years are now very common, particularly under the reign of Mr Justice Jackson, the Judge in charge of the TCC. The Courts can now truly emulate the speed of adjudication. Only in the last month I had an action commenced as a Part 8 proceedings on 8 February and trial concluded by 27 February.
- 13 The TCC is also no longer the Cinderella it once was largely as a result of the Judge Jackson having applied a keen sweep approach to getting its "house" in order.
- 14 Domestic arbitration of course has not fared that well. While certain arbitrators are invoking procedures to expedite the process and we have of course the Society of Construction Arbitrators' 100 day rules; there is not really much evidence of its use on a wider scale.
- 15 However, as we all know adjudication is really where the genesis of most construction common law is and where the dynamics of change arise and therefore I make no apologies for devoting most of the rest of my paper and discussion this

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<sup>14</sup> See NEC 3 Form of Contract provides that adjudication is a pre-condition to either litigation or arbitration. NEC 3 provides as follows: *The party does not refer any dispute under or in connection with this contract to the Tribunal unless it has first been decided by the Adjudicator in accordance with this contract.*



afternoon on adjudication developments for after all, it is adjudication where many big fish are fried, many small fish are battered and it can be saucy. As we all know there is an ever increasing appetite for adjudication to cover construction disputes such as professional negligence, ‘kitchen sink’ adjudications, the pot boilers of the industry.

- 16 Then of course there are those contracts I mentioned where one cannot go to another process such as arbitration or litigation because adjudication is a condition precedent to doing so<sup>15</sup> which deplete the probability of a next stop.
- 17 Other important developments over the last year are in the steady stream of authorities which demonstrate that there is usually no point arguing a dispute did not exist as a matter of jurisdiction because the threshold test is now so low for the referring party and the grounds for objecting to an adjudication enforcement are now increasingly restricted. I am not saying that the door is closed for that would be false but, it has well and truly become as stiff as the door to the secret garden<sup>16</sup>.

### **PFI Projects, Adjudication and provisional sum machinery**

- 18 Within the last year we have of course all come across the epic case of *Midland Expressway Limited -v- Cambba* which has, I think, gone through seven mini trials and at least one hearing in the Court of Appeal.
- 19 What I really wanted to mention to you all was the significant points arising from it insofar as the affirmation of Section 108 which of course provides that a Construction Contract as defined by the Act will cover a PFI Construction Sub-Contract and may also cover the hard “services part” of a Facilities Management Maintenance Sub-Contract. We know too the rights of a party to a Construction Contract in such circumstances to refer a dispute to adjudication at any time. This right cannot be excluded by contract so that if a sub-contractor invokes his rights under Section 108 before the special purpose vehicle (SPV) project company has had a chance to secure its finances under a related project agreement, the project company could still be exposed to the cost of the outcome of an adjudication to which it would be bound.

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<sup>15</sup> The principal dispute resolution procedure in NEC3 is adjudication. The parties have an option. Option W1 applies unless the Housing Grants, Construction & Regeneration Act 1996 (“HGCRA”) applies. If the HGCRA applies then option W2 is the appropriate dispute resolution procedure.

<sup>16</sup> See HHJ Coulson QC in *Cubitt Building and Interiors Limited -v- Fleetglade Limited* [2006] EWHC 3413 (TCC): “...parties to adjudication would know that, if the necessary timetable has been kept to, the TCC will generally enforce the decisions of adjudicators, unless it is a rare case where the adjudicator decided something in respect of which he had no jurisdiction, or there has been a breach of natural justice...”

Mr Justice Jackson confirmed what most knew in PFI circles that building contractor's rights to adjudicate at any time in accordance with the HGCR Act cannot be avoided under the Building Contract nor for pay when paid reasons.

- 20 Upstream there therefore comes a consequential risk of inconsistency in that a decision can be reached in the dispute between the SPV and the Sub-Contractor which might not ultimately be the result of a dispute resolved by some other dispute resolution procedure under the principal project agreement which of course can expose the project company to a liability that it has not predicted or provided for.
- 21 In addition, under Section 113 of the HGCR Act and its prohibition on pay when paid and conditional payments, any attempt in the PFI community to try and cap the sub-contractor's entitlement to when monies are received in the food chain above will fail and are likely to be held unenforceable.
- 22 So what Mr Justice Jackson decided in *Midland Expressway* was what we always all thought. In PFI circles there was always a risk that the building contractor's right to adjudicate at any time was one that could be readily invoked. Any notion that payment could be held up because of the existence of Equivalent Project Relief<sup>17</sup> (EPR) provisions or the right to present parallel claims has been scotched by this decision.
- 23 The ramifications of this Authority for project companies are significant. They and their advisors generally argue that pay when paid clauses and clauses postponing adjudication are commercially necessary when in fact we now know that they are unlawful.
- 24 The Courts have been strident, grounds of objection are increasingly restricted as I have mentioned at the beginning of this paper.
- 25 Judge Jackson said in *Midland Expressway* that it was "the duty of this Court to uphold and support the adjudication system and to give effect to the intention of Parliament as expressed in the 1996 Act". This approach was endorsed by the Court of Appeal. But there is another aspect of the Decision in *Midland Expressway* which is relevant in terms of legal developments over the last year and that is the Decision that went up to the Court of Appeal in relation to the question of provisional sums under this Contract.

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<sup>17</sup> EPR clauses provide that under its contract with the Project Company, a Subcontractor will receive no more (and, in certain circumstances, no less) than the Project Company is able to secure from the Authority under the Project Agreement.

26 By way of some relevant detail on the provisional sum argument, which is worthy of attention, the Contractor had argued that the Contract did not provide for provisional sums to be omitted or to be adjusted according to the value of the work actually carried out. There was no reference for example to the comfort of SMM7, Rule 10 so the Contractor argued that it should be paid a provisional sum without adjustment and in addition to the work it was instructed to carry out. Mr Justice Jackson rejected this at first instance and found that provisional sums should be deducted from the Contract Price. The Contractor appealed, Carillion had spotted that though it should be paid for work instructed against provisional sums, nowhere in the Contract was there a clause where this requirement to deduct was set out. It therefore claimed an entitlement to be paid for the work it carried out and, in addition, to be paid the entirety of the provisional sums entered in the Contract! Counsel for Carillion accepted that this interpretation had a “*surprising feel*” and Lord Justice May in the Court of Appeal commented that this was an “*elegant understatement*”. In his view, the very adoption of the word “provisional” suggested that the parties did not contemplate that sum to be paid without adjustment. Carillion’s interpretation offended that expectation. Lord Justice May noted that although it would have been more elegant and saved a lot of lawyers’ fees if the Contract had provided for provisional sums to be omitted and the actual expenditure paid instead, provisional sums were by definition in the Contract only payable at all if and to the extent that the Employer so instructed. The Court of Appeal upheld Mr Justice Jackson’s Decision for the reasons he gave.

### **Timing, tightening screws, serial adjudications (aka serial judies) and specific performance**

27 We turn next to the temporal requirements of adjudication and as Aretha Franklin sang in her song “what a difference a day makes, 24 little hours”. We see that in adjudication the courts have now put their marker down. This is a part of their toughening more literal approach in relation to adjudicators making their decisions late or parties referring documents outside the Scheme or the Act beware there will be a price to pay. We are now close to a point that provided the adjudicator answers the right question (even if he answers it fundamentally wrongly) but does so accordant to the stipulated times he will be upheld upon enforcement.

28 I will also be looking in this part of the paper at the principles to be applied to ‘serial judies’ and if we have time at the end I shall question specific performance and cohesive relief which is something the courts have given an indication they are prepared to exercise not just in the context of the reference I gave earlier to rights

to light but now in relation to adjudication enforcement where there is a stipulation for a documentary disclosure.

### **The validity of a Referral Notice served late and a late decision**

- 29 The late service of a Referral and the validity of an Adjudicator's Decision after the date for reaching that Decision are much more common than might be thought at first flush.
- 30 In the case of *Hart Investments Limited -v- Fidler and Larchpark (2006<sup>18</sup>)*, Hart contracted with Larchpark to carry out building works at Muswell Hill and Fidler was retained by Hart as the Engineer. One of the many issues between the parties which ended up in court was the enforcement of an adjudication decision which Hart had obtained against Larchpark. Larchpark challenged the validity of the Adjudicator's Decision on the basis that the Adjudicator lacked jurisdiction. As a matter of fact it was agreed that the Adjudication Referral Notice had been served 8 days after the Notice of Intention to Refer, rather than the 7 days stipulated by Section 107 of the HGCR Act. There are two points of interest from this Decision the first, the Referral Notice was not served in accordance with the Scheme but provided 8 days rather than 7 after the Notice of Intention to Refer.
- 31 His Honour Judge Coulson noted that there were no reported Decisions on the consequences of late service of a Referral Notice. The Court spent some time considering the various Decisions dealing with an Adjudicator's failure to provide a Decision within 28 days. Judge Coulson expressly agreed with the Decision of the Inner House of the Scottish Court of Session in *Ritchie Brothers -v- David Phillip* where the Court held that the 28 day limit meant what it said and thus in that case, a Decision not provided until a day after the expiry of the 28 days was a nullity. Here the Judge's initial reaction was to consider that in the overall scheme of things, it is difficult to say that a delay of one day in the provision of the Referral Notice should be accorded great significance. However he pointed the main point of adjudication was one of speed given its precedence over accuracy what matter is a quick decision, emphasising my remark earlier<sup>19</sup>. Therefore there must be a summary timetable with which everyone must comply.
- 32 In addition, if *Ritchie* is a correct statement of the position at the end of the adjudication process under the Scheme, it followed that the same principle must be

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<sup>18</sup> [2006] EWHC 2857 (TCC)

<sup>19</sup> Never Mind The Quality, Feel The Width!

applied to the event which signalled the commencement of the adjudication process. Therefore the Referral Notice was irregular and/or invalid and the Adjudicator did not have jurisdiction. The Decision of Judge Coulson makes it clear that the whole point of Section 107 of the HGCR Act was to ensure swift adjudication is operated and only operated in circumstances where the underlying contract is clear. The reason for this is that adjudication will not become bogged down in arguments about unwritten and unclear contract terms.

### More cases on what a difference a day makes

33 Most of you will be familiar that there is quite a lot of jurisprudence now in relation to late Adjudicator's Decisions and the main ones are these:

- *Ritchie Brothers Limited -v- David Phillip*
- *St Andrew's Bay Development -v- HBG Management* where a Decision was 2 days late but no sanction was imposed by the Court
- *Simon's Construction Limited -v- Aardvark Developments* where His Honour Judge Seymour decided that an Adjudicator's Decision delivered 7 days late was still valid
- *Barnes & Elliott -v- Taylor Woodrow* where the Decision was signed on the agreed date but was put in the document exchange and received the following day and was found to be valid.

34 The case that I now turn to against that backdrop is a very Decision of one of my colleagues, Dr Julian Critchlow and it is the case of *Cubitt Building and Interiors Limited -v- Fleetglade Limited* which cures the divergence that had existed until December of last year between English Courts and Scottish Authorities on the effect of late Decisions.

35 Cubitt were engaged as Main Contractor under a Contract incorporating the JCT 98 Standard Form of Building Contract on 24 August 2004, a Final Certificate was issued on 20 September the last day to challenge the Certificate Cubit issued an Adjudication Notice relating to the value of the Final Certificate. *Cubitt* considered both late service of the Referral (8 days after the Notice of Adjudication) and the validity of an Adjudicator's Decision issued a day later than the extended date for the Decision to be reached. In other words, it had two problems, not one.

36 Clause 41A.4.1 of the Contract required that if the Adjudicator is appointed within 7 days of the Notice of Adjudication then the Referring Party shall provide its Referral

within 7 days of the Notice. His Honour Judge Coulson QC decided that a failure to comply with the mandatory requirement would render the Adjudication a nullity. However, he pointed out that the clause goes on to say that if the Appointment is not made within 7 days of the Notice then the Referral shall be made immediately upon such Appointment. The Judge said the twist in this case arose in the facts. The RICS had been unusually slow in securing the Appointment of the Adjudicator who confirmed his appointment to the parties at 5:35p.m. on the seventh day after the Notice. The Referral was served the following day. On the facts, Coulson decided that the Referral was valid. He considered that the bulk of the delay was caused by the RICS [which begs a few questions in relation to their efficiency these days] and the Referring Party should not be penalised for this, and more importantly, the terms in clause 41A.4.1 needed to be interpreted sensibly such that an Appointment of an Adjudicator right at the end of the business day meant that service of the Referral the following day amounted to service immediately upon the Appointment.

37 Judge Coulson then had to consider the validity of the Decision issued by email after mid-day on 25 November the day after it was due to be reached. On the day before, the Adjudicator had advised by email to the parties that he had completed his Decision but it was subject to a final proof and arithmetical checking. He also indicated that he was considering exercising a lien. Given the time neither party responded and the Adjudicator then decided to issue his Decision the following day i.e. without waiting for confirmation of payment. His Honour Judge Coulson confirmed that the requirement of an Adjudicator to reach a Decision within the timescale is mandatory, and a failure to do so will result in the Decision being a nullity and, in accordance with the Contract, the Decision should be communicated forthwith. Judge Coulson declared Adjudicators do not have the jurisdiction to extend without the express consent of both parties and he warned Adjudicators that if their time management was so poor that they failed to provide a Decision in the relevant period and they had not sought an extension, then their Decision may well be a nullity. The significance of Adjudicator's default in such circumstances should not be underestimated.

38 There are a number of important principles that the Judge set out in the Decision:

- It is not correct to say that a Decision is not a Decision until it has been communicated. There is a two stage process involved in an Adjudicator's Decision, which is expressly identified in clause 41A. Stage 1 is the completion of the Decision, Stage 2 the communication of the Decision to the parties which must be done forthwith.

- An Adjudicator must reach his Decision within 28 days or any agreed extended date; a Decision which is not reached within 28 days or any agreed extended date is probably a nullity;

39 A Decision which is reached within 28 days or an agreed extended period, but is not communicated until after the expiry of that period will be valid, provided that it can be shown that the Decision was communicated forthwith (which means hours not 24 plus and you are in the danger zone) per *Barnes & Elliott -v- Taylor Woodrow*<sup>20</sup> followed;

#### A lesson for Adjudicators

40 The Judge stressed that the events of 23-25 November nearly caused a serious problem for the Adjudicator himself not least because his immunity may well have been waived. For example if the Judge had reached a different conclusion, the Adjudicator's failure to comply with the timetable might irredeemably have deprived Cubitt of its right to challenge the Final Certificate that would have been the Adjudicator's fault. Hence the Judge concluded Adjudicators can only accept nomination and appointment if they can complete the task within 28 days or an agreed extended period. To be on the safe side, although completion is a two stage process (completion of the Decision and the communication of it to the parties), the Adjudicator must aim to do both no later than the 28<sup>th</sup> day or the agreed extended day. Only in exceptional circumstances will the Court consider Decisions which were not communicated until after that period and in no circumstances will a Court consider a Decision that was not even concluded during that period.

#### Lien

41 As for lien Judge Coulson agreed with the Decision in *St Andrew's Bay -v- HBG Management*<sup>21</sup> and said that the Adjudicator was not entitled to a lien on his fees either at contract or law. The Judgment makes a number of important points concerning the operation of adjudication including the following:

- The juridical nature of this adjudication (and unarguably all adjudications) as contractual not statutory and the focus in some report cases has been too much on the 1996 Act and not enough on the relevant terms of the parties' contract

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<sup>20</sup> [2003] EWHC 3100

<sup>21</sup> 2003 SLT 740

- The essence of adjudication is speed, the ultimate correctness or otherwise of the Decision matters less because the Decision is not binding in that it can be challenged in a court or arbitration
- The adjudication timetable will be construed strictly even to the extent that it is contractual, albeit that the provisions as to time must be construed sensibly. An adjudicator who decides late may lose his immunity from suit
- Reaching a Decision and publishing it are two separate events subject to the parties' agreement; a Decision reached in time will be valid if published out of time provided that the publication is forthwith as in this case. But, forthwith means within a few hours at most
- Time periods in adjudication will normally encompass full days and not merely business days. The CPR does not provide an analogy in this regard
- Those who feign the HGCR Act may be surprised that adjudication is applied in extremely complex cases
- Adjudicators cannot hold a lien over their Decisions even when they make provision in their terms of acting
- It is incumbent on nominating bodies such as the RICS which have generated considerable revenue from nominating to act promptly when fulfilling their function
- There is no reason in principle why adjudications should not proceed concurrently with curial or arbitral proceedings

### **CIC Rules and GC/Works discrepant with HGCR - the time bell tolls again!**

42 If adjudicators did not jolt on the last case, at the beginning of the year they certainly would have done so when there was consternation when HHJ Havery QC ruled the validity of the Construction Industry Council (CIC) Model Adjudication Procedure (MAP) and the adjudication rules in the GC/Works contracts were Act discrepant. Judge Havery QC held in the case of *Epping Electrical Company Limited v Briggs and Forrester (Plumbing Services) Limited* [2007]<sup>22</sup> that paragraph 25 of the MAP does not comply with the requirements of the Housing Grants Construction Regeneration Act 1996 (HGCR). This meant that the adjudication rules in the statutory Scheme for Construction Contracts (the Scheme) applied in place of the MAP.

43 The facts were that the adjudicator requested and was given an extension of time of 7 days, until 21 November 2006, to reach his decision. On 21 November, the adjudicator told the parties that his decision was complete but at the same time sent them an invoice for half of his fee. The adjudicator said that he would issue his decision once the fees were paid. The parties disagreed with this and positions were

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<sup>22</sup> [2007] EWHC 4 (TCC).



reserved. When the decision was eventually released, on 23 November, it was in Epping's favour. Paragraph 25 of the CIC procedure provides that if an adjudicator fails to reach a decision within the time permitted, that decision shall nevertheless be effective if reached before the referral of a dispute to any replacement adjudicator. Epping argued that the decision was reached within the time period agreed by the parties and even if it was not, it should in any event be enforced in accordance with Rule 25. B&F relied upon the Scottish case of *Ritchie v Phillips* where a decision, under the Scheme, was not enforceable because it was out of time. Of course there is a divergence in the authorities. See for example the comments of Mr Justice Jackson in *M. Rhode Construction v David* where he said that a slight delay was not fatal. The Judge felt that although he was strictly not bound by the Scottish decision, as it was a decision of an Appellate Court and as the HGCR applied both in England & Wales and Scotland, he ought to follow it.

- 44 The Judge then considered the effect of paragraph 25 of the CIC procedure. He felt that it was inconsistent with the mandatory nature of section 108(2) of the HGCR which provides a time limit for the reaching of a decision. Accordingly, he decided that the provision was ineffective, which meant that the Scheme would apply in place of the adjudication provisions of the contract, in other words the entire CIC procedure. Further the Judge considered that whilst B&F had consented to an extension of time until 21 November 2006 that consent was conditional upon the decision being issued by that date. That condition was not fulfilled and as a consequence, the adjudicator had reached his decision out of time and it could not be enforced.
- 45 In the subsequent case of *Aveat Heating Limited v Jerram Falkus Construction Limited* [2007]<sup>23</sup> Judge Havery ruled in his very last case that the adjudication rules in the standard form of GC/Works sub contract also did not comply with the HGCR and once again the Scheme's rules would apply instead rather than the rules that the parties had intended at the outset of the project. These decisions have come as a surprise to the construction industry.
- 46 It is noteworthy that I gather no appeals are being run and that the CIC will be changing its MAP. I have heard too that the ICE has decided to remove clauses 6.4 and 6.6 from the ICE Adjudication Procedure 1997. This amendment will be incorporated into any new copies of the Procedure and all ICE adjudicators will be informed of it. The ICE recommends that at the outset of an adjudication under the

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<sup>23</sup> [2007] EWHC 131 (TCC)

ICE Procedure the adjudicator makes it clear that clauses 6.4 and 6.6 do not apply.  
So Judge Havery certainly retired with a bang!

### Check the address and check who is home

- 47 The onus is on a Claimant to ensure that a Defendant is aware of the proceedings. There is a real risk that the Defendant may otherwise be able to get a Default Judgment pursuant to an Adjudication enforcement set aside. In this regard the Decision in *M Rohde Constructions -v- Nicholas Markham-David*<sup>24</sup> is relevant - in this case an Application was made to set aside a Default Judgment on the basis that the Claimant had not successfully served a Notice of Adjudication on the Defendant. The Claimant purported to serve the Notice by sending it to a rental property owned by the Defendant. The Claimant Contractor had obtained Judgment enforcing an Adjudicator's Award in its favour against the Defendant client. The Court granted the Defendant's Application to set aside but the Defendant and his wife had separated and left the matrimonial home; the Claimant used this address for all mail which was returned undelivered. The Court considered this as an exceptional case where the prejudice to the Defendant outweighed that of the Claimant. The Defendant had acted promptly in challenging the Judgment when he discovered its existence and that was the rationale. You might say that is not a particularly special decision but it just does show that a cavalier attitude in relation to plugging on when the other side stays mute is not always a wise move.

### Serial Adjudications ('serial judies')<sup>25</sup>

- 48 What are the principles to be applied when there are successive adjudications about an extension of time claim and the deduction of damages for delay? Well in relation to this we have the benefit of a Court of Appeal Decision from 20 December 2006 in the case of *Quietfield Limited -v- Vascroft Contractors Limited*<sup>26</sup>. This was a seminal Decision from the TCC Judgment of Mr Justice Jackson dismissing the appeal by the Claimant Quietfield, the owner. The Adjudicator had held in the first adjudication that the Contactor, Vascroft had failed to show entitlement to an extension of time. Quietfield subsequently began a second and a third adjudication and the same Adjudicator held that he was bound by his original finding and refused to consider Vascroft's new evidence challenging it. Unfortunately for Vascroft, the Adjudicator's Decision was not the end of their misery. Quietfield had decided to take the

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<sup>24</sup> [2006] EWHC 535 TCC

<sup>25</sup> A Fenwick Elliott term of endearment.

<sup>26</sup> [2007] CILL 2425

initiative and claimed liquidated damages from Vascroft for its delay. Quietfield commenced then enforcement proceedings in the TCC but the Court held that the Adjudicator had been wrong not to consider the new evidence in the third adjudication.

- Mr Justice Jackson held, on the facts of this case, that the Contractor's alleged entitlement to an extension of time in the later adjudication had identified a number of causes of delay which had not featured in the first adjudication proceedings; and
- The claims the Contractor sought to advance in the later adjudication proceedings were "substantially different" from the claims it had advanced in the first adjudication. The Judge's conclusion was that the Adjudicator should therefore have considered the Contractor's Defence and the Adjudicator's Decision would not therefore be enforced. The Court of Appeal held that the Judge had reached the right conclusion and the Award would not be enforced.

49 What Lord Justice Dyson observed in relation to paragraph 9(2) of the Scheme was that an Adjudicator must resign where the dispute is the same or substantially the same that one has been referred to adjudication and a decision taken in that adjudication thus leading to the inference that it was not intended the dispute should be referred to adjudication in such circumstances.

50 In the case of Vascroft however its new submission identified relevant events which were substantially more extensive than those which had been the subject of the earlier adjudication meaning that it should have been considered by the Adjudicator. So what is a different claim to pass the test? The Court of Appeal gave this answer and said it was a question of fact and agreed the classic lawyers' answer. It also said that if the Contractor identified the same relevant event and the success of applications for extension of time, but gave different particulars of its expected effects, the differences may not result in the two disputes being substantially the same. Where the only difference between the disputes was that the later application made good at shortcomings of the earlier application an adjudicator would usually have little difficulty in deciding that the two disputes were substantially the same.

### **Are the Courts toughening their approach to Adjudication enforcement applications?**

51 Should you use the insolvency procedures to try and enforce a debt/adjudication decision? This is an important point of practice not least because it is something

which does arise from time to time. In fact Withholding Notices are still commonly not served. Absent a Withhold Notice a debt is prima facie created and if there is no evidence of the dispute why should the Contractor not be able to go and enforce directly by taking action by presenting a Petition.

52 The case of *Medlock Products Limited -v- SCC Construction Limited (2006)*<sup>27</sup> is one such case. There was in fact no adjudication. SCC, a Sub-Contractor, raised a series of invoices against the Contractor, Medlock. No Withholding Notices had been served. They were not paid and SCC succeeded to present a Petition to wind up Medlock. The Claimant dispute was approximately £52,000. The solicitors acting for Medlock indicated that the quantified losses of Medlock greatly outweighed those sums claimed by SCC. In other words, the debts were bona fide disputed on substantial grounds or there were cross claims which Medlock had not yet been able to litigate which exceeded the amount of the Petition.

53 The Court held that there was no bona fide dispute of the debts in substantial grounds. Significantly the Court placed great weight on the absence of a Withholding Notice and finding that there was no genuine cross claim. The application to restrain the advertisement was dismissed.

54 The Judge noted that the Contract's written Contracts within the meaning of the HGCR Act because they incorporated the written terms of Medlock which are standard terms of contract. The Judge considered the possibility that the absence of a Withholding Notice might be a special circumstance following the leading Insolvency case of *Bayoil*<sup>28</sup> for refusing an Order restraining advertisement. However, he decided that he would not do so in the absence of any Withholding Notice to support his conclusion that the cross claims were not substantial or serious claims which Medlock would have had in mind irrespective of the winding up proceedings.

55 What this case goes to show if you are bold enough is you may proceed straight for a Winding - up Petition absent a Withholding Notice and we at least have a Judge now that has affirmed the position.

56 The case emphasises the importance of compliance with Section 111 Withholding Notices for Contracts subject to the provisions of the HGCR Act. If these provisions

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<sup>27</sup> Unreported, Bristol High Court, 13 July 2006

<sup>28</sup> Reviewing earlier authority the Court of Appeal in *Seawind Tankers Corporation v Bayoil S.A.* [1999] Lloyds Rep 210 held that where a company had a genuine and serious cross claim (exceeding the petitioner's debt) which it had not been able to litigate, the petition should be dismissed or stayed unless there were special circumstances.

are not complied with, it will support the conclusion that any possible cross-claims will not be considered genuine.

### The sins of placing an each way bet

57 I want now to deal with approbating and reprobating, aka not to run hot and cold. To approve or reject or to use the Latin tag *quad approbo non reprob*. I wish I had a t-shirt with that printed on the back as it is a good lesson in life. As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect of such contract or conveyance hence a party can be bound by the principle of election and cannot blow hot and cold or approbate and reprobate its earlier argument.

58 In this regard the Decision of *Redworth Construction Limited -v- Brookdale Healthcare Limited (2006)*<sup>29</sup> is instructive. Brookdale were the Employer on a project for the construction of a group of 4 homes in a day care centre. It engaged Redworth as Contractor for the Project and proceedings arose out of an Adjudication Decision delivered in April 2006 finding some £210,000 due to the Contractor. The Employer contended that the Adjudicator had not jurisdiction to decide the matter put before him because there was no Contract in the JCT Form as claimed by the Contractor and/or the principal terms of contract were not recorded in writing so as to satisfy Section 107 of the HGCR Act. The Adjudicator had made a non-binding Decision that there was a Contract in the JCT 98 Form as maintained by the Contractor. On enforcement Judge Havery QC was asked to determine the following issues:

- whether there was a Contract in writing within the meaning of Section 107;
- whether the Contract included the JCT Terms
- if the Contract did include the JCT Terms whether Section 107 applied
- whether the Responding Party were the party to the Contract
- whether there was a dispute to refer to adjudication

59 What makes the case unusual on jurisdiction is the Contractor submitted a different argument to the Court than it had to the Adjudicator and Judge Avery held in Redworth that the principle of election prevented the Contractor from going beyond the matters that had been relied on in the adjudication, the Contractor “cannot blow hot and cold, or approbate and reprobate its earlier argument”. A party who has

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<sup>29</sup> [2006] BLR 366

taken some benefit under an instrument such as an Order of the Court cannot disavow instruments so as to obtain a further benefit. The Contractor had elected to put its argument in the particular way in order to obtain the benefit of the Adjudicator's Decision both as to jurisdiction and substantively. According to the Judge, the Contractor had therefore made an election from which it would not be just to allow it to resile, not least because it would be impossible to determine what the Adjudicator's Decision would have been had the other matters been put to him.

- 60 The Judge said that the Contractor had elected or chosen not to use the arguments and the facts at that time and could not go back upon that election.

### **Costs when resisting enforcement**

- 61 What might be your liability for costs if you resisted enforcement of an Adjudication Decision up until the date of the proposed enforcement hearing? Well the answer is pretty painful and this is apparent from the Decision in *Gray & Sons Builders (Bedford) Limited -v- The Essential Box Company Limited (2005)*<sup>30</sup> where an Adjudicator's Award had not been met by payment from the Defendant, the Defendant's solicitors had indicated that the Claimant's enforcements proceedings would be contested and took a number of technical points.

- 62 It established, as if it needed to be restated, that anybody seeking to resist the enforcement of an Adjudicator's Decision without very good grounds for doing so can expect to both fail and have to pay the other side's costs on an indemnity basis. This case marks an interesting development. Courts are now prepared to award indemnity costs against a party seeking to frustrate the purpose of adjudication provisions in the Construction Act by resisting enforcement.

### **Could a Contractor rely on its own Application for Summary Judgment in relation to its Final Account to bring about the adjournment of an adjudication enforcement hearing?**

- 63 Well the Authority for this is a case called *Hillview Industrial Development -v- Botes Building (2006)*<sup>31</sup>. In this case the Claimant sought to enforce an Adjudication Decision in its favour for liquidated damages for delay. The Defendant, Botes had pursued a subsequent proceedings on the Final Account dispute in respect of which an enforcement hearing was pending. The Defendant conceded there were no

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<sup>30</sup> [2006] EWHC 2520

<sup>31</sup> [2006] EWHC 1365

grounds to oppose the current enforcement action, but sought to combine the two enforcement actions in order to set one off against the other. The Court declined the stay. Botes said it was entitled to set-off the balance due to it against the larger sum awarded under the adjudication proceedings.

- 64 Alternatively it argued that if Summary Judgment was entered in favour of Hillview, execution of the Judgment should be stayed until Botes' Application for Summary Judgment shall be determined. His Honour Judge Toumlin decided that Hillview was entitled to Summary Judgment. Botes had conceded that it had not defence. There was no justification to adjourn the Summary Judgment Hearing; Adjudication under the HGCR Act was intended to resolve construction disputes albeit on a provisional basis by way of prompt payment. Sadly by way as a postscript Botes went into liquidation shortly after this.

### **Can a losing party in Adjudication withhold payment on the basis that it expects to recover an equivalent or larger sum in subsequent litigation?**

- 65 The Decision on this one is *Interserve Industrial Services -v- Cleveland Bridge UK Limited (2006)*<sup>32</sup> where the parties were engaged on works to refurbish the Tinsley viaduct. Disputes arose, there were a series of adjudications carried out in accordance with the CIC Scheme Model Adjudication procedure [yes the rules that would now of course be non-compliant with the HGCR Act]. Mr Justice Jackson in reviewing the arguments specifically agreed with the conclusions of His Honour Judge Gillian QC in *Gleeson -v- Devonshire Green*<sup>33</sup> and *McLean -v- The Albany Building*<sup>34</sup> where the Judge held that payment ordered by an Adjudicator could not be withheld on the basis of a claim which accrued after the adjudication had been commenced and that a party could not set off a claim for damages against an adjudicating decision. Mr Justice Jackson said that if the existence of a claim could be relied upon as a reason to withhold payment, then you may have a situation where there would be a series of consecutive adjudications with a result that no adjudication decision is implemented. Each Award would take its place in the running balance between the parties. Accordingly the answer to the question as to whether a losing party could withhold payment on the basis that it is expected to recover an equivalent or larger sum in a subsequent adjudication was no. Therefore if you do think you have a cross claim you must start your own adjudication as quickly as possible. It supports still further the juridical basis that Judge Jackson has constantly

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<sup>32</sup> [2006] EWHC 741

<sup>33</sup> Unreported, 2004 (TCC) HHJ Gilliland QC

<sup>34</sup> [2005] TCC 101/05

reasserted that adjudication is a contractual process and that effectively Adjudicator's Decisions need to be determined, settled and followed as they arise.

### **What is the effect of economic duress on adjudication?**

66 The case here is *Capital Structures Plc -v- Time and Tide Construction Limited (2006)*<sup>35</sup>. The Claimant sought Summary Judgment for interest arising from an Adjudicator's Decision in respect of a Settlement Agreement. The Defendant resisted on the basis that the Adjudicator had no jurisdiction because the Agreement resulted from economic duress.

67 HHJ Wilcox noted that the courts, in adjudication enforcement cases, must be wary of encouraging complex satellite litigation. He therefore cautioned against "imaginative and strange interpretation of the facts and events arising in the commercial rough and tumble of the construction industry". This should not be allowed to found weak challenges to jurisdiction. The Judge first considered the suggestion that even if economic duress was proven, the adjudication provisions of the contract would have survived. He said that where there had never been a contract because it had been avoided on the grounds of duress, it logically followed that any adjudication provision also became void. Here, the Judge felt there was, just, an arguable case. As this was a claim for summary judgment, this was all T&T had to demonstrate. Accordingly, T&T were given leave to defend and summary judgment was refused. If economic duress was proven and if T&T had taken proper steps to avoid the settlement agreement which was the subject of adjudication, then the adjudicator would not have had jurisdiction.

### **Cohesive relief, specific performance and all that jazz**

68 My last topic is that of cohesive relief, specific performance and all that jazz and it is the case of *Multiplex Constructions (UK) Limited -v- Mott MacDonald (2007)*<sup>36</sup>. This concerns an application to enforce an Adjudicator's Decision. It came before Mr Justice Jackson to enforce an Adjudicator's Decision and arose out of the Wembley Stadium Project. Motts were the Structural Engineer in the project and were engaged upon engineering work for the stadium since May 1998. On 6 April 1999, Mott entered into a Consultancy Agreement with Wembley National Stadium. Motts, Multiplex and Wembley National Stadium then entered into a Novation Agreement. Clause 13.1 of the Novation Agreement contained a clause allowing Multiplex access

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<sup>35</sup> [2006] CILL 2345 TCC

<sup>36</sup> [2007] All ER (D) 133 TCC



to pertinent records. Multiplex subsequently asked Motts for access to its pertinent records and a dispute arose between the parties as to the meaning of the interpretation of clause 13.1 of the Novation Agreement. This was referred to adjudication where an Adjudicator gave his Decision that he had jurisdiction to decide the dispute and gave a Decision as to the meaning of pertinent records and ordered Motts to provide access to these records within 7 days of the days of the Decision. Motts allowed Multiplex to inspect the documents and Multiplex believe that these documents were insufficient. Multiplex then sought a declaration that the Adjudicator's Decision was binding on Mott and sought an Order for specific performance or alternatively an injunction of damages. There issues were:

- whether the Adjudicator had jurisdiction to reach his Decision;
- whether as a matter of fact there had been compliance of the Adjudicator's Decision. Motts argued that they never put forward an alternative interpretation of pertinent records and Multiplex never succeeded in widening the dispute. Secondly, there was not a dispute about the broader question of what was the true meaning of the phrase "all records pertinent to the services";
- therefore the relief claimed by Multiplex was too wide;
- the Adjudicator had answered a broad question in his Award i.e. the true meaning of the phrase "all pertinent records relating to the services"; and
- as the Adjudicator awarded per Multiplex interpretation, the Adjudicator should have dismissed Multiplex's claim altogether.

69 His Honour Judge Jackson considered that he must construe the correspondence on a fair reading of that correspondence on the true meaning of the phrase "all records pertinent to the services". Multiplex put forward their favoured reading of the phrase and Motts asserted that the true meaning was something different without saying what it was. Therefore, Multiplex had correctly formulated the first dispute in the Notice of Adjudication. The interpretation of the correspondence also leads to a result that accords with common sense. The Adjudicator formulated his own interpretation of clause 13.1 and in doing so was resolving a pre-existing dispute between the parties. He therefore acted within his jurisdiction. His Decision was binding on the parties until the dispute was finally determined or by agreement or by arbitration. The issue of whether Motts had complied with the Adjudicator's Decision was not resolved on the basis of the written evidence at the hearing under CPR Part 24. Therefore Multiplex failed in its application for Summary Judgment on its claim for specific performance as there was a still a dispute on the facts as to whether Motts had complied with the Adjudicator's Decision. The proper course was for the

Court to grant a declaration as requested by Multiplex as the jurisdiction issue had been fully argued and Multiplex's case on this issue was sufficient to warrant a Summary Judgement. The question of the Adjudicator's jurisdiction remained a live issue and as a matter of policy, the TCC should at each stage of litigation resolve every issue which was capable of resolution which it would do here.

- 70 It will be seen that on the third issue (compliance) Mr Justice Jackson concluded that, on the present evidence, he could not say whether Mott had in fact complied with the adjudicator's decision or not. Accordingly Multiplex failed in its application for summary judgement on its claims for specific performance, an injunction and/or damages to access Mott's records.

### **Time at large or no - another epic on Wembley**

- 71 I cannot say too much as the Approved judgment is not out yet but it will be when I email my paper. Judgment has been given in what is for our industry likely to be the most important decision to come out of the construction of the Wembley Stadium<sup>37</sup>. It concerns litigation between Multiplex and Honeywell. As we all know Contractors will often play the "time at large card" when they fall into delay or where the completion date of the contract is missed. This case demonstrates how difficult it is for such an argument to succeed, and that the courts will seek to uphold extension of time clauses whenever possible. Mr Justice Jackson construed the contract terms by resolving ambiguities in favour of the contractual extension of time mechanism, and accordingly, time had not been set at large. The Court considered the Australian decision in *Gaymark Investments v Walter Construction* [1999]<sup>38</sup>, and said that: "*Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that Gaymark represents the law of England.*"

- 72 The case therefore clears up a long standing debate on the effect of conditions precedent in the context of a contractor's right to an extension of time. Mr. Justice Jackson affirmed the view previously taken by the Inner House of the Court of Session in Scotland in *City Inn*<sup>39</sup>, that there are good reasons for the employer requiring a contractor to give prompt notice of delay, and for creating sanction by way of condition precedent for a failure to give such notice. The condition precedent in the Multiplex case did not seek to take advantage of any potential breach by Multiplex that may have prevented Honeywell from giving the requisite notice, because clause

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<sup>37</sup> *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited No. 2* [2007] EWHC 447 (TCC)

<sup>38</sup> (2000) 16 B.C.L. 449

<sup>39</sup> *City Inn Ltd v Shepherd Construction Ltd* (2002) SLT 781

11 did not require Honeywell to give notice if it was impossible to do so. This is an important qualification, since conditions precedent which did not take account of such impossibility would, based on the prevention principle itself, arguably be unenforceable.

- 73 The case is important as marking a new determination by the courts to shore up the effectiveness of extension of time provisions in construction contracts and to limit the extent to allow these contractual mechanisms to be shattered by time at large or contract mechanism arguments.

## **Summary**

- 74 It's a long voyage and we never arrive but we can only 'better'!

**9 March 2007**

**Simon J A Tolson  
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