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Adjudication and Latest Case Law

Recent cases in the Technology and Construction Court

Progress on reform

1. In July 2008, the Department for Business Enterprise & Regulatory Reform ("BERR") published the draft Construction Contracts Bill, which they described as having "been developed in the light of formal consultations in England, Wales and Scotland in 2005 and 2007 and extensive discussion with industry stakeholders".

2. BERR invited comments by 12 September 2008, particularly "about how effectively the drafting achieves its purpose", and further developments are now awaited. In order for the bill to be included in the next Queen's Speech, those developments are going to have to take place quickly.

3. The draft bill amends Part 2 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). It comprises 12 clauses, briefly summarised as follows:

4. Clause 1 concerns the application of the draft bill; it will apply only in relation to construction contracts entered into after the coming into force of the Act;

5. Clause 2 removes the current limitation of Part 2 to contracts which are in writing;

6. Clause 3 introduces a provision, extending only to Scotland, to facilitate the correction of minor, clerical or arithmetical errors in an adjudicator's decision;

7. Clause 4 contains provisions dealing with the costs of an adjudication, addressing and distinguishing between, the parties' own costs in relation to an adjudication, and the fees and expenses of the adjudicator;

8. Clause 5 is designed to prohibit the parties from agreeing in advance that decisions taken by a third party, such as an adjudicator, are to be conclusive of the amount of any periodic or interim payment;

9. Clause 6 addresses the issue of making periodic payments under a construction contract conditional upon obligations under another contract by confirming that such an arrangement does not constitute an adequate mechanism for payment;

10. Clause 7 amends the existing provisions relating to the notices which a payer gives of the sum which he proposes to pay and introduces provisions relating to the giving of notices by the payee;

11. Clause 8 introduces (in most cases) a requirement to pay sums specified in these notices;

12. Clause 9 amends the existing provisions relating to a contractor's right to suspend performance when he has not been paid; and

13. Clauses 10 to 12 deal with general matters relating to the draft bill.

Clauses relating to adjudication

Clause 2: Requirement for contracts to be in writing

14. Section 107 of the HGCRA provides that Part 2 of the HGCRA only applies to contracts which are "in writing". This section has been interpreted restrictively by the courts, with the Court of Appeal holding in the case of *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270 that all terms of construction contracts must be "in writing" for Part 2 to apply, not just the material terms relevant to the matter(s) in dispute. One of the consequences of this decision was HHJ Wilcox deciding in the case of *Bennett (Electrical) Services Ltd v Inviron Ltd* [2007] EWHC 49 (TCC) that a letter of intent failed to comply with the section 107 requirement.

15. Clause 2 removes this general requirement, whilst prescribing that various matters must nevertheless still be in writing.

16. Clause 2(1) repeals section 107 of the HGCRA in its entirety. The effect is that Part 2 of the HGCRA will apply to all construction contracts – those which are wholly in writing, partly in writing or wholly oral.

17. Clause 2(2) provides that certain provisions of a construction contract relating to adjudication must be "in writing"; these are the provisions necessary in order to comply with the requirements specified in section 108(2) to (4), which set out the terms that must be included in a construction contract, such as requiring the adjudicator to reach a decision within a certain time period, etc.

18. Clause 2(3) inserts a new section 115A into the HGCRA, which defines what is meant by provisions made "in writing" for the purposes of Part 2; the new section broadly follows the "in writing" requirements of the former section 107, and confirms that reference to anything being "*written*" or "in writing" includes "its being recorded by any means".

Clause 3: Adjudicator's power to make corrections: Scotland Clause 3:

19. As a result of the judgment in *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314, in which the Judge decided that adjudicators do have the power to correct mistakes in their decisions, BERR concluded that it was not necessary to amend the HGCRA in this respect in relation to England and Wales, but only to Scotland. There is now therefore a new subsection 5A to section 108 of the HGCRA, which has the effect of requiring the parties to a Scottish law construction contract to provide in their contract, in writing, that the adjudicator has the power to correct a clerical or typographical error in their decision arising by accident or omission.

Clause 4: Adjudication costs

20. This clause inserts new sections 108A, 108B and 108C into the HGCRA; these address, and distinguish between, the parties' own costs in an adjudication, and the fees and expenses of the adjudicator.

21. New section 108A provides that any agreement between the parties to a construction contract concerning the allocation between the parties of the costs relating to an adjudication is ineffective unless such agreement is made after the appointment of the adjudicator and is in writing. This section covers both an agreement as regards the allocation of the parties' own costs, and an agreement concerning paying the fees and expenses of the adjudicator.

22. New section 108B applies where the parties have made an effective contractual provision concerning the allocation as between the parties of costs relating to the adjudication (i.e. it is made in writing after the appointment of the adjudicator), and that provision does not leave the allocation of those costs to the adjudicator to decide.

23. This section provides that if the adjudicator considers that any of the costs, other than the fees or the expenses of the adjudicator, which a party is required to pay are unreasonable, then he may make a determination to that effect. Where the adjudicator makes such a decision, then the parties' allocation in respect of such costs is ineffective, with the result that the costs concerned remain the responsibility of the party incurred them. Subsections (3) to (5) of new section 108B enable such a decision by an adjudicator to be challenged in the courts by one of the parties to the construction contract in question, if they do not agree with it.

24. Additional provisions are included in new section 108C regarding the fees and expenses of the adjudicator; section 108C(3) gives a party to the construction contract the right to challenge whether or not work was reasonably undertaken, and/or expenses reasonably incurred, by the adjudicator by applying to the court.

25. Clauses 2, 3 and 4 of the draft bill are set out below:

2 Requirement for contracts to be in writing

(1) Section 107 of the 1996 Act (provisions applicable only to contracts in writing) is repealed.

(2) In section 108 of the 1996 Act (right to refer disputes to adjudication)

(a) in subsection (2), after "The contract shall" insert "include provision in writing so as to";

(b) in subsections (3) and (4), after "provide" insert "in writing".

(3) After section 115 of the 1996 Act insert –

"115A "In writing"

(1) For the purposes of this Part, provision of a construction contract is in writing if -

(a) it is made in writing (whether or not it is signed by the parties),

(b) if it is made by exchange of communications in writing,

(c) it is made by reference to terms which are in writing, or

(d) it is evidence in writing.

(2) For the purposes of subsection (1)(d), provision of a construction contract is evidenced in writing if it is made otherwise than in writing but recorded by one of the parties, or by a third party, with the authority of the parties to the contract.

(3) For the purposes of this Part, an exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of provision of a construction contract otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties provision of the contract in writing to the effect alleged.

(4) References in this Part to anything being written or in writing include its being recorded by any means."

3 Adjudicator's power to make corrections: Scotland

In section 108 of the 1996 Act, after subsection (5) insert –

"(5A) For Scotland, this Part is to be read as if after subsection (3) of this section the following additional subsection was inserted –

"(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to correct a clerical or typographical error arising by accident or omission.""

4 Adjudication costs

After section 108 of the 1996 Act insert –

"108A Adjudication costs: effectiveness of provision

(1) This section applies to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

It is immaterial whether the contractual provision is contained in the construction contract or not.

(2) Any contractual provision to which this section applies is ineffective unless it is made in writing after the appointment of the adjudicator.

108B Adjudication costs: costs of the parties

(1) This section applies in a case where -

(a) a dispute arising under a construction contract complying with the requirements of section 108(1) to (4) is referred to adjudication,

(b) the parties have made effective contractual provision concerning the allocation as between the parties of costs relating to the adjudication, and

(c) that provision is not provision requiring a party to pay such of those costs as the adjudication may determine.

(2) In a case where this section applies –

(a) if the adjudicator considers that any of the costs (other than fees or expenses of the adjudicator) which a party is required to pay pursuant to the provision referred to in subsection (1)(b) are unreasonable, he may make a determination to that effect, and

(b) that provision is ineffective to the extent that it would require the payment of any costs in respect of which the adjudicator makes such a determination.

(3) Where a party disputes such a determination, that party may apply to the court (upon notice to the other party and the adjudicator).

(4) On such an application, the court may –

(a) for England and Wales, the High Court or a county court, and

(b) for Scotland, the Court of Session or the sheriff.

108C Adjudication costs: fees and expenses of the adjudicator

(1) Where -

(a) a dispute arising under a construction contract complying with the requirements of section 108(1) to (4) is referred to adjudication, and

(b) the adjudicator determines the matter in dispute or his appointment is

brought to an end for reasons other than his default or misconduct,

the parties are jointly and severally liable to pay to the adjudicator such reasonable amount as he may determine in respect of fees for work reasonably undertaken and expenses reasonably incurred by him.

(2) Subsection (1) does not affect -

(a) any contractual liability that a party to the construction contract may have to the other party to the construction contract in respect of the fees and expenses referred to in that subsection;

(b) any liability that a party to the construction contract may have in respect of those fees and expenses under a contract with the adjudicator.

(3) Where there is any dispute as to -

(a) what for the purposes of subsection (1) is a reasonable amount,

(b) whether for those purposes work was reasonably undertaken or expenses were reasonably incurred by the adjudicator,

a party to the construction contract may apply to the court (upon notice to the other party and the adjudicator).

(4) The court may on an application under subsection (3) -

(a) determine the matter, or

(b) order that it be determined by such means and in such terms as the court may specify.

(5) In this section "the court" has the same meaning as in section 108B."

Trends in adjudication

26. The latest research from the Adjudication Reporting Centre of Glasgow Caledonian University, published in May 2008, showed that after a slight upturn (5%) in adjudication in the ninth year after the HGCRA came into force, the first half of the tenth year had actually shown a decline in numbers of 4% in respect of adjudications conducted through the Adjudicator Nominating Bodies (ANBs).

27. Quantity surveyors continued to be most often appointed as adjudicator than any other profession, with lawyers second, then civil engineers and architects.

Latest case law

Cantillon Ltd v Urvasco: Part 1 **[2008] EWHC 282 (TCC)**

This case is important for two reasons. First Mr Justice Akenhead set out the following propositions which should be followed if a breach of natural justice was being alleged:

(i) It must first be established that the adjudicator failed to apply the rules of natural justice;

(ii) Any breach of the rules must be more than peripheral. It must be a material one;

(iii) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the

dispute and is not peripheral or irrelevant;

(iv) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this;

(v) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving parties the opportunity to comment, or where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction v The London Borough of Lambeth* [2007] was concerned comes into play.

28. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation to that point.

***Cantillon Ltd v Urvasco: Part 2* [2008] EWHC 282 (TCC)**

29. Although it is clear that a decision that is wrong on the facts will be enforced, provided the adjudicator had jurisdiction to decide the matter and provided he answered the question referred to him, what is the position with a decision that might be good in part and impeachable in others? This time, Mr Justice Akenhead, having reviewed the authorities, suggested that a decision could be severable if two or more disputes have been determined and the challenge only goes to one of those disputes. In doing so, he listed the following propositions:

(i) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.

(ii) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.

(iii) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

(iv) The same logic must apply to the case where there is non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

(v) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.

(vi) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in

breach of the rules of natural justice, the decision will not be enforced by the court.

***Harris Calnan Construction Co. Ltd v Ridgewood (Kensington) Ltd* [2007] EWHC 2738 (TCC)**

30. This was a claim to enforce an adjudicator's decision for some £102k. Ridgewood said that the adjudicator did not have the necessary jurisdiction because there was no contract in writing. Unusually, there was no suggestion in any of the documents before the court that Ridgewood had actually reserved its position on this issue during the adjudication. Accordingly, it seemed to HHJ Coulson QC that the decision that the adjudicator reached as to the existence of a contract in writing could not now be challenged by Ridgewood.

31. However, the Judge did go on to consider whether or not there was a contract in writing. This is of interest because the contract in question took the form of a Letter of Intent. There have been a number of cases, including *Bennett v Inviron* to which I have already referred above, where the particular letters of intent in question were ruled not to be contracts where all the terms were in writing.

32. As HHJ Coulson QC made clear, each case must turn on its own facts. Here, the letter of intent made plain that there was complete agreement between the parties as to the contract. The contract workscope was contained in what was described as "Tender Documents dated 2nd November, 2005". There was an agreed lump sum of £200,787.75 and an agreed set of contract terms (namely the JCT 2005 Standard Form, Private with Quantities). The retention was 5% and LADs were agreed at £5,000 per week. Finally, the contract period was 16 working weeks.

33. The adjudicator observed that "there appears to be nothing left for the parties to agree" and went on to note that all that was missing was a set of documents which made that agreement more formal. The Judge agreed that that did not mean that there was not a contract between the parties. All the terms were evidenced in writing. Accordingly, the adjudicator did have the necessary jurisdiction.

***Ledwood Mechanical Engineering Ltd v Whessoe Oil & Gas Ltd & Anr* [2007] EWHC 2743 (TCC)**

34. A dispute arose in respect of the defendant joint venture's assessment of interim application 19. The contract incorporated adjudication provisions, even though the project related to the fabrication and erection of pipeworks at a natural gas terminal. An adjudicator held that the joint venture (JV) had wrongly withheld some £1.2m. The JV did not challenge the decision. However, it claimed that it was entitled to set off against the adjudicator's decision. The contract provided for a risk/reward (often known as "pain and gain") regime to be applied. The JV said that the elements of risk/reward should be dealt with on applications for interim payments.

35. Ledwood had made their application 19 in July 2007. Before the adjudicator made his decision, there were three further interim payment applications, 20-22. The JV issued a revised payment notice against application 22 on 11 October 2007. However, when they received the adjudicator's decision, the JV issued a revision to that payment notice giving effect to the decision but also assessing their own deduction for risk/reward. This led to a negative sum being due. Mr Justice Ramsey said

that to permit the JV to use an adjustment to the payment notice for application 22 to give effect to the adjudicator's decision would ignore the wrongful deduction from application 19 and permit the JV to take account of subsequent events and other rights of set-off, which it was not entitled to do. However, the JV also argued that a risk/reward adjustment should be made in respect of application 19. They said that this was based on the logical corollary of the adjudicator's decision. In particular, they referred to the decision of Mr Justice Jackson on the *Balfour Beatty v Serco* [2004] EWHC 3336:653 case where the Judge had said:

> Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).

36. The question for Mr Justice Ramsey was whether it followed logically that the JV was entitled to recover a specific sum by way of adjustment of the risk/reward element. First he had to consider whether a set-off could be made. There was a dispute between the parties about the expended and revised target man hours which formed the basis of the risk/reward calculation. The Judge held that while the natural corollary of the decision was that it increased the number of expended hours in the pain/gain calculation, the calculation of the effect was not undisputed or indisputable. Thus, the position differed from the calculation of LADs which can be made using a number of weeks decided by an adjudicator and applying the contractual rate. Therefore, Ledwood was entitled to the summary judgment.

***Makers UK Ltd v The Mayor and Burgesses of the London Borough of Camden* [2008] EWHC 1836 (TCC)**

37. Sometimes, a party will contact a potential adjudicator direct to try and ascertain whether they would be available to accept the appointment. This case demonstrates the caution that must be used. Here, Camden challenged the appointment of an adjudicator and his jurisdiction because his name was suggested to the RIBA for appointment. Camden also argued that there was apparent bias because the claimant's solicitor had contacted the adjudicator before his appointment to check on his availability. Before Mr Justice Akenhead both arguments failed. The Judge made the following observations:

    (i) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent.

    (ii) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.

    (iii) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions. If it is to be permitted in any given circumstances, the institutions might wish to consider whether notice of the suggestions must be given to the other party.

***Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd* [2007] EWHC 2421 (TCC)**

38. Vauxhall employed Ringway to carry out the development of a large car park to accommodate new cars being built by Vauxhall. The contract was the JCT1998 with Contractor's Design as amended. On 16 May 2007, Ringway submitted interim application No. 11. This was a detailed document, and sought the sum of £1,303,704.95. Vauxhall, acting principally through its agent Walfords LLP, finally responded on 27 June 2007 stating that it had not had sufficient time to consider in detail the build-up of the variation costs. It did not issue a payment notice. Although both parties discussed the need to resolve the matter between themselves, this came to nothing and an adjudicator was appointed. Vauxhall made several jurisdictional challenges, which were rejected. The adjudicator found that by operation of clause 30.3.5, Vauxhall were obliged to pay Ringway the amount stated in the interim payment application, plus interest and his fees.

39. The inevitable enforcement proceedings came before Mr Justice Akenhead. The jurisdictional challenges included that the adjudication notice referred to Ringway's ultimate entitlement under its final account as opposed to the amount due under the interim application. Vauxhall also said that no dispute had crystallised prior to the reference to adjudication in relation to the interim application, because no demand had been made for payment. As Ringway had not, prior to the reference, relied upon the provisions of clause 30.3, no dispute existed or could exist in relation to the claim made in respect of interim application which was based on clause 30.3.5.

40. The Judge was of the view that the key issue was whether the adjudicator had jurisdiction to decide that, in the absence of any timely payment or withholding notices, Ringway was entitled under clause 30.3.5 to the sum claimed in interim application 11. The Judge was satisfied that the dispute which was referred to adjudication, was a dispute relating to the interim application. It was material that the previous applications for payment were numbered 1-10, and that these were valued by Walfords LLP within a seven day period of their receipt. Interim application 11 was not an academic valuation exercise upon which Ringway were seeking to embark. Further, the Judge had to decide what, if anything, was in dispute and if there was a dispute, whether the dispute resolved by the adjudicator was the one referred to him. Here, as a matter of fact, the dispute concerned the amount due to Ringway arising from application 11. Part of this dispute was whether or not Vauxhall had complied with the payment provisions of the contract.

41. The Judge held that the issuing of a payment notice under clause 30.3.3 was a mandatory obligation. Vauxhall's failure to do so was effectively a breach of contract. Although there was no express reliance in the adjudication notice to clauses 30.3.3 and 30.3.5, this did not change the fact that there was a clear claim for payment. The lack of a timely notice under clause 30.3.3 inevitably meant that under clause 30.3.5, the sum claimed became due and payable.

***CSC Braehead Leisure Ltd and Anr v Laing O'Rourke Scotland Ltd* ScotCS CSOH 119**

42. Braehead claimed that Laing had caused or contributed to the collapse of a ceiling in an Odeon Cinema. On 23 January 2008, Braehead referred the dispute to adjudication. The time for the issuing of the decision was extended until noon on 7 April 2008. By email timed and dated 11.56 a.m.

on 7 April, the adjudicator issued his decision. A signed version of the final document was issued on 10 April 2008. Laing said the decision was invalid.

43. When the adjudicator emailed his decision, in which he held that Laing were in breach of contract, he said that he envisaged some minor further written procedure to take account of a matter touching on overall quantum. In fact, he sought comment from the parties by 11 April in relation to this discrete issue. If there was agreement, so much the better, but if there was not, the adjudicator said he would work further on any submissions received. Laing immediately said that as the adjudicator had failed to issue a proper decision by noon, the mandatory period for a decision had expired and the adjudicator's jurisdiction had come to an end. Laing were not prepared to agree any further extension. In correspondence with Laing, the adjudicator referred to his award being an "interim award". Laing replied that a proper decision should have been issued by the 12 noon deadline. An adjudicator has no power to make an interim decision and obliged to reach his decision within the time limit as extended. The adjudicator did not determine the dispute referred to him but left certain matters to be determined at a later date.

44. Braehead said that it was clear that the adjudication procedure was intended to be flexible, and that the adjudicator could make interim directions. Directions might be issued at any stage and were not confined to procedural matters. While it is clear there must be one final decision dealing with all matters, there was no reason why the adjudicator could not issue his decision in part. The adjudicator was clearly aware of the timescale and regarded his decision as final. The adjudicator intended to produce a document which would fulfil the obligations incumbent on him in terms of his remit. There was no obvious reason why, en route to the final decision, the adjudicator should not make an interim or partial finding. Looking at the decision as a whole, the final document did constitute the adjudicator's final decision as required by the contract.

45. Where the adjudicator knows that the time limit is about to expire then maybe all that could be done is for him to give the decision his "best shot". The only issue causing the adjudicator concern was whether a particular item should result in any deduction. The actual finding was for the minimum amount which the adjudicator considered to be due. Lord Menzies noted that there were difficulties of expression in the adjudicator's decision. The adjudicator acknowledged that he could not reconcile one figure with another and sought further statements. The adjudicator also delayed apportioning his expenses. This might tend to suggest that this was not a final decision.

46. However, looking at the document as a whole, the Judge reached a view that the adjudicator intended it to be his final decision. The findings with regard to liability were conclusively stated. The adjudicator noted that he was satisfied he had sufficient information to allow him to make a decision on quantum. He then went on to express a concern about one aspect of quantum, which may have resulted in a deduction. That concern was directed to 10% of the value of the claim. What the adjudicator had done was find in favour of Braehead for the minimum sum which could possibly be due. He was aware of the time limits but offered to refine that decision if the parties agreed to an extension of time to let him do this. The amount which he found in favour of Braehead was the bottom line below which he was not prepared to go. Therefore the decision could be enforced.

47. There was also a bespoke amendment to the contract which stated that:

> The adjudicator shall determine the matters in dispute in accordance with the law and the terms of the contract, applying the normal standards of proof applicable to civil disputes.

48. Laing said this imposed an onerous duty on the adjudicator, requiring him to find evidential proof on the balance of probabilities. Laing said that the adjudicator had failed in this duty. Lord Menzies said that challenges such as this to an adjudicator's decision can only succeed if his reasons are "so incoherent that it is impossible for the reasonable reader to make sense of them". Here, the Judge noted that the adjudicator's reasons were at times briefly stated and "somewhat opaque" but he did not consider it was impossible to make sense of them. Of course, whether the decision was correct or not, was not and could not be the point of these proceedings.

***CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC)**

49. Verry engaged CJP under a subcontract to undertake brickwork, blockwork and stonework. The subcontract was based upon an Order issued by Verry incorporating DOM/2 terms and conditions and other "Sub-Contract Documents". CJP submitted an interim application for payment. It was not paid and no payment or withholding notice was issued. CJP brought adjudication proceedings and CJP served its Referral. Under clause 38A of DOM/2, the response is to be served within seven days of the Referral. Verry requested an extension of time to serve the response. The adjudicator stated that he had no power to go behind clause 38A and that Verry was obliged to enter the response in accordance with the timetable in the contract unless the parties agreed otherwise. CJP agreed an extension of time to 12 p.m. on 14 May 2008. Verry served the Response document at about 5.30 p.m. on 14 May 2008. CJP submitted the adjudicator that he could not consider the response because it had not been served within the timeframe agreed between the parties. Verry disagreed. The adjudicator informed the parties that he had no discretion under the adjudication agreement in clause 38A to extend time for service of the Response and would therefore not consider the Response in making his decision.

50. The adjudicator made his decision awarding CJP the full value of interim application. Meanwhile, Verry had started a second adjudication based upon its defence in the rejected Response concerning defects. Part-way through that adjudication, Verry attempted to abandon that adjudication but the adjudicator went on to make a finding against Verry. Verry did not honour the award in the first adjudication and CJP commenced enforcement proceedings. Verry defended these on the basis that there had been a breach of natural justice in the adjudicator not considering the Response. CJP's position was that there was no such breach but even if there had been a breach of natural justice it was not a material breach because the outcome of the second adjudication showed that Verry's defence in the first adjudication would have failed.

51. Mr Justice Akenhead disagreed with the adjudicator that clause 38A of the DOM/2 conditions imposed a mandatory timetable on the parties. He found that clause 38.2.5.5 gave the adjudicator an absolute discretion to set his own procedure concluding that:

> One of the entitlements of parties to an adjudication is a right to be heard, that being the rule of natural justice. There is thus a reasonable expectation of parties to an adjudication that, within reason and within the constraints of the overall requirement to secure the giving of a decision within the

requisite time period, each party's submissions and evidence will be considered by the Adjudicator. It is a draconian arrangement (which the parties are of course free expressly to agree) that a party is denied its right to be heard unless it has been given a fair and clear opportunity to put its case. Very clear wording would be required to ensure that such a right was to be denied.

***Birmingham City Council v Paddison Construction Ltd* [2008] EWHC 2254 (TCC)**

52. BCC engaged Paddison to undertake construction work for a new community and training centre. The contract provided for a completion date of 24 February 2006 which was revised to 17 April 2006. Practical completion was certified as at 23 June 2006. Paddison alleged that BCC was responsible for the delay in completion and sought, amongst other matters, a full extension of time and loss and/or expense. Paddison referred the dispute regarding responsibility for delay and the financial consequences of such delay to adjudication. After agreeing to several requests for an extension of time, the adjudicator decided that Paddison was entitled to an extension of time for the full period and that BCC should repay LADs which had been withheld in the sum of £27k and £25k in respect of variations.

53. In relation to the claims for loss and/or expense, the adjudicator said that these were "extravagant and exaggerated". That said, he accepted that some of the claim may be valid and he went on to say that he: "would grant the Contractor leave to pursue this claim via a further adjudication if they so wish."

54. Given the tight timescales associated with adjudication, even if an extension of time was granted, the adjudicator was of the view that it was necessary to hold a "dedicated" adjudication to consider the loss and/or expense claim within the prescribed time frame. The adjudicator added that in his view, for the claim to be analysed in detail, he considered that a third party quantity surveyor would need to be appointed to assist.

55. Paddison said that this meant that no decision had been made in relation to their claim for loss and/or expense. They then required BCC to assess their entitlement to loss and/or expense based upon the extension of time which had been awarded. BCC considered that the adjudicator had decided that Paddison was entitled to nothing further by way of loss and/or expense. Paddison then served a second notice of adjudication, seeking reimbursement of loss and expense, alternatively damages. BCC said that the adjudicator should resign on the grounds that the dispute referred to him was the same as that which the first adjudicator had decided. However, the adjudicator refused to resign.

56. Accordingly, BCC commenced Part 8 proceedings seeking declarations to the effect that the dispute referred was the same, or substantially the same, as that which had been previously referred. BCC also argued that the first adjudicator had made a decision on the dispute, such decision having binding effect on a temporary basis; and that, as a consequence, the second adjudicator had no jurisdiction to act as adjudicator and must resign.

57. HHJ Kirkham decided that the first adjudicator did make a decision. The adjudicator had considered Paddison's claim and found it to be "extravagant and exaggerated". He was not prepared to grant further monies relating to the loss and/or expense as claimed. As the Judge said,

"plainly" the first adjudicator had no jurisdiction or power to "grant" Paddison the right to pursue its claim in another adjudication. Further, this was not a case where the adjudicator concluded that he could not make a decision. The first adjudicator gave express consideration to Paddison's claim and decided to refuse to award them any money.

58. The second question for the Judge was whether or not the dispute referred to the second adjudicator was substantially the same as in the first adjudication. In the second Referral, Paddison relied on an expert report. However, having considered the report carefully the Judge was not persuaded that the second adjudication was in relation to a separate dispute.

59. The period in which the loss and/or expense was claimed was the same or substantially the same. Although different sums were claimed, the differences in the figures lay in the claims made for head office and overhead recovery. In the first adjudication Paddison calculated this head of claim by reference to the Hudson or Emden formula, whereas in the second adjudication the claim was based on records such as invoices. As far as the Judge was concerned this was not a real difference, as a claim made pursuant to a formula must nevertheless still be rooted in evidence. That evidence was the same. Finally, in the second adjudication a claim was made for damages for breach of contract. No such claim was made in the first adjudication. However, to all intents and purposes, the damages claim was coextensive with the claim for loss and/or expense.

60. In the clear view of the Judge, Paddison was seeking to make good in the second adjudication own shortcomings in the claim in the first adjudication.

***VGC Construction Ltd v Jackson Civil Engineering Ltd* [2008] EWHC 2082 (TCC)**

61. By a subcontract dated 13 November 2006, Jackson Civil Engineering Limited engaged VGC Construction Limited to provide various construction services relating to the provision of ducts and cabling on the M3 Motorway.

62. The subcontract overran by 26 weeks. In September 2007, VGC issued its application for payment no.13 which included a one line item of *"delay and disruption £300,000"*. Jackson issued certificate no.13 but did not allow any monies for the delay and disruption claim.

63. In October 2007, VGC made an application for an extension of time to Jackson enclosing a four-page document in support. This document comprised simply a number of heads of reasons for delay. In November 2007, VGC issued application for payment no.14 which again included the one line item for delay and disruption in the sum of £300,000. Jackson issued certificate 14 and, again, allowed nothing for the delay and disruption claim.

64. There followed a number of meetings between the parties concerning amounts that should be paid to VGC. At a meeting in December 2007, it was agreed that VGC would submit a Final Account in mid-January 2008 and would attempt to finalise the extension of time claim by the end of January 2008. In April 2008, a further meeting took place at which VGC threatened to adjudicate. Jackson made the point at that meeting that adjudication would not be appropriate in relation to the delay and disruption/extension of time claim because it had not been tabled and there was therefore nothing to adjudicate upon.

65. On 30 April 2008, VGC sent Jackson a detailed as-built programme and, two days later, issued a Notice of Adjudication. The Notice of Adjudication referred to final account negotiations, the basis of which was application no. 14. The claim in the adjudication included the £300,000 delay and disruption claim. In their Response, Jackson argued that insufficient information with regard to the delay and disruption claim had been produced by VGC for Jackson to assess the validity of the claim and accordingly the delay and disruption claim should be valued as nil. In their Reply, VGC stated that they had produced substantiation of their claims but then went on to attach a calculation totalling £300,301.50 for their additional overhead and profit costs due to the overrun of the works. This was a half page document based on the Hudson formula.

66. Jackson objected to the adjudicator that the calculation produced by VGC was totally new and asked the adjudicator to treat it as inadmissible.

67. On 8 June 2008, the adjudicator issued his decision. He was not obliged to give reasons. He did, however, set out a list of disputed items which included "extension of time". He said that he had "considered and decided on each of the above items" and determined that VGC's final account was £3,883,220.50 exclusive of VAT and that Jackson were to pay the difference between the determined final account and the amount they had already paid to VGC.

68. Jackson refused to pay the amount awarded and VGC referred the matter for enforcement. Jackson relied on three arguments to oppose the enforcement proceedings, namely:

    (i) that the claim for £300,000 had been removed or separated from the final account and that there could be no dispute in respect of a claim that was withdrawn;

    (ii) that the claim for £300,000 was of such a nebulous nature that there could be no dispute in respect of it. In particular, it lacked contractual foundation in law, it was unsupported and nothing more than a single line demand; and

    (iii) the claim for £300,000 as it became during the course of the Adjudication was entirely or substantially new and therefore the Adjudicator had no jurisdiction to deal with it.

69. It was held that a claim that has been withdrawn is not capable of being in dispute. However, on the facts, the claim for £300,000 had not been withdrawn.

70. The calculation was new, but was in response to Jackson's Response and Jackson had the opportunity to address it and there was no breach of natural justice. It was not so nebulous and ill-defined that there could be no dispute in respect of it.

Withholding liquidated damages from an adjudicator's decision

71. The basic starting point question is: if a defendant is entitled to be paid liquidated and ascertained damages, is he entitled to set off that claim against the sum which the adjudicator has decided must be paid to the claimant?

72. The relatively recent decision of HH Judge Gilliland QC in *Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd* [2007] Adj.L.R. 01/04 provides a summary of the law. The judgment emphasises the need for

adjudicators carefully to consider the legal basis of any claim made and ensure that their decision follows logically from that legal basis.

73. The argument has been that a term permitting deduction of LADs from a decision is necessary because without it, the contract would become unworkable. There have been a number of court cases on this issue and on the entitlement of the paying party to resist paying an adjudicator's decision due to set-off. However, as far back as 2000 this robust submission was rejected by Dyson J, as he was then, in *Edmund Nuttall Ltd v Sevenoaks DC* (unreported, 14.4.00). Dyson J held that the contract worked perfectly satisfactorily without such a term. He was very wary about implying a term as to the circumstances in which LADs may be deducted from a sum due to the contractor, when the contract contained detailed express provisions which dealt precisely with the issue. The Judge also pointed out the employer's failure to address the claim for LADs; the cross-claim should have been advanced in the adjudication, but was not.

74. Two years later in *The Construction Centre Group Limited v The Highland Council* (2002) the paying party only gave notice of withholding monies pursuant to Section 111 of the Act after the adjudicator's decision, arguing that it was impossible to give notice before the decision as there was otherwise "no sum due under the contract" and the Notice of Adjudication had not referred to the paying party's claim for recovery of LADs, and which the paying party had not therefore pursued in the adjudication itself. The court found that an employer who disputes sums claimed by a contractor due to an alleged entitlement to recover LADs is entitled to rely on that LADs claim as a set-off in adjudication. The fact that it had not been referred to in the Notice of Adjudication was irrelevant to the issue of whether or not the adjudicator could consider the claim, assuming the claim had been made prior to the Notice of Adjudication being issued. However, and crucially, as the paying party had chosen not to raise the LAD claim during the course of the adjudication, the court decided that they were not entitled to raise that claim as a set-off against the adjudicator's decision and that it was not possible to issue a Section 111 Notice after the adjudicator's decision.

75. In 2004 Jackson J gave guidance (reviewing *VHE, Bovis Lend Lease, Parsons Plastics and Levolux*) on this point at paragraph 53 of his judgment in *Balfour Beatty Construction Ltd v Serco Ltd* [2004] EWHC 3336:653:

    (i) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision…

    (ii) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case. [emphasis added]

76. Two years later came *R J Knapman Ltd v Richards and Others* [2006] EWHC 2518 (TCC).

77. This case restricts the scope of the *Balfour Beatty* decision. Knapman was the contractor. Richards was the employer. It was decided that if it

does not strictly "follow logically" from the adjudicator's decision that a sum is due by way of liquidated damages, then no set-off can be made by the employer. In the *Knapman* case, the adjudicator had decided that Knapman was entitled to an extension of time of 13 weeks and that liquidated damages and interest were therefore repayable in part. Richards therefore took the line that they were entitled to set off liquidated damages for the balance of the delay period up to practical completion. However, the court decided that there were three grounds for saying that the right to deduct liquidated damages did not follow logically:

(i) The adjudicator had not carried out an exhaustive review of delay within the adjudication.

(ii) Knapman had put its claim on the basis that practical completion arose at the end of April 2006. It did not claim, in the alternative, that if there were a later practical completion date, it was entitled to an extension of time to that date. The court concluded that "the adjudicator was not dealing with any full extension claim in the adjudication".

(iii) Richards' entitlement to levy liquidated damages depended on there being a non-completion certificate. The contract administrator had not issued a non-completion certificate. Hence there was no entitlement to take liquidated damages.

78. The Knapman case demonstrates that, even though the adjudicator has only awarded a partial extension of time, the employer cannot set off liquidated damages unless the adjudicator's review of delay is comprehensive, and all relevant notices and procedures under the contract have been complied with.

***Avoncroft Construction Limited v Sharba Homes (CN) Limited* [2008] EWHC 933, TCC (Birmingham).**

79. The issue here was whether an employer could oppose enforcement of an adjudicator's decision by applying a later set-off in respect of liquidated and ascertained damages.

80. As we know, when an adjudicator orders that a pecuniary sum should be paid by one party to another, the paying party will usually want to consider any options open to it to avoid making payment. One option which may be available is to make a deduction, or set-off, of monies which the paying party considers are due to it from the other party, either separately in its own right or as an indirect consequence of the adjudication.

81. There have been a number of cases in which the question of a set-off against an adjudicator's decision has been considered.

82. In his book *Construction Adjudication*, Mr Justice Coulson suggests (page 327) that if the terms of the contract as to set-off are to override the effect of the adjudicator's decision, and deprive the successful party in the adjudication of the sum otherwise due pursuant to the adjudicator's decision, then the terms of the contract must clearly provide for such an outcome.

83. In *Avoncroft Construction v Sharba Homes* HHJ Kirkham also rejected a cross-claim for liquidated damages made against an adjudicator's decision. The contract under which a dispute arose was JCT 98 Without Quantities and, in a decision dated 14 February 2008, the adjudicator

decided that the sum of £56,380 was to be paid by 21 February 2008.

84. The Judge reviewed the two principles of law identified by Jackson J (see above) and concluded in relation to (a) that the adjudicator did not decide the question of entitlement to liquidated damages, but he had decided whether the claimant was entitled to an extension of time for completion. No claim was made within the adjudication for payment of liquidated damages.

85. As regards (b), she concluded that clause 41A.7.2 is clear; the parties are obliged to comply with the decision of an adjudicator, and that there is no reference to any right of set-off against such decision.

What's new at the Technology and Construction Court?

86. On 6 April 2007, a revised Pre-Action Protocol for Construction and Engineering Disputes came into force. There have already been a number of decisions where the courts have indicated how the Protocol should be interpreted.

87. In particular, Mr Justice Akenhead has had to consider the approach to take when faced with an application to stay proceedings in order for the Pre-Action Protocol for Construction and Engineering Disputes ("the Protocol") to be followed in two cases. In both, he decided that the correct approach to take was a pragmatic one.

Orange Personal Communications Services Ltd v Hoare Lea **[2008] EWHC 223 (TCC)**

88. The dispute arose out of works carried out at the Bristol Data Centre. Kier had been engaged to carry out the fit-out works including an air conditioning system. Haden Young were responsible for that air conditioning system. There was a flood which was said to have caused some £2m of damage. Orange issued proceedings against both Kier and Haden Young in relation to the flood. The position taken by Kier and Haden Young in those proceedings was that they were not in any way to blame for the loss and damage which was, they said, due to failings by Orange and/or its design team.

89. Hoare Lea had been retained in relation to the design of the M&E works. As it was nearly six years after the flood and fearing a possible limitation defence, Orange issued separate proceedings on 15 August 2007 against Hoare Lea and APS Project Management who had carried out various project management services. APS dropped out of the proceedings, having obtained a stay under the 1996 Arbitration Act. In the first action, a trial date was fixed for 14 January 2008. However, the timetable slipped and the trial was pushed back to October. The directions made provision for Alternative Dispute Resolution in April.

90. In December 2007, Orange served Particulars of Claim on Hoare Lea in the current action. Orange did not actually consider that Hoare Lea had anything to do with the flood. Orange's approach was a "belt and braces" one, being contingent upon the argument put forward by Kier and/or Haden Young in the first action succeeding. If that happened, Orange intended to assert that Hoare Lea was responsible in tort for the failures leading to the flood. Perhaps sensibly, Orange sought an application to seek an Order that the claims be consolidated or heard together. Hoare Lea then issued an application that the claim be stayed because Orange had not followed the Protocol. Orange responded by offering to provide any particular information which Hoare Lea said they might require. As the Judge noted, that offer was not taken up. The reasons why Hoare Lea

made the application were as follows:

(i) The Protocol was there to be complied with and should generally be complied with. There are general advantages in following the Protocol process;

(ii) Orange were guilty of a number of failings. It could have served the proceedings earlier. It should have served the proceedings earlier. Orange should have brought the matter before the Court earlier to seek directions at the time it issued the Claim Form;

(iii) Hoare Lea wanted to avoid additional costs which would inevitably be incurred if the Protocol process was not implemented, for example in relation to the exchange of information and the narrowing of issues; and

(iv) The Particulars of Claim were inadequate, failing properly to define the allegations of negligence. This could be resolved during the Protocol process.

91. Having considered the authorities, Mr Justice Akenhead made the following general observations:

(i) The overriding objective [in CPR Part 1] is concerned with saving expense, proportionality, expedition and fairness; the Court's resources are a factor. This objective whilst concerned with justice justifies a pragmatic approach by the Court to achieve the objective. The overriding objective is recognised even within the Protocol as having a material application.

(ii) The Court is given very wide powers to manage cases in CPR Part 3 and elsewhere so as to achieve or further the overriding objective.

(iii) The Court should avoid the slavish application of individual rules, practice directions or Protocols if such application undermines the overriding objective.

(iv) Anecdotal information about the effectiveness of the Pre-Action Protocol process in the TCC is mixed. It is recognised as being effective both in settling disputes before they even arrive in the Court and narrowing issues but also as being costly on occasion and enabling parties to delay matters without taking matters very much further forward.

(v) Whilst the norm must be that parties to litigation do comply with the Protocol requirements, the Court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of costs orders.

92. Accordingly, having considered the situation as a whole, he dismissed the application put forward by Hoare Lea. The Judge gave a number of reasons, including:

(i) He did not consider that the Protocol process in this particular case would be sufficiently productive to justify a stay;

(ii) Hoare Lea already had the relevant pleadings from the earlier action. Therefore there had already been an exchange of information. Hoare Lea had also been reluctant to take up Orange's offer to provide additional information.

(iii) Bilateral discussions between Hoare Lea and Orange would not narrow issues significantly because Orange's published primary case was not against Hoare Lea;

(iv) A settlement was much more likely if all parties participated in the ADR planned for the spring. A timetable could be set up now to enable that to happen. This chance might be lost if there was a stay;

(v) The two claims were intimately connected. It would be unfortunate if they had to be tried separately. A timetable could be achieved now which could secure the trial of both claims.

(vi) Little in terms of time or costs would be saved by embarking upon the Protocol process. That said, the Judge reserved any application for additional costs for the future.

(vii) Finally, the Judge noted that although Orange had not complied with the Protocol to effect the Protocol process, that failure had not been "contumelious or Machiavellian".

93. This left the question of the costs of this application. The Judge was concerned about the failings of Orange and thought that Orange could have told Hoare Lea about the potential claim earlier. There were also delays by Orange in relation to the procedural elements of this application. Accordingly, the Judge was of the view that Orange should pay their own costs and pay one third of the costs of Hoare Lea. This reflected the likely increase in Hoare Lea's costs occasioned by Orange's procedural failings.

94. As always, the judges of the TCC will consider individual cases on their own merits. This may be why the judge here adopted his "pragmatic" approach to the claim for a stay. He duly considered the whole context of the dispute between not just Orange and Hoare Lea but all the parties involved. He also considered both parties' conduct. Orange may not have followed the Protocol, but it had not done so wilfully and Hoare Lea, being pragmatic, could have accepted Orange's offer of additional information.

95. Had this been a claim just between Orange and Hoare Lea then the situation may well have been different. However, there was a bigger picture, and taking that picture into account, the overall overriding factor was the need to try and resolve the entire dispute. Allowing Hoare Lea's application for a stay might have jeopardised this.

***TJ Brent Ltd & Anr v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC)**

96. Mr Justice Akenhead further clarified in this case what he means by the adoption of a "pragmatic approach" to the Protocol. B&V alleged that Brent had failed to comply with the Protocol. In many respects, the facts of the case do not really matter. Of more importance are the comments made by Mr Justice Akenhead about this type of application. First of all, in response to criticisms made of Brent's Letter of Claim, the Judge said that there was no need for the Letter of Claim to provide information in "ultimate detail" unless it was critical to the claim. The court should ask whether the absence of information was such as to prevent or make it difficult for a defendant to respond in detail: "What the Court should do in considering the Pre-action Protocol is to look at the matters in substance, not as a matter of semantics and not for technical non-compliances with the letter of claim requirements in the Pre-action

Protocol."

97. Here, the Letter of Claim provided a clear summary of the facts on which the claim was based and identified so far as possible the principal contractual terms and statutory provisions relied upon as well as the nature of the relief claimed. The Judge also commented on the time taken by B&V to raise the alleged failure to comply with the Protocol. Whilst he accepted that it was not incumbent upon a defendant as a matter of practice or procedure to have to raise the issue once the Particulars of Claim were served, the delay here, some seven months, undermined the stance taken now by B&V.

98. Further, Mr Justice Akenhead commented that it was not enough to demonstrate that there had been a failure to comply with the Protocol. A party making such allegations also had to demonstrate the effect of such failure. For a defendant to succeed, it would have to establish that there was some realistic prospect, prior to the issue of the proceedings, of:

    (i) a mediation taking place; and

    (ii) some possibility (but no certainty or even necessarily probability) that a resolution of the disputes between the parties would be achieved.

99. A court would need to consider what would have happened if there had been an attempt at alternative dispute resolution during the period when the Protocol process would have taken or did take place. Not only must a court consider whether there had been non-compliance, it must also consider the extent to which the failure to follow aspects of the Protocol might have prevented a resolution of the dispute. The onus of proof is on the defendant to show that a settlement would or could realistically have been achieved at that stage. Here, B&V's unwillingness to attend meetings or discuss any matters without prejudice in any way, suggested that settlement was unlikely.

100. Mr Justice Akenhead also referred back to his earlier decision in Orange v Hoare Lea where he made it clear that the overriding objective was concerned with saving expense, proportionality, expedition and fairness. Adopting that pragmatic approach to the facts of the present case, it was clear to the Judge that, in substance, B&V was very well aware, before these proceedings commenced, what the nature of the claim was against it. It did not know every detail but it knew in substance and it was able to deal with it in substance. Therefore B&V was able to work out what its defences were in some detail. The Judge cautioned that a court should be slow to allow the rules to be used in such a way for one party to obtain a tactical or costs advantage where in substance the principles of the Protocol have been complied with. Accordingly, the application failed.

Mediation and the costs of the pre-action process

101. It is well known that, where a claiming party is a limited company, if it appears by credible testimony that there is a reasonable belief that the company will be unable to pay the defending party's costs if its claim fails, then it may be required to provide security for the defending party's costs. Mr Justice Coulson in the case of *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd & Anr* was asked to consider whether a party seeking security for costs can include, within those costs, the costs of pre-action activities, including mediation.

102. The dispute between the parties related to the purchase of an alleged defective printing press. In January 2005, a mediation took place which failed to produce a settlement. Over two years later, in May 2007, proceedings were issued. As the claimant, Lobster, had been placed in administration, it was agreed that it was appropriate to provide security. However, the amount of that security was not agreed. Heidelberg sought in the region of £160k, including security in respect of the costs incurred during the pre-action proceedings. Mr Justice Coulson noted that, as a matter of principle, the costs incurred by a party prior to commencement of litigation proceedings can be recovered as costs. Following the case of *McGlinn v Waltham Contractors*, that is provided that those pre-action costs could be said to be either the costs of or costs incidental to the proceedings. Lobster put forward a number of reasons as to why the application for security in respect of the pre-action costs was misconceived. Of these, the Judge found that the following were important:

    (i) a considerable part of the pre-action costs were incurred in relation to the mediation and those costs were not recoverable in any event; and

    (ii) the length of the pre-action period was such that these costs should not form the subject of an order for security.

103. The mediation was carried out under the CEDR Model Form and the parties had, in the usual way, agreed to bear their own costs and share the costs of the mediator. Accordingly, the Judge was firmly of the view that mediation costs should not form part of the security ordered. The only way in which such costs would be recoverable would be if the parties had agreed that the specific costs could be the subject of any subsequent application. The Judge did take into account the delay. He thought that a court would be slow to exercise its discretion to award security in respect of costs incurred two years before proceedings were commenced. The longer the delay between the incurring of the pre-action cost and the application for security based on that item of cost, the more reluctant the court would be to make such an order. Here, the pre-action period was very prolonged, covering a period from the mediation to proceedings of nearly two and a half years. The Judge said he would be very reluctant to decide that after all this time, Lobster should provide security to Heidelberg for the costs incurred during this period. That would be "unnecessarily draconian".

104. The Judge therefore disallowed the pre-action costs incurred by Heidelberg. The main reason for this was that a large proportion of the costs related to the mediation the secondary factor was the large gap in time. However, Lobster was required to provide suitable security up to the exchange of witness statements in the sum of £70k, being £50k to reflect the period from the application to the exchange of witness statements and an assessed figure of £20k to reflect the costs incurred from the commencement of the proceedings to the making of the application for security for costs. Some concern has been expressed about the costs parties are required to incur as a consequence of the requirements of the pre-action protocols.

105. Where companies are bringing claims, and there are legitimate questions about their ability to repay any costs that may be awarded against them, then those defending such claims may be well advised to consider including their pre-action costs in any application they may bring for security.

Other recent cases

***Brynley Collins & Others v Drumgold & Others* [2008] EWHC 584 (TCC)**

106. In this case, Mr and Mrs Collins and some of their neighbours ("the Claimants") issued proceedings against seven different parties ("the Defendants") claiming that their properties suffered from inadequate foundations and consequently had suffered from heave damage. The Claimants claimed breach of statutory duty and/or breach of contract against the contractor, and breach of statutory duty against the architect for certifying practical completion and allegedly implying that the properties were constructed to a reasonable standard and fit for habitation. They also claimed breach of statutory duty against the structural engineer employed by the contractor. Some of the Claimants were also claiming against their solicitors who undertook their conveyancing.

107. The disputes related to the adequacy of the design and construction of ground beams, and therefore involved the consideration of detailed geotechnical and engineering calculations. There were also disputes on causation, limitation, and the scope and applicability of the Defective Premises Act 1972. The overall claim was for some £300k. The Claimants issued the claim in the Cambridge County Court. Numerous pleadings were exchanged and disclosure took place. The court gave permission for architectural, engineering and valuation expert evidence to be called and it was estimated that up to nine experts might be instructed. In accordance with CPR 30, the Second Defendant made an application in the TCC to transfer the case from the county court to the TCC. The application was opposed. CPR 30.3(2) sets out the matters which a court hearing such an application must consider. However, there were no reported authorities on the application of these principles to a transfer from a county court to the TCC.

108. In considering the matters in CPR 30.3(2), what approach will the TCC adopt to applications for transfer of a case to the TCC from a county court?

109. The TCC will consider (i) whether the dispute is one of the types of claim listed in the Practice Direction to Part 60 as suitable for the TCC; (ii) whether the financial value of the claim and/or its complexity mean that in accordance with the overriding objective, the case should be transferred to the TCC; and (iii) whether questions of convenience to the parties have any effect on the decision to transfer.

110. It is interesting here that complexity was given priority over the amount in dispute. This is important in construction cases as many low value cases are still highly complex, particularly where issues of negligence are involved. Before this case there was no specific authority on transfer of cases from the county courts to the TCC. We now have clear guidance on the factors that will apply to such applications, including the likely increase in cost of such transfer and the availability of specialist judges.

***Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC)**

111. In early 2007, Clapham Park Homes ("CPH") wished to have refurbishment and regeneration works carried out to a number of houses and flats. Diamond Build Ltd ("DB") were invited to tender for the works. The invitation to tender letter dated 2 March 2007 enclosed a specification and other documents. The specification stated that the contract would be the JCT Intermediate Building Contract 2005 edition With Contractor's

Design and that the agreement would be executed as a deed.

112. DB submitted its tender on 2 April 2007 and on 5 June 2007, CPH sent DB a letter of intent, which was reissued on 7 June 2007. The letter of intent was signed by DB. Amongst other things, the letter of intent set out when the works were to commence and the Contract Sum, and also stated that:

    (i) it was CPH's intention to enter into a contract with DB on the basis of the JCT Intermediate Form of Contract, 2005 Edition with further amendments as specified in the Specification;

    (ii) should it not be possible for CPH and DB to execute a formal contract in place of the letter of intent then CPH would reimburse DB their reasonable costs up to and including the date on which DB was notified that the contract would not proceed, provided that the Supervising Officer was satisfied that those costs were appropriate and that in any event total costs would not exceed £250,000; and

    (iii) the undertakings given in the letter of intent would be wholly extinguished upon execution of the formal contract.

113. Following commencement of the works, the contract documents were drawn up and signed by CPH and sent to DB for signature. In the meantime, DB negotiated with a subcontractor to enter into a JCT form of subcontract consistent with the main contract arrangement, and interim certificates were issued using a JCT proforma. However, DB did not sign and return the contract documents. Disputes arose between the parties and on 15 November 2007, CPH wrote to DB giving notice that no further work was to be carried out under the letter of intent. DB responded stating that the contract was based on the JCT Intermediate Form of Contract, 2005 Edition. The question of what contract terms governed the parties was referred to the TCC.

114. It was held that the letter of intent had not been superseded by the contract documents, and that CPH were not estopped from relying on the letter of intent.

115. At the outset of his judgment the judge commented that this was a case which illustrated the dangers posed by letters of intent which are not followed up promptly by the parties' processing of the formal contract anticipated at the letter of intent stage. Even though the parties in this case essentially acted as if the formal contract documents had been executed, on the basis of the law as it stands, the letter of intent was still held to be in force thus limiting the recourse of the contractor against the employer.

***Galliford Try Infrastructure Ltd (formerly (a) Morrison Construction Ltd and (b) Morrison Construction Services Ltd) v Mott MacDonald Ltd and Rowen Structures Ltd* [2008] EWHC 1570 (TCC)**

116. This action arose from the redevelopment of the former Victorian Birmingham Children's Hospital for commercial purposes between 1998 and 2002. The relevant parties were:

- Morrison Property Solutions (Birmingham Children's Hospital) Limited ("MPS"), the employer;
- Galliford Try Infrastructure Limited, then Morrison Construction Limited ("MCL"), the design and build contractor;
- Morrison Developments Limited ("MDL"), joint owner of MPS and wholly owned subsidiary of MCL (but proceeding at arm's length);

- Morrison One Limited ("MOL"), a wholly owned subsidiary of MDL;
- Mott MacDonald Limited ("MM"), consulting engineers for the project;
- Diamond Lock Grabowski ("DLG"), the architects;
- Citex Bucknall Austin ("BA"), the quantity surveyors; and
- Rowen Structures Limited ("Rowen"), steelwork subcontractor.

117. MCL tendered for the design and build contract for the project. MOL engaged MM as consulting engineer for the project and MM provided information to MCL as part of the tender process. It was intended that once the contract was entered into, MM would be novated to MCL. During the tender period, MCL became increasingly unhappy with MM and engaged Rowen to undertake steelwork design.

118. The contract between MCL and MPS was signed in January 2000. The novation of MM never took place as the negotiations for that novation, which included trying to agree additional services, broke down.

119. As the works progressed, two design issues came to light which resulted in MCL incurring delay and additional cost. The first related to the horizontal ("prop") forces from the piling walls ("the pile bracing issue") and how they were to be addressed. The second issue related to the retention of the hospital façade.

120. MCL made a claim against MM for losses which were said to have arisen primarily because MCL made no or inadequate allowance in its contract price and programme for addressing the pile bracing and hospital façade problems in reliance upon what it had been led to believe by MM in the tender period leading up to the signing of the contract with MPS.

121. MM joined Rowen to the action for a contribution on the basis that if MM were liable for the pile bracing issue then Rowen was at fault for this. Rowen had no material involvement in the hospital façade issue.

122. As no novation agreement had been concluded between MCL and MM, there was no contract between MCL and MM and MCL's claim was brought in the tort of negligence on the basis that there was sufficient to found a duty of care to justify the recovery of economic loss. The duty of care was said by MCL to arise from the "close relationship" between MCL and MM, MM's "special skill" in respect of the relevant design and other structural matters, MCL's lack of special skill, the foreseeable and actual reliance by MCL on advice and statements from MM and because it was reasonable for MCL to rely upon MM.

123. It was therefore held that MM and Rowen did not owe a duty of care to MCL in relation to the pile bracing issue or owe a duty of care to MCL in relation to the hospital façade issue.

***Mylcrist Builders Ltd v Mrs G Buck* [2008] EWHC 2172 (TCC)**

124. By a contract dated 8 December 2004, Mrs Buck engaged Mylcrist Builders Limited ("Mylcrist") to build an extension to her property in Kent. The Contract comprised a letter written by Mylcrist to Mrs Buck and signed by Mrs Buck. The Contract incorporated Mylcrist's printed standard terms and conditions, paragraph 11 of which stated:

> Should any disagreement arise in connection with or out of this contract the matters in dispute shall be referred in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time

being in force.

125. A dispute arose between Mylcrist and Mrs Buck with regard to the amount to be paid for the works. Mrs Buck took advice from the Trading Standards Department at Kent County Council and they advised that there were a number of clauses, including paragraph 11, in Mylcrist's standard terms and conditions which had the potential for unfairness pursuant to the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations"). The potential for unfairness was brought to Mylcrist's attention.

126. In March 2006 Mylcrist issued a Notice of Arbitration and contacted a potential arbitrator, Mr Hannent, to ascertain whether he would be willing to act as arbitrator. Mr Hannent contacted Mrs Buck who made clear in a series of communications that she did not accept that the matter should be arbitrated and would not be making any representation in the arbitration. Mylcrist signed and returned the Arbitrator's appointment agreement and Mr Hannent proceeded to consider Mylcrist's claim. He produced an award in February 2007, awarding Mylcrist £5,230.51 (including VAT) together with costs and interest.

127. Mrs Buck did not pay the award and in January 2008 Mylcrist issued proceedings to enforce the award.

128. Two issues with regard to the enforceability of the award fell to be determined. Firstly, whether Mr Hannent had been properly appointed as arbitrator and secondly whether the arbitration clause was an unfair term within the 1999 Regulations.

129. With regard to the appointment of an arbitrator, s.16(3) of the 1996 Act states that where there is no agreement as to the procedure for the appointment of an arbitrator then the parties shall jointly appoint the arbitrator. S.18 of the 1996 Act provides that where there is a failure of the appointment procedure then the court can appoint an arbitrator. Mrs Buck argued that an arbitrator had neither been jointly appointed not appointed by the court and therefore the arbitrator had not been properly appointed. Mylcrist argued that the arbitrator had been properly appointed as s.17 of the 1996 Act allows a party to appoint an arbitrator where the other party refuses to appoint an arbitrator. Mrs Buck argued that s.17 only applied to arbitrations where each party was to appoint an arbitrator, not where, as here, there was to be a sole arbitrator.

130. It was held that section 17 of the 1996 Act only applied where each party was to appoint an arbitrator, not where there was to be a sole arbitrator, and the arbitrator was not properly appointed.

131. It was also held that paragraph 11 was unfair pursuant to the 1999 Regulations.

Victoria Russell
October 2008