TECBAR Review

Issue Spring 2010

The Newsletter of the Technology and Construction Bar Association

in association with

SWEET & MAXWELL

From the Chairman

Recent highlights of the TECBAR calendar have included the joint meeting with SCL in December, when John Powell QC delivered a splendidly provocative talk on professional liability, and in January both the joint conference with the ICE and TECBAR's own annual conference.

The landscape of adjudication enforcement will be altered after the address of our newest TCC judge, Mr Justice Edwards-Stuart, at the TECBAR conference. He drew to our attention the significance of his decision in *Osborne v Atkins Rail* [2009] EWHC 2425 (TCC). Provided the material point is capable of being decided quickly, without a full trial of the facts, and provided there is no arbitration clause, a party can use CPR Pt 8 proceedings to trump the temporary decision of an adjudicator before it is enforced, by obtaining a final decision of the court.

Where there is an arbitration clause, the same effect can be produced by quickly commencing arbitration and requesting the arbitrator to produce a speedy decision of the point in issue before the adjudication enforcement reaches the court. Where the terms of the arbitration clause permit, this is an ideal opportunity for the claimant to nominate someone from the TECBAR arbitrators list, who will understand the legal framework within which a speedy decision needs to be arrived at, and who will be able to give suitable directions so that the necessary promptness is achieved.

Note for members: when you receive your direct debit form for your TECBAR subscription, please fill it in quickly and don't forget to cancel your standing order. I will look forward to seeing many of you at the TECBAR Party on April 27.

Andrew Bartlett QC, Chairman

From the Editor

The TECBAR Review makes (I hope you will agree) a welcome return after something of a hiatus. In this issue, James Bowling addresses the interface between adjudication enforcement and the insolvency legislation: a subject of some importance in the wake of the financial crisis and the significant impact felt by the UK construction industry. Clare Packman considers the consequences of Jackson L.J.'s civil costs review to those practising in and using the TCC. In the adjudication context, Nicholas Baatz QC considers the limits of a party's ability to be both "here" and "not here" in the light of *Linnett v Halliwells*. Finally, Colin Reese QC recalls the life of His Honour Edgar Fay QC, who sadly passed away in November 2009 after a long and highly distinguished career as a practitioner, judge and arbitrator. He will be sadly missed.

For the TECBAR Review to be a regular and valuable publication, it is entirely dependant upon high quality contributions from the membership of TECBAR. To that end, I take this opportunity to encourage members of TECBAR to contribute articles, case notes and other such copy (email and postal address on the back page). I hope you enjoy this issue.

Mark Chennells, Atkin Chambers

List of Contents

What does the Final Report on the Review of Civil Litigation Costs mean for TCC practitioners?

Claire Packman reviews those proposals likely to impact upon TCC litigation.

On January 14 Sir Rupert Jackson published his Final Report on the Review of Civil Litigation Costs ("the Report"). It gives a series of recommendations intended to control costs and promote access to justice. It follows a Preliminary Report, published on May 4, 2009, which has been the subject of much discussion and consultation.

TCC litigation is dealt with at Ch.29 of the Report. As befits a former judge in charge of the TCC, he sets out with pleasure the reports of satisfaction from TCC users. In general TCC practices are given a pat on the back "I should be extremely cautious before recommending any significant changes to the existing procedures of the TCC", but there are a number of significant recommendations of which TCC practitioners should be aware.

Key recommendations likely to affect TCC practitioners are:

- The Pre-Action Protocol for Construction and Engineering Disputes should be amended so that:
  (a) it makes clear the limited level of detail required;
  (b) costs should be disallowed at the first CMC if a party has gone beyond what is required.

  The need for that protocol should be reviewed by TCC judges, practitioners and court users after 2011.
- Low value TCC cases should be able to be allocated to the Fast Track and managed and tried by district judges of appropriate construction experience.
- Contingency fee agreements should be allowed.
- TCC Judges are encouraged to disallow costs in respect of pleadings or witness statements which contain extensive irrelevant or peripheral material.
- Courts should be more flexible about allowing supplementary evidence-in-chief.
- Lists of issues should be focused upon key issues rather than upon all the issues in the case.

The Pre-Action Protocol for Construction and Engineering Disputes

The Protocol is dealt with in Ch.35 para.4.1 et seq. The Report notes complaints about the excessive and disproportionate cost of complying with the pre-action protocol. The Protocol is to remain pre-action (contrary to submissions from TCC judges and TECBAR), but:

(a) *The protocol should be clarified:*

> "It should be made clear in the protocol that the claim letter should not annex or reproduce a draft pleading and that expert reports should not normally be served at the protocol stage. Documents should not be annexed to the claim letter or the response letter, unless there is good reason to do so. Documents in the possession of both sides should not be supplied."

(b) *There is to be greater judicial control and sanction* if a party goes beyond the requirements of the protocol. The costs estimates before the first CMC should expressly state what costs have been incurred in complying with the protocol.

> "If it is found that either party has gone substantially beyond the requirements of the protocol, the judge should so certify at the first CMC and should decide the amount of costs to be disallowed."

> "...it is to be hoped that a few robust judicial decisions will rapidly have the desired effect upon pre-action behavior, thus reducing the need for cost disallowance applications."

The court should also have the power by way of amendment to CPR r.25.1 to give directions pre-action where there is a serious problem in relation to the protocol process.

When the TCC moves into the Rolls Building in 2011, the need for the protocol should be reviewed particularly given the lack of pre-action protocols for proceedings in the Chancery and Commercial Courts.

Low Value TCC cases

Fast Track

Currently all TCC cases are multi-track pursuant to CPR r.60.6(1). The Report recommends a change to allow TCC cases to be allocated to the fast track if of appropriate value (under £25,000), if there is only one expert on each side and if they can be tried in a day. Such cases will therefore be subject to the fast track fixed costs regime.

In order to deal with such cases, it is recommended that a small number of district judges with suitable construction experience be appointed.

Low value TCC cases not in Fast Track

Greater publicity is to be given to the fact that there is county court jurisdiction for TCC work. Judges in the county court should generally be more alert to the possibility of transferring cases to the TCC.

Mediation

The Report recommends that mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful.

Pleadings

Criticisms are levied at "overlong and discursive statements of case". The guidance given is that

(a) where "shortcomings" are obvious from the outset, the offending party should be required to re-plead;

(b) where the deficiencies or irrelevancies only become apparent later, costs should be disallowed.

The Report points out that the court already has the power to give such directions, and practitioners can expect this guidance to be influential immediately. The Report also recommends amending s.5 of the TCC Guide to make this guidance explicit.

"Shortcomings" presumably would have to be patent and

serious for the court to require a party to re-plead. No doubt it is hoped that, in practice, the threat of re-pleading with associated costs implications will curb the long-winded.

Witness Statements

Witness statements are particularly in the firing line of the Report as they are said not often to be the catalyst for settlement, yet engender extensive cost which is only of real value if the matter in fact proceeds to trial.

Witness statements in construction litigation are singled out for particular criticism, and parties are discouraged from going through the bundle commenting on each recorded event. Sir Rupert Jackson accepts that, in return, the court should be more flexible about allowing supplemental evidence-in-chief.

Practitioners should note and beware the comments on witness statements because costs sanctions are encouraged if witness statements contain much irrelevant or unnecessary material.

Disclosure

The majority of those who expressed an opinion favoured retaining standard disclosure for TCC cases. However, the recommendations in the Disclosure section of the Report will apply to TCC cases.

For substantial cases the Report recommends a "menu option" with a range of disclosure options (to be agreed between the parties or imposed by the court) as follows:

- dispense with disclosure;
- disclose documents relied on and request specific disclosure from other party;
- disclosure by issue;
- standard disclosure;
- disclose documents which it is reasonable to suppose may contain information which may:
  - (a) enable the party applying for disclosure to advance his case or damage the case of the party giving disclosure, or
  - (b) lead to a train of enquiry which has either of those consequences;
- any other order in relation to disclosure that, having regard to the overriding objective, the court considers appropriate.

There may now be a move to change the CPR to implement the menu option but this is unlikely to happen in the immediate future. In the meantime this part of the Report may be used to encourage a culture change to adopt a more flexible approach to disclosure where the parties agree, and to costs orders where they don't.

As for e-disclosure, no further recommendations were made as part of the Report on the basis that the necessary reforms were already being put forward for implementation by the draft "Practice Direction Governing the Disclosure of Electronically Stored Information". That Practice Direction will require parties and their legal representatives to consider, at an early stage, the use of technology to identify potentially relevant material, to collect, analyse and review it. This is currently before the Civil Procedure Rule Committee and it is reported that the intention is that it should be finalised soon and brought into effect in April 2010.

Lists of Issues

Lists of issues should be focused upon key issues rather than upon all the issues in the case, and paras 14.4.1 and 14.4.2 of the TCC Guide should be simplified to reflect this. There was no enthusiasm in the TCC to follow the Commercial Court approach to list of issues.

Part 36 Offers

With regard to Pt 36 offers, the Report considered the effect of the Court of Appeal decision in *Carver v BAA Plc* [2009] 1 W.L.R. 113 ("*Carver*") which permitted "a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight".

Sir Rupert Jackson criticises the uncertainty which has been brought into the Pt 36 costs regime by the decision in *Carver* and concludes that it should be reversed judicially or by rule change: "It should be made clear that in any purely monetary case 'more advantageous' in rule 36.14(1)(a) means better in financial terms by any amount, however small."

The Report also suggests including an uplift of 10 per cent of damages (unless the court considers it unjust to do so) for claimants whose offer is not accepted but who beats their offer at trial.

Funding Litigation

Major changes are recommended to the current funding regime. Primary legislation will be required to effect many of the recommendations. In particular:

- (a) *Preventing the recovery of success fees and ATE insurance premiums* from defendants. Tree root claims by insurers against councils being funded by conditional fee agreements came in for particular criticism.
- (b) *Lawyers be allowed to enter into contingency agreements*. It is recommended that both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients. However, the cost of the contingency fee will come out of damages rather than being payable by the opposing party. Contingency fee agreements will have to be properly regulated and will not be valid unless the client has received independent advice.

In conjunction with the funding changes is a recommendation to increase general damages, including payments for nuisance, by 10 per cent.

Conclusion

It remains to be seen precisely which of the recommendations become law and when. Those entailing change to primary legislation (such as those relating to the funding of litigation) are likely to take some time to come into effect if at all. However those relating specifically to procedures in TCC litigation are more likely to be accepted quickly given Sir Rupert Jackson's particularly deep knowledge of the TCC and the relatively modest scope of the changes recommended.

Claire Packman
cpackman@4pumpcourt.com

"Pay Now & Argue Later—Or I'll Wind You Up"

The Insolvency Act 1986 v The Construction Act 1996

The recession is posing a real test of the HGCRA 1996. Adjudication enforcements in the TCC are increasing. However, a statutory demand or a winding up petition can also be used and the attractions are obvious; it is quick and cheap. It can frighten a debtor into paying. But can the creditor really say—I am entitled to be paid; and if you don't pay, you are deemed to be insolvent?

A party who will not pay an *indisputable* debt is generally considered insolvent; *Cornhill Insurance v Improvement Services* [1986] 1 W.L.R. 114. But here two competing principles struggle for mastery. Under the HGCRA debts can indeed become indisputably due. But are those debts, arising on unchallenged certificates or adjudicators' decisions, also indisputable under the Insolvency Act 1986? After all, the sum due has not been *finally* determined; only held so under a "pay now, argue later" regime. The person required to pay is shut out temporarily from raising his arguments. He can still refer the dispute to litigation or arbitration, or bring a cross-adjudication. In the end, the "debtor" might owe nothing.

The court will not usually allow a petition where the debt is disputed on genuine grounds, save where there are "special circumstances". Is the fact that a debt under the HGCRA 1996 is indisputably due now, under statute, such a "special circumstance"?

Three cases indicate clearly that it is not. In *Case no.1299 of 2001, Re* [2001] C.I.L.L. 1745, *Guardi v Datum* [2002] C.I.L.L. 1934 and the very recent case of *Shaw v MFP Foundations & Piling* [2010] EWHC 9 (Ch) on each occasion the court held that the mere fact that the debt was indisputably due under the HGCRA 1996 did not mean that the debt was indisputable for the purposes of the Insolvency Act 1986. The "pay now, argue later" philosophy of the HGCRA does not mean that, without further analysis, a company will be wound up (or an individual made bankrupt) where there are outstanding cross-claims or other disputes which might extinguish the amount said to be owed.

These cases followed the approach of the Court of Appeal in *Bayoil SA, Re* [1999] 1 W.L.R. 147. There, a petition was presented against unpaid freight (payable at common law without set off or deduction). But the CA held that just because the law said freight was to be paid without set off, that was not a "special circumstance" entitling the creditor to wind the debtor up. The petition was therefore dismissed. However, there is an important qualification. The Court will not simply accept at face value a suggestion that the debtor has cross-claims. The debtor has to demonstrate that his dispute is genuine. That usually means getting on with his claimed dispute, by starting his own adjudication on the cross-claims. If he does not, the court can (and usually will) infer that the alleged "cross-claims" are not genuine, and that the petition should be allowed to proceed; see *Case no.1299 of 2001*, where it was said that if the debtor had foregone a "reasonable opportunity" to adjudicate his cross-claims, the court would usually allow a petition to proceed.

That was also the conclusion reached by the judge in *Guardi Shoes v Datum Contracts*. In this case the judge refused to continue an injunction to restrain a petition, because the debtor hadn't utilised the contract mechanism, which allowed for a cross-adjudication and payment only of the resulting balance.

Similarly, in *Shaw v MFP Foundations & Piling* [2010] EWHC 9 (Ch), HHJ Stephen Davies decided, following both *Guardi* and *Case no.1299*, that each case had to be decided on its own facts, and that in the instant case, there were genuine cross-claims which meant that the statutory demand would be set aside.

What if there is no cross-claim, but the debtor says 'I dispute the certificate's amount, even though I failed to serve a notice of withholding'? Here there is simply an allegation of over-valuation, without reference to a cross-claim. The debtor's remedy is to refer the certificate to an adjudicator for re-assessment. It is suggested that if he does not do so (or if the adjudicator upheld the valuation) the debtor would have to pay or be wound up/made bankrupt. That would be consistent with the reasoning in *Case no.1299* and *Guardi v Datum*, where the debtors failed to use the contract mechanism to have their alleged "disputes" decided.

What about an adjudicator's decision that the paying party says it is simply wrong on the merits? If the court were to conclude that the debtor had a real prospect of demonstrating that he might ultimately overturn the adjudicator's award in litigation or arbitration, the court might refuse the petition. For example, in *George Parke v The Fenton Gretton Partnership* [2001] C.I.L.L. 1713 a statutory demand was set aside where the debtor had started proceedings in the TCC claiming that on a proper determination, he was in fact owed money by the contractor. This is a difficult decision (and comparatively early in the case law).

Coulson J. has suggested extra-judicially that *Fenton Gretton* is a case on its own facts.[1] It might be said that following *Guardi* and *Case no.1299* the more likely outcome would be that if the debtor did not pay, then the petition would succeed. However, I suggest another analysis might be:

1. The insolvency court could exercise its discretion to dismiss the petition if it was satisfied that there were genuine disputes on the merits and the debtor could show a strong possibility that the adjudicator was wrong. The debtor would have to overcome the fact that he had already lost the arguments in question before the adjudicator—so the error would have to be plain on the face of the decision, or by reference to easily provable facts.
2. Subject to that (high) hurdle, evidence of the debtor taking steps to overturn the adjudicator's decision would be analogous to the steps held sufficient to defeat a petition in the "cross-claim cases".

There is some support for this in the recent decision in *Shaw v MFP Foundations* [2010] EWHC 9 (Ch) where the judge explained and reconciled the *Parke* case with the decisions in *Guardi* and *Case no.1299*. Although that was a cross-claim case, the reasoning seems to support the test set out above:

1. Coulson J, *Construction Adjudication*, (2007), at pp.336–368, paras 12.42–12.45.

> "where a statutory demand is founded on an adjudicator's decision, if the debtor can show that he has a substantial cross-claim, the insolvency regime does not contemplate that he should be shut out from raising those matters in opposition to bankruptcy proceedings simply because he could have, or even unsuccessfully did, also raise those matters before the adjudicator."

This can be seen by reference to an extreme case: it seems unlikely, for example, that the adjudicator's decision in *Bougyes v Dahl Jensen* [2000] B.L.R. 522—where it was clear that the adjudicator had mistakenly ordered release of the retention—would have supported a winding up petition for the mistakenly ordered amount. In this context it is also worth noting that in *Harrow & Milner v Teasdale (no.1)* [2006] EWHC 54 (TCC) it appears that a statutory demand was set aside by consent where the debtor, having lost the adjudication, commenced arbitration over the same question.

But the insolvency courts will not be bamboozled by technical arguments. If the "dispute" is only that there is a technical defence in that the adjudicator lacked jurisdiction, the insolvency courts will usually expect the debtor to apply to the TCC for a declaration of non-enforceability. For example, in *Jamil Mohammed v Dr Michael Bowles* [2003] Adj.LR 03/14 the court refused to set aside a statutory demand on the basis that the paying party claimed that the adjudicator had lacked jurisdiction. The Registrar held that it was for the paying party to apply to the TCC to determine that question; as he had not done so, the statutory demand would not be set aside. This is consistent with the approach I suggest above; the insolvency court clearly accepted there could still be a bona fide dispute about the sums due notwithstanding the adjudicator's decision; but it took the view that it was for the debtor to help himself, as in the "cross-claim cases", by taking steps to show that his dispute was a genuine one with real prospects.

The above cases demonstrate that—perhaps inevitably given what is at stake—the insolvency courts' approach is less absolutist than on enforcement in the TCC. Again, this was referred to in both *Parke* and in *Shaw*, in the latter case the judge holding that:

> "... there is a clear difference between enforcing an adjudicator's decision in the TCC ... and seeking to use that decision and/or the enforcement judgment itself to found bankruptcy proceedings even where there is a genuine and substantial cross claim which the debtor is either actively pursuing or for genuine reasons has been unable to pursue thus far. Although the respondent places considerable emphasis on the policy behind the 1996 Act, i.e. the pay now litigate later philosophy, there is nothing in my judgment in either the Act or the Scheme which indicates that this should displace the position as applied to personal insolvency ... or, for that matter, to corporate insolvency law. The structure of the 1996 Act is to require the contract to provide that the decision of the adjudicator is binding until the dispute is finally determined ... the obligation to pay the amount decided to be due by the adjudicator is a contractual one. That, it seems to me, is not fundamentally different from the common law rule in relation to payment of freight without deduction, which does not override the normal position in insolvency ..."

The thread running through all of these cases is that where there is a debt which is, on the face of it, indisputably due under the HGCRA 1996, that does not lend it special weight in an insolvency court; but nevertheless the burden is on the paying party to demonstrate, to a high standard of proof, that he has good prospects of demonstrating that the debt will not be due when all disputes are litigated out—and that he is taking steps to bring that about. Often, the paying party will have to show that he has got (or is in the process of getting) a favourable result "going the other way" from an adjudicator or from the court in order to discharge that burden.

The recent changes to the HGCRA 1996, although not yet in force, seem unlikely to change the principles outlined above. Similarly, although there is not yet any clear and binding authority as to whether an adjudicator's decision gives rise to an independent obligation to pay, or whether it merely recognises an existing right (see the discussion in *David Mclean Housing Contractors v Swansea Housing Association* [2002] B.L.R. 125) it seems unlikely that that debate is affecting the approach of the insolvency courts. The message is clear; debtors who wish to avoid insolvency will have to be proactive.

James Bowling, 4 Pump Court

His Honour Edgar Fay QC October 8, 1908–November 14, 2009

Edgar Fay ("EF") was never a member of the Official Referees Bar Association (ORBA). He had retired from judicial office before ORBA was set up. However, it was a comment made to Patrick Garland QC (as he then was), shortly before EF retired from the bench, that sparked the setting up of a specialist bar association to represent the interests of those practising in the various areas of "Official Referees Business". What Sir Patrick Garland vividly recalls is Edgar Fay saying "you chaps want to organise and form a union!" He thought about it, consulted other practitioners and, in due course, ORBA was set up.

EF was called to the Bar in 1932. He became a tenant at 3 Paper Buildings. He built up a very successful junior common law practice and, in 1956 he was appointed a Queen's Counsel. Success as a common law practitioner continued as a QC. He was appointed to chair a number of public inquiries—most notably two inquiries into the 1958 Munich air crash in which Manchester United football players were amongst the fatalities. A West German inquiry put the blame for the crash on the pilot on the basis that he had failed to inspect the wings for ice before take off. The pilot maintained the crash had been caused by the dragging effect of slush on the runway. In 1959, the British Government asked EF to carry out an independent inquiry. He

concluded that the pilot had not done enough to check that there was no build up of ice on the wings but, there was no way of knowing if there had in fact been ice on the wings. In 1968, the British Government asked EF to re-open the inquiry after it had become clear that positive evidence existed that there had been no build-up of ice on the wings. He concluded that the crash had been caused by the dragging effect of slush on the runway.

In 1971, EF was the last person to be appointed to the office of "Official Referee of the Supreme Court of Judicature". When the Courts Act 1971 re-organisation was implemented he became a circuit judge. He sat as a judge for 10 years in the old "OR's Corridor" in the RCJ. He was in every respect a good and courteous judge; he was respected and well liked by all the advocates who appeared in his court; he gave sound judgments, expressed with admirable clarity. After retiring from the Bench when he had to, at the age of 72, he quickly found himself in demand as a construction arbitrator. He continued in practice for a number of years before deciding that, after approximately 55 years (interrupted only by war years spent as a civil servant) in practice as a barrister/judge/arbitrator, the time had come to retire from legal practice.

The obituary published in The Times newspaper on December 11, 2009 began, "[EF] was an outstanding Barrister and Judge who was regarded by his peers as deserving at least the High Court." That was indeed, to my certain knowledge, the view of very many of his distinguished contemporaries. Inferentially, it would also seem to have been the view of the senior politicians and senior civil servants who, in 1975, decided that he was the appropriate person to chair the inquiry into the collapse of the Crown Agents. The Chairman of that Inquiry needed to possess all the qualities required of a High Court Judge. When published, his very thorough report amply demonstrated that he did indeed possess all the necessary qualities.

Once retired from legal practice, EF was fortunate to enjoy good health for many years. He regularly attended ORBA, and more recently TECBAR summer garden parties. At one such, at about the turn of the century, he cheerfully explained to all present that as a result of the index-linking on his judicial pension, the Government was now paying him more than he had been paid in his final year as a Judge. At the age of 100, Edgar Fay was still able to enjoy life—he attended, and very obviously enjoyed, a number of dinners given in his honour, including a TECBAR dinner. After enjoying the meal and listening to tributes paid to him, he stood up and responded unscripted, fluently and wittily for over ten minutes. There are few men who live to be 100, and very few centenarians who are as physically and mentally fit as EF was in 2008.

Away from the law, EF was a family man. He is survived by his third wife (Eugenia) and by three sons.

Colin Reese QC

"Here" but "Not here", the significance of Linnett v Halliwells for jurisdiction

Linnett v Halliwells [2009] B.L.R. 312 makes more problematic the position of a party who wishes to take jurisdictional objections in arbitration or adjudication.

The Facts

Halliwells entered into a building contract with ISG, fit out contractors. Disputes arose. ISG served a Notice of Adjudication upon Halliwells on May 22, 2008 and the next day applied to the RICS for nomination of an adjudicator as provided for in the contract. Mr Linnett was nominated by the RICS on May 28, 2008. On the same day he wrote to ISG and Halliwells enclosing his terms and conditions. On May 29, 2008 ISG served a Referral on Halliwells and Mr Linnett by fax and sent the enclosures to the Referral by post. However these did not reach Mr Linnett. A further copy was sent which reached him on June 4, 2008. Consequently Mr Linnett did not receive the enclosures to the Referral within seven days of the Notice of Adjudication.

On June 5, 2008 Halliwells responded to Mr Linnett's correspondence expressly without prejudice to their contention that Mr Linnett did not have jurisdiction to deal with the matters purportedly referred. Halliwells wrote that the delay until June 4 in service of the complete Referral deprived Mr Linnett of jurisdiction because the Referral was served outside the seven days prescribed by the terms of cl.41 of the building contract (which implemented the requirements of the HGCRA 1996). Although expressly not granting him power to decide upon his jurisdiction, Halliwells asked him to withdraw. Should he not withdraw, he was asked to extend time for the Response to June 11, 2008.

Mr Linnett replied rejecting Halliwells' jurisdiction argument. Halliwells served a Response which repeated both its reservation as to jurisdiction and its argument on jurisdiction. It added a further jurisdictional argument namely that because the building contract had been varied orally it was no longer a construction contract fully evidenced in writing for the purposes of the HGCRA 1996. By letter dated June 17, 2008 Halliwells effectively did not accept Mr Linnett's proffered terms and conditions. On June 24, 2008 Mr Linnett made his Decision. He rejected Halliwells' arguments and apportioned his fees and expenses entirely to Halliwells. Halliwells however refused to pay his invoice. Mr Linnett started proceedings claiming his fees and expenses.

The Decision

Ramsey J. held that there was no express contract between Halliwells and Mr Linnett because Halliwell's silence in response to Mr Linnett's offer of his terms and conditions could not be inferred to be acceptance and Halliwells were under no express or implied obligation to speak. Halliwells had furthermore made it clear that they would not accept Mr Linnett's terms. However he held that Halliwells' letter of June 5, 2008 had asked the adjudicator to do something, namely to make a

non-binding decision as to jurisdiction, to withdraw if he found that he had no jurisdiction but alternatively if he found that he had jurisdiction to proceed with the adjudication and extend time for service of the Response so that they could defend the claim on the merits. Accordingly, he held, Halliwells asked Mr Linnett to carry out work, which Mr Linnett had done, with the consequence in law that the request and the work gave rise to a contract formed by conduct whose terms as to payment were that Halliwells should pay Mr Linnett's reasonable fees and expenses. Ramsey J. held alternatively that Mr Linnett had a claim in restitution on the grounds identified in *Banque Financiere de la Citie v Parc (Battersea) Ltd* [1999] 1 A.C. 221 at 227 i.e. on the grounds of unjust enrichment, adopting at para.78 of his judgment, the four questions asked by Lord Steyn at [1999] 1 A.C. 227A.

Ramsey J. also decided both Halliwells' jurisdictional points against them (acknowledging at para.86 of the judgment that in the light of his prime determinations that that might not be strictly necessary). He held that while the failure to serve the accompanying documents on the adjudicator was a breach of cl.41A.4 of the contract it was not a sufficient breach to mean that the Referral was invalid because it was not a total failure to serve the Referral in time but a failure to comply with detailed procedural aspects of cl.41A. It could not have been the intention of the parties that that would render the Referral a nullity in the circumstances of this case. He further held that the jurisdiction was preserved by the saving provision of cl.41A5.6 which applied to procedural non compliances limited to procedural steps within a validly constituted adjudication such as the circumstances of this case. As to Halliwells' second jurisdictional point, he held that the asserted oral variation did not affect the jurisdiction of the adjudicator under cl.41A, the existing express adjudication provision, and distinguished *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] B.L.R. 217. Finally, Halliwells had contended in a subsequent adjudication that Mr Linnett's decision could only be enforced by a court. Ramsey J. held that making that contention amounted to defending ISG's claim in the second adjudication on the basis that Mr Linnett's decision was binding. He held that Halliwells had therefore elected to approbate Mr Linnett's decision and were consequently bound by it including the jurisdictional decision. Mr Linnett was not a participant in the second adjudication.

Discussion

As Ramsey J. noted in his judgment, adjudication and arbitration are analogous so far as concerns questions of jurisdiction. This case is of interest both for arbitration and adjudication. A party wishing to raise a jurisdictional argument before an arbitrator or an adjudicator has two principal options. The first is to assert lack of jurisdiction and withdraw at once from the process. Since this involves the risk that all the arguments as to the merits will go by default should the jurisdictional objection fail, this option is often combined with an application to the court for a declaration that there is no jurisdiction. The second option is to assert lack of jurisdiction but to continue to participate in the process without prejudice to the objection. This second option is a delicate balance and always required a clearly expressed standing objection so as to prevent waiver coupled with an explanation that the relevant party is both "Here" and "Not Here". So far as arbitration was concerned this option has been long recognised and it is reflected in ss.31 and 73 of the Arbitration Act 1996. This particular decision makes this second option more problematical. First, continued participation may render the objecting party liable for the tribunal's fees because the participation may form a contract by conduct between the objector and the tribunal. An ultimate finding that there was no jurisdiction will not remove that liability, which may be considerable. Secondly however, it is interesting to consider the position vis a vis the other party (which it was not necessary for the court to determine in this case). Depending upon what is said and done the reasoning in the case may be extendible to the position of the other party. The objecting party's request to the tribunal to carry out work and make a non-binding decision may involve or entail a request to the other party to participate in that process and to carry out work, for example, to provide particulars of its case on the merits. In certain circumstances, on the basis of the reasoning in this case, that may be capable of creating a contract by conduct between the objecting party and the other party in relation to the non binding process even where there is no direct request. It may be that in such circumstances there would be an analogy to *The Satanita* [1895] P 248. In that case an entrant into the Mudhook Yacht Club's regatta was held to have contracted with another entrant on the basis of the regatta rules although each had only communicated with the club. On that basis the Earl of Dunraven and Mount-Earl was able to recover from Mr Clarke, the owner of the yacht, *Satanita* when *Satanita* ran into, and sank, the Earl's yacht *Valkyrie*.

What is clear is that the second option requires very careful thought. The question arising out of the statement that a party is both "Here" and "Not Here" may be to ask what the party is there *for* and whether the party is consenting to and participating in a process (what process?) involving work and by whom? Any objection may have to be framed so as to be explicit in disclaiming any intent to contract or form legal relations and the request to do work framed as observations rather than requests. Since it may be the substance rather than the form that matters there may be cases in which this is not sustainable. Quite apart from contract by conduct, unjust enrichment and therefore perhaps quite general considerations of justice will be engaged. Each particular case will of course depend on its specific facts (which is why these comments have no application to any particular case). It is important to note that Halliwells did make the objection to jurisdiction in overriding terms, as its prime contention and repeated it in comprehensive and prospective terms, so that the Response stated:

> "This document together with all future documents generated in this Adjudication is submitted without prejudice to the Responding Party's contention that the Adjudicator does not have the Jurisdiction to deal with the matters purportedly referred to him." (see the judgment at para.16).

It may be that the practical effect of the decision will not be to squeeze out jurisdictional objections altogether because such objections will remain a defence or ground of challenge to any substantive decision, but it may mean that a party may be at greater risk of costs in respect of the process even where the jurisdiction objection ultimately succeeds. It may therefore increase the occasions in which the first option is adopted. Being both "Here" and "Not Here" has become harder.

Nicholas Baatz QC

Readers are invited to submit material by email or on disk to be considered for possible publication. This may consist of correspondence, short articles or case notes, news of forthcoming cases or events, book reviews, or other matters of interest to members of TECBAR or SCL.

ISSN 1472 0078

Editor:

Mark Chennells

Correspondence should be addressed to; mchennells@atkinchambers.com or Mark Chennells, Tecbar Review Editor, Atkin Chambers, 1 Atkin Building, Gray's Inn, London WC1R 5AT, DX 1033 Chancery Lane, Tel 020 7404 0102, Fax 020 7404 7456.

Published by Sweet & Maxwell Ltd

100 Avenue Road

London NW3 3PF

If you do not wish to receive TECBAR Review, please notify the Editor.

Typeset by EMS Print Design

Printed by St Austell Printing Company

SWEET & MAXWELL

325899