// TECBAR Review
Issue Winter 2015

The Newsletter of the Technology and Construction Bar Association

in association with informa law

Chairman's Message

As I start my new term serving TECBAR as Chair, I can open with the wonderful news that two of our Members have been appointed to the High Court Bench:

- Mr Justice Peter Fraser, assigned to the TCC;
- Mr Justice Michael Soole, assigned to the QBD General List.

Mr Justice Peter Fraser is the fifth Judge to be appointed to the Technology and Construction Court. Having studied law at St John's College, Cambridge, Peter served in the Royal Marines before accepting a tenancy at Atkin Chambers in 1990. Peter took Silk in 2009 and quickly built a large domestic and international practice. Since 1992 – Volume 56 – he has been an Editor of *Building Law Reports* and has been largely responsible for maintaining the high quality of those law reports over the last 23 years. As Paul Darling QC remarked in his much overlooked blog, Peter is "conspicuously able and fair to his bones".

Mr Justice Michael Soole was an extremely popular and able Vice-Chair and then Chair of TECBAR from 2011 to 2015. Michael read PPE at University College, Oxford from 1972 to 1975. He was called to the Bar in 1978 and took Silk in 2002. He is a Governing Bencher of the Inner Temple, Chairman of the Advocacy Training Committee of the Inner Temple. Away from the Bar, Michael was a Trustee and Board Member of the Charity Christian Aid from 1992 to 2002 and having been President of the Oxford Union whilst an Undergraduate is the Chairman of the Trustees of the Oxford Literary and Debating Union Charitable Trust.

We wish both Sir Peter and Sir Michael every success in their new careers.

Can I finally, but briefly, mention two new conferences TECBAR is organising:

- TECBAR's Annual Conference will take place at 9am on Saturday 30th January 2016 at The Caledonian Club, 9 Halkin Street, London, SW1X 7DR and our President, Lord Dyson MR, has very kindly agreed to attend and give a talk. Further details of the conference will be provided closer to the date;
- TECBAR's inaugural international conference organised with the Dispute Board Federation entitled "Building for the Future 2016" is due to take place at the Sofitel Plaza, Hanoi, Vietnam on the 31st March and 1st April 2016. Again, further details will be provided closer to the event.

Martin Bowdery QC
Atkin Chambers

From the Editor

This Winter 2015 issue of the *TECBAR Review* is my first as Editor.

I would like to start by thanking my predecessor, Mark Chennells, for all his hard work during his tenure. It is thanks to him that the *Review* has been handed over in such strong form.

The first contribution in this issue is a challenge to the correctness of the so-called 'nil cost' principle in the Court of Appeal decision in *Woodlands Oak* by James Bowling of 4 Pump Court.

The second is an assessment by Darryl Royce of Atkin Chambers of the 'right question, wrong answer' approach to the enforcement of adjudication decisions and the application of the *Nikko* doctrine.

List of Contents

No Argument for Nil Cost – the Reasonable Cost of Cure & the Decision of the Court of Appeal in *Woodlands Oak v Conwell* 2

Wrong answer? 4

Wellbeing at the Bar 6

The third is an appeal by Calum Lamont of Keating Chambers for short submissions from TECBAR Members on good and bad practice on wellbeing in support of the Bar Council's working group on Wellbeing at the Bar.

I look forward to continuing the development of the *Review* and to working with TECBAR Members on submissions for the 2016 issues.

Christopher Reid, Editor

No Argument for Nil Cost – the Reasonable Cost of Cure & the Decision of the Court of Appeal in *Woodlands Oak v Conwell*

By James Bowling, 4 Pump Court[1]

It will not be an observation shocking to the TECBAR readership that building contracts frequently result in disputes over defects. Their quantification ought to be simple and straightforward. Unfortunately, because of a misunderstanding of a curious Court of Appeal case – *Woodlands Oak v Conwell* [2011] BLR 365 – they are often anything but. Instead, *Woodlands Oak* is often cited (wrongly) as authority for the breathtaking proposition that if an employer unreasonably refuses to call the contractor back to remedy defects, *and* the contractor could have carried out the remedial works at £nil direct cost to himself by getting his subcontractors to do them, then the proper measure of damages for defects is also £nil, the employer failing to mitigate.

This article aims to explain why *Woodlands Oak* has been (or is being) misunderstood, and why the 'nil cost' argument is wrong in principle.

First, the basics. Where there are defective works the employer is entitled to damages for defective work. Such a claim is to be measured by the cost of cure or, if the employer does not intend to remedy the defects, the diminution in value; see, for example, *McGregor on Damages,* 19th ed., at para 29-016.

Prior to the decision in *Woodland Oak* the law as to how to measure the cost of cure was refreshingly simple and orthodox, and had been well-established since at least *Pearce & High v Baxter* [1999] BLR 101:

- It will often be reasonable to invite a contractor to come back to site to cure defective work. For example, the original contractor will be likely to know and understand the as-built works, even if he did not design them. Familiarity means that he may be likely to find and cure the problem more quickly. That he is funding the remedial works out of his own pocket in order to recover his retention may well mean he does his remedial works quickly and efficiently.
- If, such considerations notwithstanding, the employer nevertheless procures third party works at additional cost, that may be a failure to mitigate. If so, damages may be limited to what the original contractor would have had to have expended, rather than the employer recovering the higher third party costs in fact paid.
- What the employer can recover is fact-sensitive, like all questions of mitigation. Thus if the contractor was terminated for repudiatory breach, it may be reasonable to get others to do the work. Conversely, if there was no such breach and the employer has simply deprived the contractor of an express contractual licence to remedy notified defects without justification, that may make the employer's conduct unreasonable.
- Thus to take a simple example, if the defective work would have cost the contractor £80 to remedy but the employer instead retains a new contractor to do it for £100, the only relevant question is whether the employer gets £80 or £100. The employer always gets a minimum of £80.

So far, so good and so simple. Then comes the decision of the Court of Appeal in *Woodlands Oak v Conwell*. It was an appeal from a decision of Mr Recorder Gibney in the Southampton County Court. At first instance, the Recorder:

- Made a finding of law that the *Pearce & High* principle applied to all building contracts, including the one entered into by Mr and Mrs Conwell which (unlike the contract in *Pearce & High*) did not include an express defects rectification period[2];
- Made a finding of fact that Mr and Mrs Conwell had failed to mitigate their loss by unreasonably refusing to require the contractor to return to rectify defects[3];
- Made a further finding of fact that Mr and Mrs Conwell should recover £nil for those defects, the Recorder accepting the contractor's submission that if the contractor had been recalled he could have required his subcontractors to remedy defects at £nil cost to himself, and on application of *Pearce & High* the amount of Mr and Mrs Conwell's damages could not exceed what it would have cost the contractor to do the same work[4].

It is important to note that, insofar as relevant, Mr and Mrs Conwell appear to have only appealed the first of those three points – i.e. the judge's finding that as a matter of law the *Pearce & High* principle applied where there was no express defects rectification clause[5]. Although the judgment is not completely clear, they do not appear to have made any separate challenge

---

1 The author is indebted to Julian Bailey at White & Case LLP for his observations on this subject, some of which helped prompt this article. They were typically thorough and accurate.

2 Para 24 of the judgment.

3 Para 18 of the judgment.

4 Para 18 of the judgment.

5 Paras 18 – 24 of the judgment.

to the Recorder's subsequent finding of fact that, if *Pearce & High* did apply, then it compelled an award of £nil[6]. Mr and Mrs Conwell lost on their argument for the non-applicability of *Pearce & High* and thus the CA (with Sir Anthony May giving the only speech) held that the resulting findings of fact stood unaffected[7].

It is not clear why such a further ground of appeal was not pursued. Perhaps Mr and Mrs Conwell were advised that the appeal on the point of law was so strong that such an alternative or additional ground was not required. Perhaps it was felt that an appeal on a question of fact from a TCC judge would be a challenge too far. Whatever the reason, the result is a decision of the Court of Appeal that appears, at first pass, to support the truly radical proposition that, even where there is defective work, the contractor can escape *all* liability for it if he can show (a) that he was unreasonably denied the opportunity to come back and remedy the defects and (b) that if he had been called back, he could have passed on such an obligation to his subcontractors, so that the net direct cost to him would have been £nil, and so the damages he should pay for his defective work should also be £nil[8].

Such an interpretation of *Woodlands Oak v Conwell* would be quite wrong, in the writer's view. Indeed, if (as appears likely) the only thing under appeal was *whether* to apply *Pearce & High*, not *how* to approach quantum if it did apply, the Recorder's findings of fact form no part of the *ratio decidendi* in the Court of Appeal.

And with all due respect to Recorder Gibney, his approach to that question at first instance is almost certainly wrong. There is no sound basis in law for the suggestion that the Court should assess damages for defective work by reference to the fact that their cost could have been passed on by the party in breach of contract (i.e. the contractor) to his subcontractors. Indeed, if were otherwise the results are truly surprising:

- First, such an approach is wrong from first principle. It is obviously irrelevant and no defence that a contract-breaker has subcontracted the work in question. Liability for defective works is strict. The fact that it was performed vicariously by a defaulting subcontractor is simply ignored as between the two immediate parties to the contract. The amount for which the contractor is found liable simply forms the basis of the resulting claim down the contractual chain after judgment against him (or settlement by him: *Biggin v Permanite* [1951] 2 KB 314).
- Secondly, to apply the Recorder's approach gives the contractor effective immunity from liability for defective subcontracted work, whereas work done by the contractor in-house does not attract such immunity. There is no basis for such a distinction.
- Thirdly, it is inherent in the Recorder's analysis that the contractor could in fact have passed on the whole of the obligation to carry out these works to a subcontractor at £nil cost. Such "full immunity" would however be lost where, for example, the subcontractor became insolvent, or where the subcontractor might refuse to carry out the works because it had a *bona fide* dispute as to its liability. Further, what if the subcontractor accepted some, but not all responsibility, such that on the evidence he would only have been obliged to make a partial contribution to the cost of curing the defects? Is the position then that the employer's damages are capped at the value of the partial contribution the subcontractor would have made? If such points were relevant to the proper measure of damages as between the employer and the contractor, damages could fluctuate depending on a range of fact-specific and supervening events. Such a result goes against the general rule that damages are assessed at the date of breach.
- Lastly, on the Recorder's contrary approach, the results are truly unjust, even indefensible. By definition, the employer must be under-compensated for defective work recognised by the Court. The contractor will automatically be over-compensated, being paid without deduction. Perhaps most surprisingly of all there is an unacceptable windfall to the true villain of the piece – the subcontractor carrying out the defective work. The employer lacks any contractual or other legal claim against him, whilst the contractor has suffered no loss and cannot claim for that reason. The subcontractor thus gets off scott-free.

These points demonstrate that there is no such immunity from liability for subcontracted work as the Recorder's analysis at first instance in *Woodlands Oak* presupposes. The proper approach is simply to: look at the likely cost to the contractor of curing the defects (including such elements of the contractor's cost of cure as would have been borne by any relevant subcontractor *inter se*[9]); compare it to the costs the employer has in fact incurred; and comparing the two numbers (as well as the other relevant considerations) decide whether or not the employer has reasonably mitigated the cost of cure by using third parties for remedial works. This is the approach taken in other TCC cases (see e.g. HHJ Coulson QC, as he then was, in *Tombs v Wilson Connolly* (2004) 98 Con LR 44 at para 95).

Julian Bailey, in his excellent book on construction law, agrees that insofar as *Woodlands Oak* is cited for the proposition that the employer recovers £nil where a contractor is unreasonably deprived of the right to carry out remedial works via subcontractors at £nil net cost to himself, it was wrongly decided[10]. I have attempted to demonstrate above why

6 But see para 25 of the judgment, where it is perhaps curious that Sir Anthony May did not at least comment on the Recorder's approach to quantification of loss where there had been a failure to mitigate.

7 Para 25 of the judgment.

8 Or perhaps only minimal supervision costs.

9 And upon which the contractor must call evidence to show that he could have carried out the remedial works more cheaply if he wishes to say that the employer's remedial costs are unreasonably high; see e.g. *Owners of Strata Plan 64622* v *Australand Corporation Pty* [2009] NSWSC 614 at para 25, per Brereton J.

10 *Construction Law,* Informa, 2011, Vol. I at 14.109, fn. 281.

Woodlands Oak in the Court of Appeal does not even decide the issue at all; it is simply (and solely) authority for the (surely uncontroversial) proposition that mitigation principles as per *Pearce & High* apply whether there is a defects rectification clause or not.

It is also worth pointing out that insofar as *Woodlands Oak* is relied on by contractors for the wider proposition adopted by the Recorder, it is significantly out of step with the approach shown in analogous appellate cases. See, for example, *Copley v Lawn* [2009] EWCA Civ 580, where the Court of Appeal had to consider whether an innocent party to a road accident had failed to mitigate his hire car losses by refusing to take up the offer of a 'free' car from the defendant's insurer, such that he could not recover his own, alternative hire costs. As Longmore LJ pointed out, the argument for no loss by the defendant was based on a false premise: *"The defendants' case was attractively put by saying that the claimants had entered an agreement* [for third party hire] *… What, in those circumstances, could be more reasonable than to expect them* [instead] *to accept the defendants' offer of a "free" replacement car? This deceptively simple argument does, however, have to be unpicked. Is the defendants' offer really an offer of a "free" car?* [Is it] *right to regard it as "free" because it is right to ignore the fact that the defendants' insurers will incur a cost of hire themselves …?"* (at paras 10-11). Importantly, Longmore LJ concluded that: *"if a claimant does unreasonably reject or ignore a defendant's offer of a replacement car, the claimant is entitled to recover at least the cost which the defendant can show he would reasonably have incurred; he does not forfeit his damages claim altogether"* (para 32).

The direct analogy with the facts under discussion before the Recorder in *Woodlands Oak* is striking, as is the opposite (and it is submitted, entirely correct) conclusion reached by the Court of Appeal. *Copley* was not cited in *Woodlands Oak*.

Woodlands Oak would be not much more than an appellate curiosity but for the fact that the way it came before the Court of Appeal makes it appear as authority for the erroneous proposition that, in effect, to subcontract is to gain full immunity from defects claims. It is to be hoped that sooner or later a TCC judge will explain that it is not, and restore orthodoxy accordingly.

Unfortunately, in the most recent case to come before the TCC on the point (*Oksana Mul v Hutton Construction* [2014] BLR 529) Akenhead J (to whom *Woodlands Oak* was cited) was only required to rule that simply (and surely correctly) the Employer is always entitled, at a minimum, to recover, "what it would have cost the Contract to effect the requisite remedial works for defects which it was … not give the opportunity to put right". So the argument will rumble on.

Wrong answer?

Introduction

In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*,[1] reliance was placed both at first instance and on appeal on an analogy between adjudication and expert determination and a dictum of Knox J in *Nikko Hotels (UK) Ltd v MEPC plc*[2] that if an expert 'has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.' The adjudicator had made a decision in Dahl-Jensen's favour of £207,741. In doing so, he had deducted sums paid that excluded retention from a gross sum that included retention. The works had not been completed at the time of the adjudication, so no retention would in law have been due to Dahl-Jensen. Nevertheless, the effect of the adjudicator's calculation was to release the retention to them, with the further consequence of the net balance between the parties being in favour of Dahl-Jensen instead of Bouygues. Both at first instance and on appeal it was held that this obviously wrong decision was enforceable because the adjudicator had asked himself the right question.

This approach was referred to in a trio of subsequent cases in the Court of Appeal, namely *C & B Scene Concept Design Ltd v Isobars Ltd*,[3] *Levolux AT Ltd v Ferson Contractors Ltd*,[4] and *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*.[5] A significant point emerging from these decisions is that the impregnability of an adjudicator's decision rested on two assumptions: that the law relating to expert valuations was applicable, at least by analogy, to adjudication decisions and that the *Nikko* test constituted the correct approach to expert valuations.

Part 8 Proceedings at Same Time as Enforcement

Meanwhile, the TCC developed a procedure, now enshrined in the TCC Guide, whereby Part 8 proceedings brought by the party that had been unsuccessful in an adjudication could be dealt with at the same time as enforcement proceedings. An early example was *Alstom Signalling Ltd v Jarvis Facilities Ltd*,[6] which was followed by *Walter Lilly & Co Ltd v DMW Developments Ltd*[7] and *Geoffrey Osborne Ltd v Atkins Rail Ltd*,[8] in which Edwards-Stuart J pointed out that there must have been an arbitration clause in the sub-contract (because Bouygues was applying for

1 [2000] BLR 49; [2000] BLR 522.

2 [1991] 2 EGLR 103.

3 [2002] EWCA Civ 46, [2002] BLR 93, 98 [26] - [27] (Stewart-Smith LJ).

4 [2003] EWCA Civ 11, [2003] BLR 118, 120 [8] – [10] (Mantell LJ).

5 [2005] EWCA Civ 1358, [2006] BLR 15, 28 [52].

6 [2004] EWHC 1285 (TCC) (HHJ LLoyd QC).

7 [2008] EWHC 3139 (TCC), [2009] TCLR 3 (Coulson J).

8 [2009] EWHC 2425 (TCC), [2010] BLR 363 (Edwards-Stuart J).

a stay under s 9 of the Arbitration Act 1996), with the result that any final determination of the issues decided by the adjudicator had to be by way of arbitration and not litigation, which could explain why the contractor could not and did not adopt the approach taken in the *Jarvis* case.

A further, more recent, trio of decisions in the TCC concentrating on the amendments to payment provisions implied into construction contracts as a result of the Local Democracy, Economic Development and Construction Act 2009, have demonstrated the Court's willingness to deal with issues underlying adjudication decisions at the same time as hearing enforcement proceedings. They are *Leeds CC v Waco UK Ltd*,[9] *Caledonian Modular Ltd v Mar City Developments Ltd*[10] and *Henia Investments Inc v Beck Interiors Ltd*.[11] Of these, *Caledonian* is particularly noteworthy because Mar had not issued Part 8 proceedings. Coulson J pointed out that it is envisaged at paragraph 9.4.3 of the TCC Guide that separate Part 8 proceedings will not always be required in order for an issue to be decided at the enforcement hearing. Coulson J accepted that *Bouygues* represented the general rule and which would apply 'in 99 cases out of 100', but went on to say there was an exception if the issue was a short and self-contained point, which required no oral evidence or any other elaboration than that which was capable of being provided during a relatively short interlocutory hearing. In those circumstances the defendant might be entitled to have the point decided by way of a claim for a declaration.

The Analogy with Expert Determination and the *Nikko* Doctrine

The development of this procedure is a pragmatic solution to the denial of justice inherent in the relevant part of the decision in *Bouygues*. But is the latter defensible? Are the two pillars of enforcement, the analogy with expert determination and the *Nikko* doctrine, as solid as they seem? The nearest equivalent to an expert valuation is that of a certification under a construction contract. Thus in *Ackerman v Ackerman*[12] Vos J said that it was well established that an expert is not bound to observe all the rules of natural justice, though he does have an implied obligation of fairness, relying on a dictum of Megarry J in *Hounslow LBC v Twickenham Garden Developments Ltd* in relation to an architect acting as certifier. He also cited the judgment of May LJ in *Amec Civil Engineering Ltd v Secretary of State for Transport*[13], where he said:

> "*If [the engineer] entertains representations from one party over and above those inherent in making the request for a decision in the first place, fairness may require him to invite representations from the other party. But I would not go so far as to say that this is a straitjacket requirement in all circumstances. He may be well aware, as in the present case, what the other party's position is.*"[14]

As to the *Nikko* doctrine itself, is it a meme, an idea or element of social behaviour passed on through generations in a culture, especially by imitation? Like many shorthand phrases, 'right question, wrong answer' promises more than it delivers and may not actually make much sense.[15]

The House of Lords case *Mercury Communications Ltd v The Director General of Telecommunications*[16] concerned a licence to run telecommunications systems under the Telecommunications Act 1984, which provided that the Director General of Telecommunications, if requested by the parties, could make a determination where the parties were unable to agree in negotiations for a new agreement. It was held that the courts had power to determine the proper interpretation of the phrases 'fully allocated costs' and 'relevant overheads' because the parties had intended that the Director's determination was to deal with matters and principles as correctly interpreted. This echoed the dissenting judgment of Hoffman LJ in the Court of Appeal,[17] where he said:

> "*Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to "decide" what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion.*"[18]

This sits very uneasily with the analysis by Stuart-Smith LJ in *C & B Design*, relying on the *Nikko* test, that errors of law as to the relevant contractual provisions did not prevent a decision being binding and unenforceable.[19]

Lord Neuberger MR referred to mistakes of law in *Barclays Bank Plc v Nylon Capital LLP*,[20] where he said that an expert's contractually agreed instructions could, in the absence of a

---

9 [2015] EWHC 1400 (TCC).

10 [2015] EWHC 1855 (TCC).

11 [2015] EWHC 2433 (TCC).

12 [2011] EWHC 3428 (Ch) [264].

13 [2005] WLR 2339.

14 At 2355E-F [48].

15 The reader may not wish to be reminded of such song titles as *You Got the Right String, Baby, Butthe Wrong Yo-yo*, or *Right Place, Wrong Time*.

16 [1996] 1 WLR 48 (HL).

17 [1994] CLC 1125 (CA).

18 This analysis was also specifically agreed with by the Court of Appeal in *National Grid Co. plc v. M25 Group Ltd* [1998] EWCA Civ1968; [1999] 1 EGLR 65.

19 [2002] EWCA Civ 46, [2002] BLR 93, 98 [26] - [27].

20 [2011] EWCA Civ 826, [2011] BLR 614.

provision or indication to the contrary, be said to be to value shares in accordance with the legal rights and obligations they carry with them. He continued:

> "*Accordingly, despite the fact that it has, as Thomas LJ says, been frequently cited, I do not consider that Knox J's observation in Nikko … can safely be relied on.*"[21]

The overall position may thus be summarised as follows:

(1) The equation of or analogy between expert valuation (or determination) and adjudication does not stand serious scrutiny.

(2) Even if that equation or analogy were appropriate, the 'right question, wrong answer' test does not adequately describe the ambit of the inquiry needed to be made.

(3) If an expert misinterprets a document, his determination can be reviewed by the court unless the construction of the document forms part of his mandate.

(4) In any event, the court has jurisdiction in many cases to review adjudication decisions before or upon enforcement.

Unsatisfactory Features of Current Practice

The practice of the court intervening to determine a short and self-contained issue requiring no oral evidence during a short interlocutory hearing, is a sensible and pragmatic solution to the problems raised by the *Bouygues* principle. It does, however, have the following unsatisfactory features:

- It cannot be invoked where the parties have agreed to final determination of their disputes by arbitration.
- Its adoption depends on the exercise of the court's discretion in the unsuccessful party's favour.
- The unsuccessful party, even if it prevails before the court, will often end up paying the adjudicator's fees.[22]
- The exclusion of oral evidence is illogical where it could be short and the costs involved are proportionate to the amount at stake.[23]
- It is inconsistent with the court's approach to natural justice challenges.

Possible Solutions

These difficulties suggest that the continued application of the *Nikko* test is inappropriate for adjudication enforcement proceedings. Given the various different formulations of the 'departure from instructions or mandate' point, devising a new test may be no easy task. Nevertheless, it should be attempted, because adjudication is *sui generis*: it is neither expert determination nor is it arbitration. One test could be that of manifest error, that of the obvious or easily demonstrable error, whether its adoption would need to be achieved by judicial development of the law or statutory intervention (which would seem more likely). Such a development would considerably improve the administration of justice in relation to adjudication, as well as the reputation of adjudication itself. The current situation, whereby the court is supposed to enforce an admittedly wrong decision yet can be willing to open up the decision provided the unsuccessful party is quick enough off the mark, is paradoxical and can lead to injustice.

Another way of dealing with obvious errors would be to introduce a speedy review system, as in some of the Australian jurisdictions[34] or Singapore. These review provisions have similarities to the 'third umpire' review procedure in Test matches, which does not hold up the flow of the endeavour to any significant extent and provides a way of weeding our obviously wrong decisions. The practice adopted in the UK, on the other hand, requires the parties to jump to final determination at the enforcement stage but only where the dispute fits into a restricted category and, of course, the parties are not bound by an arbitration clause.

This article is a shortened version of a paper delivered at the TECBAR Adjudication Day on 10 October 2015, which is available on the TECBAR website. Darryl Royce is a member of Atkin Chambers and his new book, Adjudication in Construction Law, *is published by Informa from Routledge as part of the Construction Law Series.*

Darryl Royce, Atkin Chambers

21 See, however, the discussion of this in *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994.

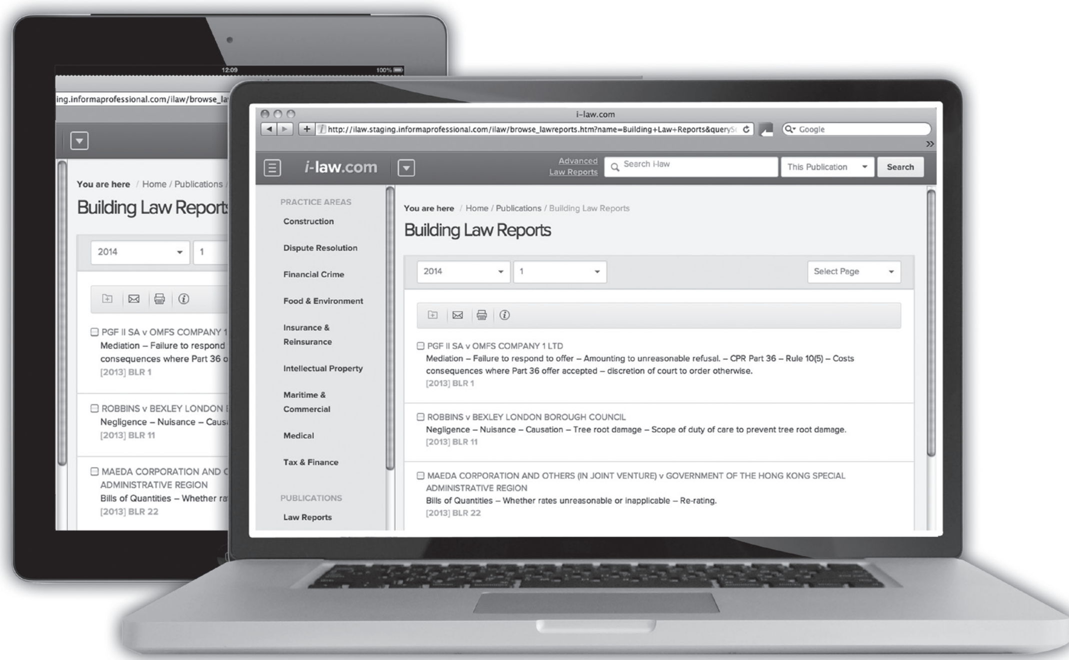
22 See the *Geoffrey Osborne* case referred to above and *TSG Building Services PLC v South Anglia Housing Ltd* [2013] EWHC 1151(TCC), [2013] BLR 484.

23 Oral evidence has, however, been received in enforcement proceedings: see *Able Construction (UK) Ltd v Forest Pty Development Ltd* [2009] EWHC 159 (TCC) [15] (Coulson J).

24 See eg, Building and Construction Industry Security of Payment Act 2002 (Victoria), as amended, s 28L; Building and Construction Industry Security of Payment Act 2004, (Singapore) s 19(3).

Continued on p8

The new look i-law.com is now live. Try it for free today!



Construction on i-law.com provides you with specialist commentary, discussion and practical analysis alongside the latest case reports and arbitrations. It covers all areas of construction law including delay and disruption, adjudication, arbitration, contracts, costs, insurance, procurement, negligence and much more.

With i-law.com, you can access these titles and more, anytime, anywhere:

- Building Law Reports
- Building Law Monthly
- Remedies in Construction Law
- International Construction Law Review
- Dictionary of Construction Terms
- Construction Industry Law Letter

The new look site is mobile responsive, and can be accessed anywhere, by tablet, mobile phone or desktop. Sign up today for your free 3-day trial and see the new look i-law.com for yourself.

Visit www.i-law.com/trial and quote Promo Code TECBAR for your free 3-day trial.

www.i-law.com

Continued from page 6

Wellbeing at the Bar

Dear TECBAR Member

The Bar Council has convened a working group focussing on Wellbeing at the Bar, following a survey in late 2014 across 2,500 barristers which found that:

- 1 in 3 barristers find it difficult to control/stop worrying;
- 2 in 3 feel showing signs of stress equals weakness;
- 1 in 6 feel low in spirits most of the time;
- 59% demonstrate unhealthy levels of perfectionism; and
- Psychological wellbeing within the profession is rarely spoken about.

A full copy of the report is available on the Bar Council website.

The intention of the Group is to set up initiatives to address wellbeing issues, starting with a series of online guides which we hope to publish in early 2016.

As part of preparing the content of those guides, and to enable the Group to prioritise the correct or most important issues, I have been asked to canvass TECBAR members to gather experiences of good and bad practice on wellbeing. That experience might be individual or chambers wide.

It would greatly assist me, and the Group, if you would be able to assist by sending me a short email outlining your experiences – clamont@keatingchambers.com

All responses will be treated in the strictest confidence.

Calum Lamont, Keating Chambers

Readers are invited to submit material by email 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
© Informa UK Limited and TECBAR 2015
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.
If you do not wish to receive the TECBAR Review please notify the Editor.
Published by Informa UK Limited.

informa law
an informa business