TECBAR Review

Autumn 2018

The Newsletter of the Technology and Construction Bar Association

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Chairman's Message

Since last writing to you, Fraser J has taken over as the Judge in Charge at the Technology and Construction Court (TCC) and we welcome him into the new role. We also expect the appointment of new judges for the Court.

In April we held our annual conference which was warmly received. In her keynote address, O'Farrell J spoke to us about the forthcoming Disclosure Pilot Scheme. This scheme has now been approved by the Civil Procedure Rules Committee and will take effect for two years from January 2019 throughout the Business and Property Courts. There is no doubt that it will have a huge impact on the way that cases are conducted. Standard disclosure will cease to be the presumed norm. The Court has new powers to fashion the disclosure process for a given case even against the joint wishes of the parties. Disclosure Guidance Hearings will be introduced. We will continue to provide informative education to those who want to know more in the lead up to the commencement of the scheme. Alongside Tecsa, we also intend to monitor the advantages and disadvantages of the new pilot scheme to better inform the review that will take place at the end of the pilot period. To that end, feedback from practitioners will be invaluable.

In May we held a very successful event, the first of its kind, to encourage an interest in and an understanding of the QC appointments system. It was very well attended. We are particularly grateful to Carr J for giving her perspective on the reference process. As it was so popular, we do intend to repeat this event next year.

On a different front, I continue to receive regular applications for nomination of a TECBAR adjudicator but there is no doubt that more could be done by our own members to publicise the benefits of using TECBAR as the adjudicator nominating body. If the opportunity arises, please do consider suggesting this to clients for an appropriate case.

Alexander Nissen QC
Chairman of TECBAR

From the Editor

This Autumn 2018 issue of the *TECBAR Review* contains three contributions.

In the first, Laura Hussey – newly elected to a tenancy at Atkin Chambers – considers the recent judgment of Fraser J in *Tectronics (International) v HSBC (Blue Oak Arkansas intervening)* [2018] EWHC 201 (TCC), in which the Court came very close to restraining an otherwise valid call on an on-demand guarantee by reason of the so-called "fraud exception". I am sure TECBAR members will join me in congratulating Laura on her election.

Second, and further to the reminder to members in the Chairman's Message of the recent approval by the Civil Procedure Rule Committee of the Disclosure Pilot Scheme, Felicity Dynes considers some of the key changes which (subject to ministerial approval) will take effect from 1 January 2019 in the Business and Property Courts at the Rolls Building and the regional centres.

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Finally, Darryl Royce has contributed another instalment of his regular column, covering the law and practice of adjudication, on the last decision of Coulson J before his elevation to the Court of Appeal, being *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC), and its potentially significant impact in departing from the previous line of authority in *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC).

Christopher Reid
Editor

In search of the fraud exception

Cases of an injunction being granted to prevent payment following a valid call on an on-demand guarantee are exceptionally rare. This is one reason why the judgment of Fraser J in *Tetronics (International) v HSBC Bank (Blue Oak Arkansas intervening)* [2018] EWHC 201 (TCC), with its unusual facts, both substantively and procedurally, makes for such an interesting read. The court came very close to granting such an injunction and it was only after new evidence came to light following the distribution of the draft judgment that the court altered its position and found that although there was fraud the balance of convenience no longer favoured granting the injunction.

Background

Tetronics contracted to carry out work at an untreated electronics waste plant in Arkansas US which was owned and operated by Blue Oak. The contract stipulated that Blue Oak could terminate in the event of Tetronics' insolvency and also for certain breaches of contract. It further provided that in such an event of termination Blue Oak could call on the guarantee to compensate for any damages or set off against any payments, as the case may be. The governing law was that of the State of New York and was subject to an arbitration clause.

HSBC provided an original guarantee on behalf of Tetronics, its customer, in favour of Blue Oak which expired in June 2017. Following which, Blue Oak and Tetronics negotiated in respect of HSBC providing a further advance payment on demand guarantee for £3.8 million.

Prior to issuing the second guarantee, HSBC wished to ensure that it was not going to be utilised as a mechanism by Blue Oak to obtain immediate payment. HSBC sought confirmation from Blue Oak that it was not aware of any current circumstances which would give rise to a demand for breach of the underlying contract. Blue Oak provided this confirmation by way of a letter to HSBC dated 13 November 2017. Following this confirmation, HSBC issued the new on-demand guarantee for £3.8 million on 21 November 2017. The governing law of the guarantee was stated to be that of England and Wales.

Shortly after, on 11 December 2017, Blue Oak issued a Notice of Default and Warranty to Tetronics stating that it had become aware of a range of matters which amounted to breaches of contract of such a nature that Blue Oak was entitled to terminate.

On 17 January 2018 Blue Oak made a call on the guarantee and the following day Tetronics sought emergency interim relief to prevent HSBC from paying out under the guarantee. On 18 January 2018 the court granted an ex parte emergency injunction with a return date of 31 January 2018.

The legal principles

It is well known that it is a wholly exceptional case that a party will be able to resist payment once a valid call has been made upon an on-demand guarantee or bond. The courts have for many years taken the approach that the bank must make payment to the beneficiary despite any dispute between the parties to the underlying contract. This approach is based upon strong public policy reasons concerning protecting the integrity of the banking system and banking instruments (*Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 WLR 392; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146). In general, nothing short of a seriously arguable case of fraud by the party seeking to call on the bond will suffice, commonly referred to as the 'fraud exception'.

This legal principle was well summarised by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31:

> *"…seriously arguable that on the material available the only realistic inference was that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and that the bank was aware of such fraud… the expression 'seriously arguable' was intended to be a significantly more stringent test than good arguable case, let alone serious issue to be tried; that even where it was possible to establish the test for fraud as opposed to mere possibility of fraud, the balance of convenience would almost always militate against the grant of an injunction…"*

As Fraser J summarised, Tetronics therefore had to satisfy the following requirements:

> *"1. It must be seriously arguable on the material available that the only realistic inference is that*

Blue Oak could not honestly have believed in the validity of its demands under the guarantee.

2. *The Bank must have been aware of the fraud.*
3. *The balance of convenience must favour granting Tetronics an injunction. This must require "extraordinary facts" and Tetronics faces very considerable difficulty in having that balance found to be in favour of injunctive relief."*

The hearing on 31 January 2018

At the return hearing on 31 January 2018, Tetronics based its case in fraud upon three primary assertions:

1) Prior to its letter to HSBC dated 13 November 2017 Blue Oak knew of the majority of the matters complained about in its Notice of Default. Therefore, either the contents of the Notice itself or the contents of the letter dated 13 November 2017 were knowingly and recklessly false (with the implication that the guarantee had been procured by fraud).
2) Under New York law Blue Oak could only make a valid claim if the underlying contract had been terminated. The Board of Blue Oak knew that the underlying contract had not been terminated and that none of the other preconditions for a valid call on the guarantee had been complied with.
3) At a meeting on 28 November 2017 between Tetronics and Blue Oak, Blue Oak had accepted that the plant had been delivered in accordance with the underlying contract. This was further supported by a written record of the meeting.

Importantly, Blue Oak chose not to challenge the evidence by Tetronics and submitted no evidence to the contrary. The court concluded that Tetronics' evidence presented a "cogent and compelling" case of fraud. On the evidence, Blue Oak must have known the contents of the Notice of Default were false. Furthermore, the allegation of fraud was sufficient as it was supported by contemporaneous documents and Blue Oak had been given the opportunity to answer the allegation. It was therefore seriously arguable that the only realistic inference was that Blue Oak could not honestly have believed in its demands under the guarantee.

For the fraud exception to apply HSBC must also have been aware of the fraud, with the relevant date for its state of knowledge held as being 17 January 2018, the date of the call upon the guarantee. The court found the following evidence sufficient to have put HSBC on notice of the fraud:

1) On 16 January 2018 Tetronics emailed to HSBC an opinion from a US law firm which stated that Blue Oak was procedurally barred from calling on the guarantee for failing to comply with conditions precedent and there was no factual or legal basis for Blue Oak's allegation that Tetronics had breached the underlying contract and that the underlying contract had not been terminated. However, even if Blue Oak had been entitled to call upon the guarantee, the amount of payment under the guarantee was limited to damages incurred.
2) Tetronics evidenced that it had informed its relationship manager at HSBC in telephone calls between 9 and 10 of January that Tetronics "believed that the Blue Oak call on the bond to be fraudulent…"

Having found that the fraud exception applied in the circumstances, the court then had to consider whether the balance of convenience favoured granting Tetronics the injunction. Tetronics gave evidence which indicated that, should the injunction be discharged, it would immediately make Tetronics insolvent. In order to meet the payment required by HSBC an immediate injection of funds from its shareholders would be required, the possibility of which was unlikely.

Furthermore, Tetronics gave evidence that Blue Oak was having its own cash flow problems and should Tetronics pursue Blue Oak, as a special purpose vehicle, it may cease to exist. As a result, the shareholders of Blue Oak would benefit from the fraud whilst HSBC would be financially damaged and Tetronics destroyed. Blue Oak presented no evidence to the contrary.

Fraser J stated in his draft judgment, with a hand down date of 20 February 2018, that on the evidence available on 31 January 2018 these were extraordinary facts and after applying the high threshold test concluded that the balance of convenience was in favour of granting the injunction and it would therefore be continued.

The developments after distribution of the draft judgment

Following the hearing and prior to distribution of the draft judgment, Tetronics notified the court and the other parties that the ICC had appointed an Emergency Arbitrator to hear Tetronics' application for emergency relief against Blue Oak.

The day before judgment was due to be handed down Blue Oak submitted a statement to the court that important and contradictory new evidence had been disclosed by Tetronics during the ICC arbitration. Blue Oak stated that Tetronics had conceded that its shareholders would in fact be able to make additional contributions in order to reimburse HSBC but that they would likely not be willing to do so unless the money paid out by HSBC was placed in an escrow account. Blue Oak therefore argued that the balance of convenience no

longer favoured the continuation of the injunction and that the court had been misled at either or both the hearings of 18 and 31 January 2018. Following receipt of this statement the court exercised its discretion and admitted the new evidence.

After a subsequent hearing on the matter the court altered its findings and held that the injunction previously granted on an ex parte basis was to be discharged. The court did not alter its conclusion on fraud but concluded that Tetronics had failed to comply with the fundamental principle that where an urgent without notice interim application is made the applicant is under a duty to make full, fair and accurate disclosure of material information to the court (*Millhouse Capital UK Ltd v Sibir Energy plc and others* [2008] EWHC 2614). Although Fraser J finds that the court would have found the injunction discharged on that ground alone the dudge goes on to state that the balance of convenience following the new evidence had also shifted to favour discharge of the injunction.

Not only is this case interesting as the court came very close to granting the elusive injunction for the fraud exception, but it provides a useful and in-depth reminder as to when those principles will apply. It also serves as an important reminder of the importance of consistency where remedies are being sought in parallel proceedings in different jurisdictions. Finally, it is a strong reminder of the consequences of not making a full, fair and accurate disclosure of material information to the court when seeking an urgent without notice interim application.

Laura Hussey

The Disclosure Pilot Scheme

As TECBAR members will recall, at our Annual Conference in April this year O'Farrell J was kind enough to give the keynote speech introducing The Disclosure Pilot Scheme. Since then, on 31 July 2018, the Civil Procedure Rule Committee has given its final approval to the proposal to run the Disclosure Pilot Scheme for two years. As such, subject to ministerial consent (which the Civil Procedure Rule Committee proposes to seek later this year), the scheme will commence on 1 January 2019.

While the Pilot Scheme will not affect disclosure orders made prior to the commencement date in existing claims,[1] the scheme will apply to new claims – and existing claims in which no disclosure order has been made – in the Business and Property Courts in the Rolls Building and in the Business and Property Centres at Bristol, Birmingham, Cardiff, Leeds, Liverpool, Manchester, and Newcastle. The requirements of the new scheme are set out in the Practice Direction on the Disclosure Pilot for the Business and Property Courts.[2]

While space does not permit a full summary of the changes which will be introduced by the Practice Direction, two of the key features are as follows. First, standard disclosure in its present form will cease to exist and will no longer be the default form of disclosure. Instead, subject to the exceptions set out in the Practice Direction, the starting point will be the new concept of 'Initial Disclosure.'

Initial Disclosure is to be given by parties when serving statements of case.[3] It is primarily to include documents which are relied upon by the disclosing party and which are necessary for other parties to understand the case they have to meet. Perhaps the most significant change is that Initial Disclosure is expected to be limited to about 200 documents (which the Practice Direction – somewhat optimistically for TCC practitioners – equates only to 1000 pages).

The second key feature is that – after closure of statements of case, but before the case management conference – the parties are to file a joint Disclosure Review Document. One of the purposes of this document is to exchange proposals for the potential for "Extended Disclosure". The Practice Direction provides five "models" for Extended Disclosure, labelled A to E, and anticipates that different models may apply to the different disclosure issues which the parties will have agreed in the Disclosure Review Document.

The Practice Direction is, however, clear that the Court is to be proactive in managing the disclosure process, such that – from the Commencement Date – parties can expect considerable judicial scrutiny of their proposals for Extended Disclosure in accordance with the requirement of "*reasonableness and proportionality*" at paragraph 6.4 of the Practice Direction. The Civil Procedure Rules Committee does, however, anticipate a programme of presentations with Business and Property Court users prior to the Commencement Date to enable practitioners better to prepare for how the new rules will work in practice.

Felicity Dynes

1 With the possible exception of existing disclosure orders which are varied or subsequently set aside.

2 Which may be viewed in full at: https://www.judiciary.uk/wp-content/uploads/2018/07/draft-practice-direction.pdf.

3 Although the concept of "standard disclosure" has been dispensed with, the Parties are under an obligation to disclose known adverse documents: see Section I, paragraph 2 of the Practice Direction.

Pay now, argue now?

Unless they have been asleep for some considerable time, TECBAR members will have learnt of the last decision of Coulson J before he was elevated to the Court of Appeal, namely *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC), in which he held that it was open to an unsuccessful responding party to a 'smash and grab' adjudication who had made payment in accordance with the decision to begin a further adjudication to determine the 'true' value of an interim valuation. In doing so, he declined to follow the earlier Technology and Construction Court decisions, *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC), [2015] BLR 233, *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC), [2015] BLR 321 and *Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC), 170 Con LR 40 and rejected the submission that, if the paying party could start a second adjudication as to the 'true' value, it would destroy the policy underlying the Housing Grants, Construction and Regeneration 1996 Act.

Coulson J relied on six reasons for doing so:

- That as the paying party, Grove, had conceded, if the court had power to open up, review and revise any existing certificates, notices or applications then so too did an adjudicator;[1]
- That there was no limitation on the nature, scope and extent of the dispute which either side could refer to an adjudicator;[2]
- That a dispute relating to the 'true' valuation of the interim application in question had not been considered or decided in the adjudication and must be capable of being referred to adjudication because of Grove's ability to adjudicate any dispute 'at any time';[3]
- That the construction contract distinguished between 'the sum due' in relation to an interim payment and 'the sum stated as due' in the payment notice or the pay less notice;[4]
- That a receiving party could refer a dispute about the 'true' value to adjudication and it would be wrong in principle to prohibit the paying party from doing that;[5] and
- That a paying party could commence an adjudication to deal with a dispute about the 'true' value of a final payment and there was no difference between the parties' rights and obligations in respect of an interim payment.[6]

In reaching his decision Coulson J made some observations about the policy of the Act. He said that the receiving party would not be prejudiced in respect of cash-flow at all, because he would be recovering the full amount for which he had claimed in his interim application;[7] that it was not one of the policies underlying the Act that the receiving party was entitled to hang on for lengthy periods to sums to which, on a proper analysis, he was not entitled;[8] and that if he is entitled to hang on to the money stated to be due, because of an absent or defective notice, it might be months or even years before there is a determination of the 'true' value of the application, as part of the final account process.[9]

It may help if we remind ourselves of the policy considerations involved and how the legislation has developed. In *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* Lord Salmon said:[10] "Bona fide claims to set off are very often disputed by plaintiffs. In such cases, the courts have no power to say to defendants: 'Pay up now and litigate or arbitrate the dispute'. This would be to emasculate the right of set-off. The dispute is resolved according to law in the litigation or arbitration; in the meantime the status quo is preserved." This was this phrase appropriated in a shorter form by Lord Ackner during the debate at Report Stage on the Bill for the Act in the House of Lords, when he said: "What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of 'pay now argue later', which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts."[11]

1 See para 70 of the judgment.
2 See paras 72-3 of the judgment.
3 See para 78 of the judgment.
4 See paras 80-3 of the judgment.
5 See para 85 of the judgment.
6 See para 89 of the judgment.
7 See para 138 of the judgment.
8 See para 138 of the judgment.
9 See para 139 of the judgment.
10 [1974] A.C. 689, 726D.
11 *Hansard*, H.L. Vol 571, cols 989-90.
12 *RJT Consulting Engineers Ltd v DM Engineering (N.I.) Ltd* [2002] EWCA Civ 270, [2002] 1 WLR 2344, 2346, [1], (Ward LJ); *Thomas-Frederic's (Construction) Ltd v Wilson* [2003] EWCA Civ 1494, [2004] BLR 23, 28, [19] (Simon Brown LJ).; *Pegram Shopfitters Ltd v Tully Weijl (UK) Ltd* [2003] EWCA Civ 1750, [2004] BLR 65, 69, para 12 (May LJ).
13 *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23, 26, para 9 (HHJ Thornton QC)
14 *SL Timber Sysytems Ltd v Carillion Construction Ltd* [2001] B.L.R. 516, 524, para 20 (Lord MacFadyen).
15 [2003] EWCA Civ 1563, [2004] 1 WLR 1867.

The mantra 'pay now, argue later' has been adopted by the courts as shorthand to describe the policy of the Act, particularly in relation to the enforcement of adjudicators' decisions.[12] Despite the imposition of a statutory exclusion of set-offs where the condition precedent of a timely counter-notice by the paying party known as a 'withholding notice', the courts were found to be willing to contemplate other bases on which paying parties could defend their liability in the absence of a notice. It was held that any abatement of the contract price by virtue of the receiving party's breaches of contract and that no additional work had in fact been carried out would not be caught by Section 111 of the unamended Act.[13] In addition, a dispute about whether the work in respect of which the claim was made had been done, or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to 'withhold ... a sum due under the contract', and therefore did not require the giving of a notice of intention to withhold payment.[14]

The position under contracts where certificates were to be issued by third parties such as architects was different. Thus in *Rupert Morgan Building Services (LLC) v Jervis*[15] it was held that in the case of such a contract, it was not the actual work done which either defined the sum or when it was due. The sum was the amount in the certificate. The certificate might be wrong – the certifier might have missed out work done or they may have included items not in fact done or items already paid for. In the absence of a withholding notice, the Act operated to prevent the paying party withholding the sum due. The party carrying out the works was entitled to the money right away.

This inconsistency of approach between the different types of contract was then apparently resolved by the amendments made by the new Section 111 introduced by the Local Democracy, Economic Development and Construction Act 2009, which extended the approach adopted in relation to certification contracts to contracts under which payment was to be made on applications by the receiving party. In the absence of the counter-notice, now called a 'pay less notice' payment was now to be made in the full amount either certified or applied for, giving rise to the 'smash and grab' adjudication in which the receiving party issued an application, sometimes at an awkward moment for the paying party, and demanded payment in the absence of the pay less notice.

The TCC's reaction to this phenomenon has been to develop a jurisdiction whereby a paying party can potentially avoid payment in the absence of a pay less notice by seeking the swift determination of an issue that could potentially defeat the claim. The limitations of this jurisdiction are that the point has to be capable of swift resolution, usually by proceedings under Part 8 of the Civil Practice Rules, and is therefore usually restricted to issues of law, and it will not be available where the construction contract contains an arbitration clause because the receiving party could obtain a stay of the claim under Section 9 of the Arbitration Act 1996.

Against this background, the decision in *Grove* is highly significant, because it would seem to go against what might be regarded as the object of the reforms made to the payment provisions in the Housing Grants, Construction and Regeneration Act 1996, which must have been to close off argument where no counter-notice had been served by the paying party. The introduction of another tier of argument, albeit after payment has been made in accordance with the first adjudicator's decision, would seem to be the antithesis of the 'pay now, argue later' principle.

Bearing that in mind, the following points can be made about the reasons relied on for this result:

- It does not follow from an adjudicator having the power to open up, review and revise any existing certificates, notices or applications that it should be exercised where there has been a previous binding decision about the amount payable.
- There are a number of limitations on the nature, scope and extent of the dispute which either side can refer to an adjudicator (it must arise under a construction contract for example) the most relevant of which here is that it must not be the same or substantially the same as one previously referred to adjudication.
- A dispute relating to the 'true' valuation of the interim application in question might be said to be incapable of arising in the absence of a pay less notice.
- Contractual terms that distinguish between 'the sum due' in relation to an interim payment and 'the sum stated as due' in the payment notice or the pay less notice cannot override the effect of the Act as amended.
- It may not be wrong in principle to prohibit the paying party from referring a dispute about the 'true' value to adjudication where the receiving party can because that reflects the policy of the Act as amended, which is reflected in the absence of any prohibition on the receiving party doing so, whereas the paying party is expressly prevented from challenging the amount payable in the absence of a pay less notice.
- There is a difference between the parties' rights and obligations in respect of an interim payment as opposed to a final payment, which is that an interim payment can be corrected in either a subsequent interim valuation or the final payment.

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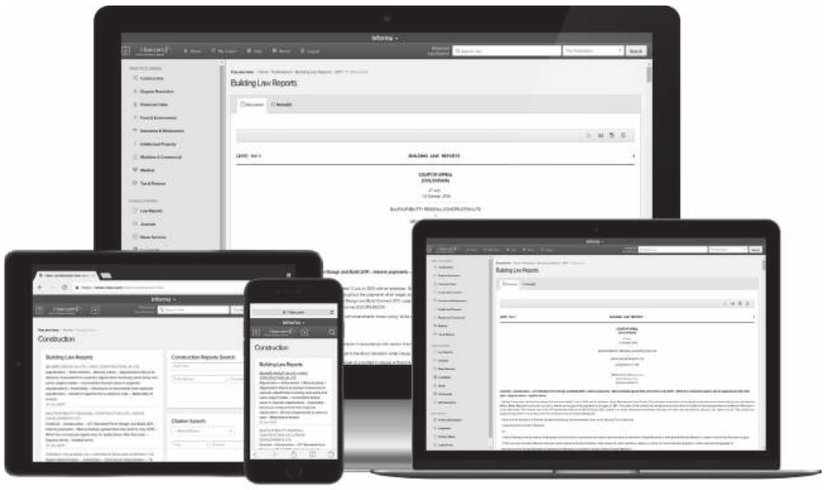

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None of these propositions would be determinative of itself, but the same point could be made in relation to the six reasons relied on by Coulson LJ. That is not intended to be a criticism of reliance being placed on those reasons, but simply to point out that this is an area of the law where there may be no overwhelming justification for deciding the main point one way or the other. It could be said, however, that the imposition of a time bar in relation to a payment notice suggests that the legislation was intended to close off further argument in relation to the valuation covered by that notice.

Darryl Royce is a member of Atkin Chambers and his book, *Adjudication in Construction Law*, is published by Informa from Routledge as part of the Construction Law Series.

Hodgson v National House Building Council [2018] EWHC 2226 (TCC), Jefford J, 29 August 2018

In 2004, the claimant made a claim under the NHBC Buildmark policy against the builder of the house in an arbitration in respect of which there was a partial award in the claimant's favour. The builder met part of the award but the majority was paid by the NHBC. In 2010, the claimant commenced a further arbitration under the JCT contract with the builder which was resolved when a settlement agreement was concluded between the claimant and NHBC, under which the claimant discontinued the arbitration and made a claim against NHBC. The NHBC declined to make any further payments to the claimant on the ground that his claims had already been dealt with in the arbitration. In February 2013, the claimant sold the property without having carried out any remedial works. The claimant commenced the present proceedings in September 2017. The NHBC applied for summary judgment and/or to strike out the whole, or part of, the claim. It did so on two grounds.

First, it submitted that, since the claimant had sold the property he had suffered no recoverable loss because he would never incur the costs of remedial works. The defendant submitted that the NHBC policy was a contract of indemnity and that the claimant was not entitled to an indemnity against a loss he would not suffer. Jefford J declined to strike out the claim on this ground or to grant to the defendant summary judgment. She noted that the claim brought by the claimant was made under the settlement agreement and not under the NHBC policy per se. According to the terms of the settlement agreement, the parties had agreed that the claimant would submit a claim which would be dealt with by the NHBC as if the builder were insolvent and the NHBC undertook to pay the cost of any work which the builder would otherwise have been liable to pay under section 2 of the policy. It was at least reasonably arguable that the settlement agreement was not a contract of indemnity or a guarantee but an additional and distinct layer of agreement to pay the cost of any work for which the builder would have been liable. On this basis the claimant was held to have a potential claim under the settlement agreement and it was not a defence to say that he had suffered no loss because he would not carry out any remedial works.

Second, the defendant submitted that each of the claims now made by the claimant had already been dealt with in the earlier arbitration and so could not be the subject of a claim under the settlement agreement. The arbitration involved the builder rather than NHBC but Jefford J held that, for later proceedings to amount to an abuse of process, it is not necessary that they are brought against a party to the previous proceedings. The public interest is a broader one in not having the same issues repeatedly litigated. Whether or not the same issues are being re-litigated involves a close merits based analysis of the facts. This required Jefford J to compare the claimant's Scott Schedule in the arbitration with the Scott Schedule in the current litigation. She carefully considered 12 items and concluded that all but one of the claims made by the claimant had no real prospect of success because they had already been determined in the earlier arbitration. She concluded that it was academic whether she gave summary judgment for the defendant on these items or whether she struck out these claims. In relation to the one item that survived, she stated that it was a matter for the claimant whether or not he wished to pursue a claim on that item alone.

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Editor: Christopher Reid
Correspondence should be addressed to: creid@atkinchambers.com or Christopher Reid, 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.
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