TECBAR Review

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The Newsletter of the Technology and Construction Bar Association

in association with informa law

Chairman's Message

After one year as Chair of TECBAR – one year to go – I was the Returning Officer for our annual elections – this year for the post of Secretary and for Committee places. I was pleased to see that more candidates stood for election than ever before and more than 160 people took part in the election. This, I consider to be the sign of a healthy association. The results were as follows:

Jessica Stephens (4 Pump Court) was elected Secretary;

Simon Hargreaves QC (Keating), Hugh Saunders (4 New Square), Felicity Dynes (Atkin), and Matthew Thorne (4 Pump Court) were elected as Committee Members.

This edition of the *TECBAR Review* contains the first column from Darryl Royce of Atkin Chambers, who is providing an Adjudication Update which we hope will become a regular and must-read column in each future issue. Darryl, as many of you will know, is the author of *Adjudication in Construction Law*, quickly becoming one of the leading textbooks on adjudication.

Over the last twelve months, TECBAR has been asked to appoint 22 Adjudicators. Now the TECBAR website is being rebuilt and updated, it is hoped that – with a more effective and updated website – this service provided by TECBAR will become more widely publicised and the number of TECBAR adjudications will continue to increase.

Finally, I am very pleased to announce – or rather re-announce – the appointment of:

Nerys Jefford QC to be a Justice of the High Court with effect from 3 October 2016; and

Finola O'Farrell QC to be a Justice of the High Court with effect from 17 October 2016.

Both Nerys and Finola have been great supporters of TECBAR over the years. They have both had outstanding careers at the Bar as determined and effective advocates and I wish them both every success in their new careers as High Court Judges.

Martin Bowdery QC,
Atkin Chambers

From the Editor

This Summer 2016 issue of the *TECBAR Review* contains three contributions, each discussing a recent case of relevance to TECBAR members.

The first, by Hugh Saunders of 4 New Square, discusses the judgment of Sir Robert Akenhead in *J Murphy and Sons Limited v W Maher and Sons Limited* [2016] EWHC 1148 (TCC) and the extent to which the principles established in the arbitration context in *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40 are applicable to adjudication.

In the second, Charles Thompson of Hardwicke comments on the decision in *Jawaby Property Investment Limited v (1) The Interiors Group Limited (2) Andrew Stephan George Black* [2016] BLR 328 as the latest in a series of TCC decisions reminding contractors that – to the extent they wish to take advantage of the statutory payment regime – they must submit interim applications properly so called in substance, form, and intent.

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Finally, I am delighted to welcome the inaugural column from Darryl Royce of Atkin Chambers. Darryl has kindly agreed to contribute his perspective on recent developments in the law and practice of adjudication to each issue of the *TECBAR Review*. In this Summer 2016 issue, he discusses the potential for an uneasy fit between the enforcement of adjudication decisions and the summary judgment procedure in light of a dictum of Fraser J in *Ground Developments Ltd v FCC Construccion SA* [2016] EWHC 1946 (TCC).

Christopher Reid, Atkin Chambers

Adjudication and Arbitration: *J Murphy & Sons Limited v W Maher and Sons Limited*

In his recent return to the TCC, Sir Robert Akenhead's judgment in *J Murphy & Sons Limited v W Maher and Sons Limited*[1] raised some interesting questions about how heavily adjudication should borrow from the law of arbitration.

The facts were relatively straightforward. Murphy was a subcontractor carrying out tunnelling works at Trafford Park in Manchester. They engaged Maher as a sub-subcontractor to carry out spoil removal under a bespoke subcontract which incorporated much of the NEC 3 Engineering and Construction Subcontract. The subcontract provided:

> *"Any dispute arising under on in connection with this subcontract is referred to and decided by the Adjudicator"*

The adjudicator nominating body was specified to be the TCC.

The works were originally expected to be completed by April 2015, but in fact continued until September 2015. Mayer's final payment application was for a gross sum of £763,980, with a balance due of some £297,149. In November 2015, the parties' representatives agreed a final account of £720,000 in a telephone conversation which, it appears, was subsequently confirmed by e-mail. No payment was forthcoming and following pressure from Maher and its claims consultants, at the start of March 2016 Murphy sent Maher a gross valuation of just £483,529 (and didn't pay the balance due on that either).

Unsurprisingly, Maher commenced an adjudication seeking payment on the basis of the agreed final account figure. As the TCC does not nominate adjudicators, Maher asked the RICS for a nomination. Following receipt of the referral, Murphy responded by raising two jurisdictional arguments. The first was that, because the contractually specified nominating body was not actually a nominating body, the contractual adjudication provisions must be entirely replaced by those in the Scheme for Construction Contracts and therefore the adjudicator had been wrongly appointed. The second was that the adjudicator would have no jurisdiction in any event because the November 2015 agreement was a standalone "*settlement agreement*" and, since the Scheme applies only to disputes "*under*" (rather than "*under or in connection with*") a construction contract, there was therefore no dispute that could be referred.

Sir Robert's first task was to decide whether the subcontract's adjudication provisions survived the error in relation to the identification of the adjudicator nominating body. Having analysed s.108 of the Housing Grants, Construction and Regeneration Act 1996, he concluded that the error did not offend against ss.108(1) to (4) because *"those sub-sections do not as such require there to be a named adjudicator nominating entity"*. Although it could be argued that the error meant that there was no *"timetable with the object of securing the appointment of an adjudicator and the referral of the dispute to him within 7 days of [the notice]"*, he decided that the parties had clearly decided to refer disputes to adjudication and, absent agreement, any responsible nominating body could be used.

The parties agreed that the wording of the adjudication provisions in the subcontract was wide enough to encompass the dispute, because any "*settlement agreement*" was connected to the subcontract. Having found that the subcontract provisions remained effective, it was not strictly necessary to go further. However, the Judge proceeded to analyse whether, had the Scheme applied, the ambit of the Scheme in only allowing disputes "*under*" the subcontract would have been wide enough to encompass a dispute about a separate settlement agreement in any event. Although this part of the decision is arguably obiter, it is here that matters get interesting.

Placing heavy reliance on Lord Hoffman's speech in *The Fiona Trust*[2], Sir Robert held that there was no place in adjudication for a distinction between the scope of clauses referring to disputes arising "*under*" and "*under or in connection with*" (or similar wording) a contract.

The relevant point in issue in *The Fiona Trust* was whether an arbitration agreement in a contract remained effective when the underlying contract was alleged to have been procured by fraud, thus allowing a dispute about the validity of the contract itself to be subject to arbitration rather than litigated before the courts. Lord Hoffman's starting point was that commercial parties make a consensual choice to submit matters to arbitration for sound commercial reasons and it would be unlikely that those parties intended some disputes to be arbitrated and others to be litigated. Further, s.7 of the Arbitration Act 1996 provides:

> *"Unless otherwise agreed … an arbitration agreement which forms or was intended to form part of another agreement … shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."*

In that context, his Lordship went on to find that a long line of previous authority which drew distinctions between particular forms of words as to disputes "*arising under*", "*arising out of*",

1 [2016] EWHC 1148 (TCC).

2 *Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40.

"*arising in relation to*" or "*in connection with*" a contract *"reflect no credit upon English commercial law"* and should be ignored. He continued (at [12], emphasis added):

> *"… a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in section 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration …"*

He concluded by quoting Longmore LJ's words when the case had been in the Court of Appeal: *"if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so"*.

Whilst giving a nod to the fact that *The Fiona Trust* was about arbitration and not adjudication, Sir Robert adopted Lord Hoffman's reasoning to hold that, by analogy, the distinction in previous adjudication cases between clauses that refer to disputes "*under*" a contract and "*in connection with*" a contract also *"reflect no credit upon English commercial or statute law"* and therefore the distinction should be abolished. On that basis, it did not matter whether Murphy succeeded in having the adjudication provisions in the subcontract replaced with those from the Scheme, because there was no difference in the scope of the provisions.

This decision is interesting for two reasons. First, the traditional approach in these cases has been to analyse whether a "*settlement agreement*" was in fact a variation of the construction contract or a genuine standalone agreement that resolved the dispute. This was the approach adopted by Jackson J (as he then was) following a review of the previous authorities in *McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc*[3]. That line of authority is arguably swept away by the *Murphy* decision. Sir Robert justified this departure, in part, on the basis that Jackson J had not had the benefit of the guidance provided by Lord Hoffman's speech in *The Fiona Trust*.

Second, although construction practitioners are used to the TCC borrowing law applicable to arbitration when necessary to make adjudication effective, it is difficult to see that the reasoning of *The Fiona Trust* should be adopted in this way for a number of reasons.

The first objection is that the two pillars of Lord Hoffman's reasoning, the intention of the parties and the statutory adoption of the principle of separability, do not apply in the case of adjudication. Adjudication is imposed on the parties by statute, notwithstanding that they are granted the freedom to agree contractual adjudication provisions (provided they comply with s.108 of the Act). Further, although parties are free to choose which disputes they want decided by arbitration and it is "*comparatively easy*" to exclude disputes about validity (or anything else), that freedom does not exist in relation to adjudication – everything under (and, it now appears, in connection with) a construction contract is subject to adjudication. There is simply no question of "*giving effect to the reasonable commercial expectations of the parties*" as in *The Fiona Trust*. Finally, and assuming that it is correct to conflate the approach to contractual construction and statutory interpretation as was done in *Murphy*, it must be open to question whether the purposive, "*anti-literal*" approach to different forms of wording advocated by Lord Hoffman in *The Fiona Trust* remains appropriate following the Supreme Court's reassertion of the primacy of the contractual words used in *Arnold v Britton*[4] and *Marks & Spencer v BNP Paribas*[5].

The decision begs two further questions: if the analogy to the approach in arbitration, based in part on the principle of separability, is correct, are adjudication agreements by analogy now separable also? If so, might that mean that adjudicators now have jurisdiction to make a decision even where it is subsequently found (either by the adjudicator or a court) that there was in fact no construction contract? This is perhaps a step too far, but it highlights the possible unintended consequences of broadening the scope of adjudication by borrowing from arbitration law in this way.

Sir Robert recognised he was possibly making new law. He finished by saying he would be sympathetic to an application for permission to appeal on the basis that there may be some uncertainty. We will have to wait and see.

Hugh Saunders,
4 New Square

3 [2006] EWHC 2551 (TCC).

4 [2015] UKSC 36.

5 [2015] UKSC 72.

Jawaby Property Investment Limited v (1) The Interiors Group Limited (2) Andrew Stephan George Black

The dispute

The dispute in this case arose out of a contract for the works to refurbish Holborn Tower, in High Holborn. Jawaby Property Investment Ltd acted through its agent APL ("the employer") and engaged Interiors Group Ltd ("the contractor") to carry out the works on an amended JCT 2011 Design and Build Contract. The employer brought a Part 8 claim for declarations concerning the validity of an interim application and a pay less notice.

The contract

- Clause 4.8.3 required that "*Interim Applications shall be made as at the monthly dates specified in the Contract*";
- The contractual due date was the 8th of each month;
- Any payment notice was to be served "*Not later than 5 days after the due date*";
- The final date for payment was 30 days after the due date and the final date for service of a pay less notice was "*not later than 5 days before the final date for payment*"; and
- Clause 1.7 provided that "*any notice, approval, request or other communication to be given by either Party under this Contract shall be sufficiently served if sent by hand, by fax or by post to the registered office, or if there is none then the last known address of the Party to be served.*"

Previous interim applications

The first six interim applications on the project had been sent by email with Excel attachments detailing the valuation of the works as at each due date. The covering email for each application referred to the valuation for the employer's "*approval*" or "*consideration*". The established practice of the parties was for the employer to 'walk the job' with the contractor on the due date and to assess the work done, which would then form the basis of any payment certificate.

The disputed application

It was out of interim application 7, in respect of the 8 January 2016 due date, that the dispute in question arose.

Unlike in previous months, on 5 January 2016 the employer emailed the contractor under the subject heading "Holborn Tower- Valuation" as follows:

> *"Please can you issue me your valuation tomorrow morning so that I can review it prior to our meeting on Monday."*

On 7 January 2016 the contractor responded with a valuation attached to the following email:

> *"Please see our initial assessment for Valuation 007, this is based upon Progress update and onsite review carried out earlier this week.*
>
> *If you could kindly confirm a time for Monday's meeting, I can ensure that it does not clash with prior diarised meetings."*

On 15 January 2016, the employer emailed the contractor with its payment certificate which provided for a negative payment due to the contractor as a result of an over-valuation of the works in the previous month. The contractor responded requesting more information about how the figures in the payment certificate had been arrived at, and the employer responded on 18 January 2016 with that information.

The 15 January certificate was outside of the contractual time limits for service of a payment notice and so the employer sought to rely on the 18 January email, or alternatively the 18 January email in combination with the 15 January certificate, as its pay less notice.

Decision: the payment application

The two central issues for Carr J were (a) whether the 7 January 2016 interim application could be valid even if served by email (see clause 1.7 above), and (b) whether it was, per Akenhead J in *Henia v Beck* [2015] EWHC 2433 (TCC), "*in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and… free from ambiguity*,"

Carr J dealt with the first point quickly. She determined that clause 1.7 did not expressly or impliedly exclude service by email and that clear words would be necessary for electronic service to be prohibited. In any event, Carr J determined that the employer's acceptance of the previous 6 interim applications, all served electronically, was a sufficient course of dealing to estop the employer from relying on the contractor's electronic service to defeat its claim under interim application 7.

However, Carr J held that interim application 7 was not in substance, form and intent an interim application in respect of the 8 January due date, as:

- the valuation was sent in response to the employer's request on 5 January, and was sent a day later than specified in the contract;
- the 7 January email described the valuation as the contractor's "*initial*" assessment, suggesting the valuation was "*only of what it considered it might be due, subject to further consideration*"; and
- the valuation did not value works beyond the 5th or 7th of January, when the due date was the 8th.

Further, the course of dealing between the parties in relation to previous applications for payment could not save interim application 7. As Carr J said at paragraph 57:

> "*However informal the format accepted by the parties historically, this was not a situation that had arisen before. The scope of such convention as existed between the parties did not extend to acceptance of an 'initial' assessment as a valid Interim Application.*"

The case sits neatly in the lineage of recent cases from the TCC emphasising that if a contractor wishes to take the benefit of the statutory payment regime, it must make its application for payment abundantly clear. Whilst it does not appear to demand perfection from an application for payment, *Jawaby* perhaps suggests that a contractor must come pretty close; Carr J said:

> *"…the Valuation did not comply with Clause 4.8.1. It did not state what TIG considered to be due to it. It was an initial assessment only. There is no, nor could there be, any suggestion that a mere statement by a contractor of what he considered might be due to him is sufficient for Clause 4.8.1 purposes. The reasonable recipient of the Valuation would not have regarded it as unambiguously informing it that this was an Interim Application for the purpose of Clause 4.8.1…"* (Paragraph 57)
>
> *…this is an area where, as the authorities make clear, there is little scope for latitude. If a contractor wishes to have the benefit of the interim payment regime such as that*

contained in the Contract, then its application for interim payment must be in substance, form and intent an interim application stating the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity." (Paragraph 59) (Emphasis supplied)

On this basis, if a payment application complied in all material respects with the contract (ie it was submitted in the correct format, on the correct date and stated the sum due at the relevant due date) but contained an equivocal covering email, perhaps in the following terms: *"Please see the attached document. I know we discussed holding off asking for any more payment whilst we negotiated the final account but we are a bit strapped for cash at the moment and wondered whether you might do us a favour and pay the attached?"* Would it be valid?

Assuming the contractor had the right to submit a payment application at the relevant time, and assuming no variation to the contract had taken place through the referenced negotiations (or estoppel), it is submitted that an application for payment made in the following terms could not be considered free from ambiguity. Thus, on a literal reading of the *Henia v Beck* and *Jawaby* cases, one can see an argument that such an application is insufficiently clear to have the draconian consequences specified in the statutory payment regime. Whether the bar is set too high is a matter that remains to be determined, therefore.

Decision: The pay less notice

However, the *Jawaby* judgment is particularly important as it touches on one of the questions left open by Akenhead J's judgment in *Henia v Beck*.

In *Henia v Beck* Akenhead J held that: "*the wording of the Construction Act was in fact wide enough such that "the Pay Less Notice can not only raise deductions specifically permitted by the Contract and legitimate set-offs but also deploy the Employer's own valuation of the Works*" (paragraph 32, judgment). Thus, there was no ostensible difference between the contents of a payment notice and a pay less notice: the employer could re-value the works in either.

One consequence of this ruling was that it left open the potential for a party to argue that an out of time payment notice stood as an in-time pay less notice. That very argument was made in *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWHC 168 (TCC) but Stuart-Smith J did not go on to decide the point, as it was unnecessary in light of his decision on an earlier point.

In *Jawaby*, however, Carr J did go on to decide the point. Although *obiter* as a result of her conclusion that the payment application was invalid, Carr J nonetheless considered the validity of the 18 January email as a pay less notice. It was submitted on behalf of the employer that:

"When the 18th January email is looked at together with the previous email from APS to TIG on 15th January 2016 as a package, it can be seen that it was a Pay Less Notice for the purpose of Clause 4.10 of the Contract."

Significantly, Carr J determined that the question of whether the 18 January email met the requirements for a valid pay less notice was answered simply on the basis that it could not constitute a valid pay less notice without the employer intending it be one:

"Whatever arguments there may be about the appropriateness of fine textual analysis to such a notice (see Thomas Vale Construction v Brookside Syston Ltd [2009] 25 Const LJ (at paragraph 43)), it is, as set out above, an essential requirement for the service of a contractual notice that the sender has the requisite intention to serve it. The senders' intention is a matter to be assessed objectively taking into account the context." (emphasis supplied)

Carr J considered that the breakdown contained within the payment certificate could not, objectively construed, have been intended as a pay less notice, given that they were "*different documents under different clauses*". Carr J must be right that, objectively, a party must intend for a document to be a pay less notice in order for it to be one. Further, whilst the test must be to look at all the circumstances, and not just the employer's intention, Carr J was also right to identify the intention of the employer as the key factor.

For example, objectively construed, the surrounding circumstances might actually indicate that a document submitted out of time with the contractual date for a payment notice was, in fact, an in time pay less notice, thereby creating the potential for a party to rely on its own failure in respect of a payment notice to support an argument that a document was actually a pay less notice. Accordingly, the decisive factor in such a situation is likely to be an objective assessment of the sender's intention.

Charles Thompson, Hardwicke Chambers

Return to the forbidden planet?

Introduction

In *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd*[1] the House of Lords took the view that the Court of Appeal's decision in *Dawnays Ltd v FG Minter Ltd*[2] had come to be regarded not as a canon of construction but as authority for a misconceived general principle of law applicable to all construction contracts to support a policy of securing prompt payment. This decision eventually led to the counter-notice regime of the Housing Grants, Construction and Regeneration Act 1996, which also provided for the adjudication of disputes. Adjudication decisions are enforced by summary judgment under Part 24 of the Civil

1 [1974] AC 689.

2 [1971] 1 WLR 1205.

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Procedure Rules. There is, however, a potential tension between the policy underlying the Act and the test to be applied before summary judgment can be granted. A recent obiter dictum in *Ground Developments Ltd v FCC Construccion SA*[3] may suggest the possibility of the Technology and Construction Court developing a policy of enforcing adjudicators' decisions except in very limited circumstances, even where the requirements for granting summary judgment may not have been complied with precisely. The point may be put shortly thus: Does the policy of the Act trump the established approach to summary judgment applications?

The enforcement procedure

In *Macob Civil Engineering Ltd v Morrison Construction Ltd* it was held that the usual remedy for failure to pay in accordance with an adjudicator's decision would be to issue proceedings claiming the sum due, followed by an application for summary judgment.[4] This has become the norm and the TCC has its own procedure for such applications involving the abridgment of the usual time limits. Under CPR Part 24, the court may give summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial.[5]

In *FG Wilson Engineering Limited v Holt*,[6] the principles applicable in respect of defendants' applications for summary judgment summarized in *Easyair Ltd v Opal Telecom Limited*,[7] in a formulation approved in a number of subsequent cases at appellate level, were adapted for claimants' applications as follows:

(1) The court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success;

(2) A 'realistic' defence is one that carries some degree of conviction. This means a defence that is more than merely arguable;

(3) In reaching its conclusion the court must not conduct a 'mini-trial';

(4) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

(5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

The *Ground Developments* case

The defendant raised seven defences, all of which failed, and summary judgment was given for the claimant. Two related defences were to the effect, not that the decision should not be enforced at all (referred to as a 'knockout blow') but to a failure of the application for summary judgment, and the need for a contested trial on the issue of the contract. One of the defendant's arguments was that it was necessary for the success of the summary application for the court to conclude that neither of the defendants' contentions as to the contractual situation had any real prospect of success. Another was that if it proved impracticable to hear that point fully and properly on the enforcement hearing, the issues could be decided on a final basis at a later date.

The Court held that the material before the court would lead to the conclusion that the alternative candidates proposed by the defendants for the arrangements agreed by the parties 'did indeed have no real prospect of success'. Reference was made to *Macob*, the expedited procedure set out in the TCC Guide, followed by the observation that has prompted this article, namely:

> *'It is not necessary, and in my view would be contrary to that approach, to have to conclude on the material currently before this court that each, all, or any of the arguments that the **[defendant]** has marshalled to resist this summary judgment application had no real prospect of success in order to give summary judgment to **[the claimant]** on this Decision. The approach of the court should be the conventional one on an enforcement, namely was the adjudicator validly appointed, did he act within his jurisdiction and in accordance with the rules of natural justice?'*[8]

It should be emphasized that the decision did not turn on this point because of the Court's conclusion as to any real prospect of success. Nevertheless, it raises the possibility that claimants in future enforcement proceedings may seek to build upon it.

Policy considerations and enforcement

The courts have, of course, consistently and repeatedly accepted the analysis in *Macob* that the intention of Parliament in enacting

3 [2016] EWHC 1946 (TCC) (Fraser J).

4 [1999] BLR 93, 100 (Dyson J).

5 CPR 24.2.

6 [2012] EWHC 2477 (Comm) [20](Popplewell J).

7 [2009] EWHC 339 (Ch) [15] (Lewison J).

8 [2016] EWHC 1946 (TCC) [60].

the 1996 Act was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and required the decisions of adjudicators to be enforced pending final determination.[9] It was, however, recognized from the start that there would be cases where summary judgment could not be given if the 'real prospect' test had been satisfied. *The Project Consultancy Group Ltd v The Trustees of the Gray Settlement*[10] dealt with a 'no contract' defence. The Court began by reminding itsself that this was an application for summary judgment, and that the question for the Court was whether the defendants had a real prospect of showing that the adjudicator was wrong in holding that a contract had been concluded. The application was dismissed on the following grounds:

> *'In my view, the question whether, and if so when, a contract was ever concluded in this case is by no means straightforward. I have heard prolonged argument, and been taken through many documents as well as a number of witness statements. I find it quite impossible to resolve these issues with any degree of confidence. I am by no means certain that I have seen all the relevant documents, or that I know the full story. Quite apart from the facts, the issues of law that have not been argued as fully as they would be at a trial are not easy to resolve. I have come to the conclusion that it is at least arguable that no contract was concluded on 10 July, and that no contract was ever concluded between the parties, save probably in relation to the services rendered in connection with the preliminary works.'*[11]

The *Building Law Reports* commentary on this decision was less than enthusiastic, stating that if a decision was not enforceable immediately, and the underlying dispute had to be resolved by the court, one of the principal objects of the 1996 Act, namely the prompt resolution of disputes, was necessarily but effectively undermined.[12] Nevertheless, the 'no construction contract' defence has repeatedly been recognized as a valid defence, particularly in relation to lack of writing under the unamended Act[13] and the statutory definition of 'construction operations'.[14]

Effect of TCC declaratory jurisdiction

Since these initial cases the TCC has developed a declaratory relief jurisdiction in tandem with enforcement proceedings, so that the Court has been able to resolve short points relating to particular defences.[15] But it can only be exercised where the issue does not involve any substantial dispute of fact and is one that the court can finally determine on the material before it.[16] There thus remains a category of cases where the application of the 'real prospect' test will be relevant.

The future

Will enforcement remain subject to the exercise of the courts' summary jurisdiction in accordance with well-established principles or will the TCC seek to carve out an exceptional category on policy grounds? The *Ground Developments* dictum may have been simply a general observation prompted by the defendant's suggestion resulting in a temporarily binding decision being held not to be temporarily binding between the enforcement hearing and trial, but then becoming temporarily binding again after that dependent upon the outcome. On the other hand, it may herald the re-emergence of something akin to the *Dawnays* doctrine: payment must not be withheld, whether on good or bad grounds.[17] It would be not altogether surprising were the latter to be the case, given the limitations already imposed by the courts on the application of the rules of natural justice to adjudications,[18] in view of 'the rough and ready nature of the adjudication process'.[19]

Darryl Royce, Atkin Chambers

Darryl Royce's book, *Adjudication in Construction Law*, is published by Informa from Routledge as part of the Construction Law Series. For more information email book.orders@tandf.co.uk

9 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, 97 (Dyaon J); approved *in Bouyges (UK) Ltd v Dahl-Jensen Ltd* [2000] BLR 522, 524, para 3, CA (Buxton LJ), and *Pegram Shopfitters Ltd v Tully Weijl (UK) Ltd* [2003] EWCA Civ 1750, [2004] BLR 65, 68, para 8 (May LJ).

10 [1999] BLR 377.

11 [1999] BLR 377, 384 [32].

12 [199] BLR 377, 379.

13 *RJT Consulting Engineers Ltd v DM Engineering (N.I.) Ltd* [2002] EWCA Civ 270, [2002] 1 WLR 2344; *Bennett (Electrical) Services Ltd v Inviron Ltd* [2007] EWHC 49 (TCC); *Carillion Construction Ltd v Devonport Royal Dockyard* [2002] BLR 79; *Hart Investments Limited v Fidler* [2006] EWHC 2857 (TCC), [2007] BLR 30;

14 *Gibson Lea Interiors Ltd v Makro Shelf Service Ltd* [2001] BLR 407; *Hortimax v Hedon Salads Ltd* (2004) 24 Const. LJ 47; *Fence Gate Ltd v James R Knowles Ltd* (2001) 84 Con LR 206.

15 *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1285 (TCC); *TSG Building Services PLC v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] BLR 484; *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC).

16 *Geoffrey Osbourne Ltd v Atkins Rail Ltd* [2009] EWHC 2425 (TCC), [2010] BLR 363 (Edwards-Stuart J).

17 *Dawnays Ltd v FG Minter Ltd* [1971] 1 WLR 1205, 1209H (Lord Denning MR).

18 What has been described informally as 'new natural justice lite'.

19 *Broughton Brickwork Ltd v F Parkinson Ltd* [2014] EWHC 4525 (TCC) [30] (HHJ Stephen Davis).

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