CONSTRUCTION LAW PERIODICAL

Editorial Committee's Note

The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.

The next edition of the Construction Law Periodical is due for release in October 2020. Please contact a member of the editorial team if you would like to submit a case note or article for consideration.

John McDonagh SC
Deirdre Ní Fhloinn BL
Michael Judge BL

Flexidig Limited v M&M Contractors (Europe) Limited [2020] EWHC 847 (TCC), 11 March 2020

Adjudicator's award - enforcement - importance of time limit on referral being adhered to - adjudication notice interpretation - non-technical approach adopted - natural justice.

General: The dispute arose out of subcontractor Flexidig's role in carrying out civil works associated with a new Virgin Media underground infrastructure in Lincolnshire. M&M, its employer, is a Northern Ireland registered company and it brought an application, (which was unsuccessful) to dismiss the proceedings on the basis, inter alia, that it had not been served properly, and that the TCC did not have jurisdiction to hear the claim as England was not the proper place to bring the proceedings.

That aspect is not covered in this case note. The works were completed in 2018, and M&M contended that they were defective. A first adjudication was brought by Flexidig and the adjudicator awarded £184,000 to it. That award was enforced by the court in Belfast. In October 2018 M&M commenced an adjudication against Flexidig seeking in excess of £1.5 million by way of damages for defective works. That led to an award of £462,456 in favour of M&M. On an enforcement application in Belfast the judge enforced that decision only to the extent of £12,000-odd.

In September 2019 Flexidig made an application for payment (the "AFP") in the sum of £2,507,481 plus VAT of which M&M paid &1.742M plus Vat. That left £673,374 plus VAT owing according to the AFP. Flexidig commenced a further adjudication in which it sought that amount or "such other sum as the adjudicator finds is due from M&M". The adjudicator made an award or £223,000 which M&M did not pay.

On the enforcement application there were two core jurisdictional objections made by M&M:

1. The adjudicator had no power to act at all because the referral was out of time (the "Referral Objection")

2. The adjudicator had no jurisdiction to make a positive award in favour of Flexidig in the sense of deciding that £223,000 should be paid once he had found there was a valid payless notice (the "Positive Award Objection")

The referral objection: The contract, which was in conformity with the UK Act, required referral of the dispute to the adjudicator within 7 days of a party giving the adjudication notice. The parties agreed that the referral had been received on 29 November, but there was a dispute as to whether the true date of the notice was the 20th, the date it was sent, or the 22nd, the date upon which it was received by the adjudicator. If the date of the giving of the notice was the date the document was sent, the subsequent referral would be out of time. If the relevant date was the date of actual, or, under the contract, the deemed service of the notice, the referral was in time. (§73)

At §76 Waksman J states that in his judgement the date of giving notice is the date when it comes to the attention of the addressee depending on the circumstances and what contractual provisions may apply. That might be the actual day it comes to his attention or perhaps a deemed date, depending on whether the contact contains such a provision. For instance in this case the contract specified that any notice "given" would, if posted, be deemed to be served 48 hours after the posting.

At §78 he stated that he could see no reason, on the basis of authority, principle, or language to say that the giving of notice meant the sending of it without the consequent receipt, nor was there any practical reason otherwise so to interpret the clause. Time did not run

until the addressee receives or was deemed to have received the notice.

At §74 and §80 respectively the judge referred to Cubitt v Fleetglade [2006] and Hart Investments v Fidler [2006], both decisions of Coulson QC, sitting as a deputy judge, and both of which usefully examine the importance of the short time limits and the need to obey them in the context of adjudication.

Hart Investments is particularly interesting in that regard. There the referral was made one day outside the 7 day period prescribed in the 1996 Act. Coulson J held that the 7 day period was mandatory. At §50 he stated that the whole point of adjudication is that speed is given precedence over accuracy. What matters is a quick decision, not necessarily a correct one. There is a summary timetable with which both the parties and the adjudicator must comply. Ultimately he held at §54 that the referral notice was irregular/invalid because it had not been served in accordance with the 1996 Act. The adjudicator therefore had no jurisdiction to enter on the reference and the award was a nullity. He accordingly declined to enforce it.

The Positive Award Objection

This broke down into three elements: The first involved a submission by M&M that it was impossible to understand how the adjudicator had arrived at his award. Waksman J held that it was very clear to him how he had done so and rejected that submission.

The next objection was that even if understood, the adjudicator had no jurisdiction to do what he did. At §84 the judge states that there is a wealth of case law as to how to decide if the decision made by the adjudicator was part of the dispute he was to adjudicate or not, and whether by reference to principles of natural justice, he should have done so. He referred to the recent decision of *Aecom Design v Staptina Engineering* [2017] in which Fraser J had stated that the court should not adopt an overly legalistic analysis of what the dispute between the parties is. It was necessary, in determining whether a particular issue was within the dispute to see what the adjudicator actually found, and to analyse matters broadly and in the round. (§85)

So far as the third objection of breach of natural justice, the judge referred to previous cases which established that any breach of the rules of natural justice must be material. A breach would be material if the adjudicator had failed to bring to the attention of the parties a point or issue which they ought to be given an opportunity to comment on, if it was one which was either decisive or of considerable importance. Where an adjudicator went off on a frolic of his own, deciding a case upon a factual or legal basis that had not been argued or put forward by either side, without giving them an opportunity to comment on it, a breach of natural justice sufficient to prevent enforcement of the award might be established. (§86)

In this case on the jurisdiction issue the judge held that the adjudicator had jurisdiction to make the award made, as the notice of adjudication did actually refer to awarding "such other sum as the adjudicator found due". (§88) In deciding this he referred back to the Aecom judgement paragraph (§31) of which stated (§89):

> *"….that attempting to define a dispute by reference to there being only two permissible answers is fraught with difficulty for conceptual reasons. It is fraught with even more difficulty when one considers that, almost uniquely in quasi-judicial resolution of disputes, adjudicators are entitled to be wrong in the answers that they give, both in fact and in law. If there are only two answers available, yet an adjudicator were to choose (perhaps incorrectly) a third, that does not go to her acting outside her jurisdiction. That would be answering the right question but in the wrong way. That would not be the same as answering the wrong question …… ".*

In that case Fraser J gave a wide interpretation to the notice to adjudicate, and while he adverted to catch-all provisions being inserted into adjudication notices, he stated that such wording should not be seen by parties as giving an adjudicator carte blanche to go outside the scope of the dispute. (§90)

At §93 Waksman J stated that in this case he took the same kind of non-technical approach as Fraser J in Aecom, recognising that this is in the context of a relatively rough and ready procedure not ultimately binding in any way.

As regards the natural justice issue he states at §§94–96 that while the actual materials before the adjudicator were very limited, enough was raised by the adjudicator and debated between the parties to allow him justly to decide on a position that was somewhere in between the respective positions of the parties. He was not obliged to go back to the parties at the very end and say that he was thinking of taking such a course. Natural justice did not oblige him to do so, and ultimately it was open to the adjudicator to reach the decision he did, even if neither party had specifically contended for it.

Accordingly the enforcement application succeeded.

John McDonagh SC

Narooma Limited v Health Service Executive [2020] IEHC 315

Judicial review – UNCITRAL – Model law – Arbitration Act, 2010 – Whether arbitration agreement – Whether a "dispute" – First statement on the substance of the dispute

The facts: The HSE entered into a contract with the Plaintiff for the purchase of 350 ventilators at a cost of almost €7.5 million. The HSE did not make payment for the ventilators as it became concerned about the Plaintiff and, specifically, the accuracy of representations made by the plaintiff concerning its status as an authorised agent or distributor for the manufacturer of the ventilators, a medical device manufacturer in China. The Plaintiff

issued proceedings and sought interlocutory relief and the Defendant made an application to refer the parties to arbitration. The Plaintiff resisted this request on a number of grounds including that there was no valid arbitration agreement and that the HSE was debarred from arbitrating this matter.

The summary: The High Court determined that the HSE had established that clause 21 of the contract is an "arbitration agreement" for the purposes of Article 8 of the Model Law and that the issues the subject of the proceedings fell within the scope of the arbitration agreement. The Court rejected the Plaintiff's contention that the arbitration agreement was illusory or meaningless and held that the plaintiff failed to establish that the arbitration agreement was "null and void, inoperative or incapable of being performed". The Court held that the scope of the arbitration agreement included actions in tort as well as contract. Finally, the court refused the submission that a phone conversation between solicitors for both of the parties could amount to the first statement on the substance of the dispute. The Court made an order pursuant to Article 8(1) of the Model Law referring the parties to arbitration and stayed the proceedings.

The judgment: The parties were agreed that where the requirements of Article 8(1) are satisfied, the court is under a mandatory obligation to make a reference to arbitration and a court does not have a discretion whether to refer a case to arbitration or not.

This case centered on the proper interpretation of clause 21 of the contract for the sale of ventilators. The Plaintiff submitted that this clause amounted to an agreement to agree, or not, to resolve to refer a dispute which arises to arbitration and that any such reference to arbitration in the case of a dispute would have to be by mutual consent. The Defendant disagreed and submitted that the interpretation of the clause put forward by the plaintiff would make no sense and would mean that it would never be possible, without a further agreement being made between the parties, for a dispute to be referred to arbitration under the provisions of the clause.

Barniville J held (§77) that: "*in order for clause 21 to constitute an 'arbitration agreement', it must satisfy the following requirements*:

> *(1) It must be an agreement by the parties to submit to arbitration all or certain disputes which either have already arisen or which may arise between them in respect of a defined legal relationship, whether arising under a contract or not;*
>
> *(2) It may be in the form of an arbitration clause in a contract or in the form of a separate agreement between the parties (but it must obviously be one of those); and (3) It must be in writing.*"

Barniville J stated (§79) that when approaching the question as to whether a clause in a particular contract amounts to an arbitration agreement for the purposes of the Model Law, the Court must give "*full judicial consideration to the issue and must not consider the issue merely on a prima facie basis*." In this regard, Barniville J continued to state that the correct approach for a court to adopt in this regard was set out at §47 in his judgment in *K & J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board* [2019] IEHC 666 ("Townmore (No. 2)"), which stated that:

> "*In order for the provisions of Article 8(1) of the Model Law to be engaged, various requirements must be satisfied. First, an action must have been brought before the court in respect of a dispute between the parties. Second, the action must concern a 'matter which is the subject of an arbitration agreement'. Third, one of the parties must request the reference to arbitration 'not later than when submitting his first statement on the substance of the dispute'. If those requirements are satisfied, the court must refer the parties to arbitration (the word 'shall' is used). The only circumstances in which the court's obligation to refer the parties to arbitration does not arise is where the court finds that the arbitration agreement is (i) 'null and void' or (ii) 'inoperative' or (iii) 'incapable of being performed'. The onus of establishing the existence of one or more of these disapplying factors rests on the party who seeks to rely on them…*" (Emphasis added).

In considering the issue as to whether clause 21 of the contract constituted an "arbitration agreement" for the purpose of the Model Law, Barniville J applied the general principles of contractual interpretation, together with the further principles applicable to the interpretation of arbitration agreements, namely, the need to give effect to the commercial purpose of the agreement where the language permits and the promotion of legal certainty. In this regard, Barniville J referred to the dicta of Lord Hoffman in *Fiona Trust & Holding Corporation and ors v. Privalov and ors* [2007] 4 All ER 951, where Lord Hoffman stated (§25) "[*i*]*f there are two possible constructions of an arbitration clause, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*."

The Court concluded that the proper interpretation of clause 21 is the interpretation advanced by the HSE. The Court held (§102) that it would make no sense at all for the parties to have agreed that, in the event of a dispute arising in the future, the dispute would be dealt with in accordance with that dispute resolution process only if they were to reach a further agreement that it would. The Court continued to state that it is hard to see how that could be said to promote, or to be consistent with, legal certainty or with the commercial purpose and objective of the overall contract and the dispute resolution clause itself. Accordingly, the Court determined that there was an arbitration agreement in place between the parties.

In respect of the scope of the arbitration agreement, the Court held that in applying the general principles of contractual interpretation, as well as the further particulars applicable to the interpretation of arbitration agreements, the words used by the parties in clause 21 of the contract are wide enough to cover all of the issues raised between the parties in the proceedings. The parties agreed to refer "*any dispute*" to the dispute resolution process referred to in the clause and Barniville J held (§118) that this means what it says. Accordingly, Barniville J held that this clause is wide enough to cover not only

the plaintiff's claims in contract, but also its claims in tort.

Finally, for the purposes of Article 8 of the Model Law, there was a dispute as to what constituted the first statement on the substance of the dispute. The Plaintiff contended that the first statement on the substance of the dispute was made by the Defendant's solicitors on a phone call to the Plaintiff's solicitors which contained disparaging comments in relation to the Plaintiff. The Court rejected this and held that (§§136–139):

> …*First, in order to constitute the submission by a party of a statement on the substance of the dispute, the submission must be made in the context of an action which is before a court. The comments relied on as referred to in the Murray Flynn letter of 6th April, 2020 were not contained in any submission by the HSE in respect of an action before the court. The action did not commence until the following day. The action was not before the court on 10th April, 2020.*
>
> *Second, the statement said to constitute the "first statement on the substance of the dispute" must be submitted by the party who is alleged to have made that statement to the court as part of a formal document, such as a pleading or affidavit*…
>
> *Third, the formal document containing the statement said to constitute the "first statement on the substance of the dispute" must actually refer to the "substance of the dispute".*
>
> *Fourth, the whole purpose of the requirement in Article 8(1) for the request for the reference to arbitration to be made "no later than when submitting [the] first statement on the substance of the dispute" is that a party cannot, on the one hand, participate in the action before the court while, on the other hand, seek to refer the dispute to arbitration.* (Emphasis added)

Accordingly, the Court held that this ground of objection by the Plaintiff was devoid of any merit and rejected it accordingly. The Court granted the relief sought by the HSE and referred the parties to arbitration in accordance with clause 21 of the contract and stayed the proceedings.

Michael Judge BL

J & B Hopkins Ltd v Trant Engineering Ltd [2020] EWHC 1305 (TCC) 4 May 2020

Adjudicator's award - enforcement application - no valid payment or payless notices issued by the employer - basic principles repeated - submission that entitlement superseded by later applications for payment - "correction principle" - meaning - application for stay - "manifest injustice".

The facts: An adjudicator issued a decision that the claimant, Hopkins, was entitled to a sum of £812,484.94 plus VAT. The defendant, Trant, was found by the adjudicator to have issued no valid payment notice and no valid payless notice. Trant declined to pay the amount and Hopkins issued enforcement proceedings in the TCC.

The law: At §12 Fraser J states that it merited repetition that there are only very limited grounds upon which adjudicators' decisions will not be enforced by means of summary judgement. The very first case on enforcement was Macob v Morrison Construction [1999] in which it was made clear that an adjudicator's decision will be enforced by summary judgement, regardless of errors of law or errors of fact contained in it, or the merits of the underlying dispute resolved by the adjudicator.

The starting point is that if the adjudicator has decided the issues referred to him, whether he is right or wrong in law or in fact, as long as he has acted broadly in accordance with the rules of natural justice, that decision will be enforced by summary judgement. As stated by Coulson J in Hutton Construction v Wilson Properties [2017] "*if the decision was within the adjudicator's jurisdiction, and the adjudicator acted in accordance with the rules of natural justice, the defendant must pay now and argue later*". (§13)

In the UK there are two narrow exceptions to the general principle which are identified in Hutton, the first being admitted error, the second being a self-contained legal point concerning timing, categorisation or description of payment notices or payless notices, in which a defendant seeks a speedy declaration under procedure provided for in their Civil Procedure Rules. (§15)

At §16 he refers to a further statement in the case of PBS v Bester [2018] which he states is worth repeating that "*adjudication is all about interim cash flow and it is routine to enforce decisions that require substantial allocations of cash to one party or another in the knowledge that it may prove to be merely an interim measure*". (§16)

In this case Trant did not contend that the adjudicator was in breach of natural justice in the manner in which the adjudication was conducted, nor was it making a jurisdictional challenge.

However it resisted summary judgement being given on the basis that by the time the adjudication was commenced in January 2020, the claimant was no longer entitled to be paid the sum stated in the application for payment in respect of which the adjudicator found in its favour. This it submitted was because any entitlement to be paid what was sought in that application for payment had been superseded by subsequent interim payment cycles in which the claimant made further applications for payment which were the subject of valid payless notices and which superseded and corrected the sum sought in the application for payment in respect of which the adjudicator had found in its favour. (§19)

Trant stated at §21 that there was another adjudication between the parties on the same project in being at the time of the enforcement application, and submitted that to enforce the decision which Hopkins sought to enforce would be inconsistent with and undermine the "correction principle" set out in the case law, namely, that interim payments can be corrected in the next payment cycle.

One of the issues which required to be decided was whether there was, in fact, something called the "*correction principle*". (§22)

At §24 Fraser J stated that there was something which, "*for today's purposes*" could helpfully be referred to as the "*correction principle*". By "correction principle" he meant that if an interim application is subject to a failure by a particular party to issue the

required notices (payment and/or payless) leading to the result that by that failure the sum applied for becomes due, any correction to reflect the true value of the work is permissible on later applications. However the quid pro quo of that is that the amount due on the original application as a result of the failure to serve the required notices must be paid.

Here that amount fell due because the relevant notices were not issued by Trant. But the correction principle could not be applied to lead to a result that the amount was not due at all. The fact that it was an interim application, and that the amount could be corrected later, did not assist Trant on the enforcement of a decision by an adjudicator that it was due to be paid. (§24)

At §27 he states that as no points on jurisdiction or natural justice were advanced by Trant, that the decision of the adjudicator was to be enforced by means of summary judgement.

As a result of that Trant applied for a stay, and in this regard relied on "*manifest injustice*". (§29)

The principles that a court would apply on a stay of execution application had been substantially set out in Wimbledon Construction v Vago [2005], and augmented by Gosvenor v Aygun [2019]. Trant did not rely upon the usual point relating solely to a claimant's apprehended inability to repay the amount which a court ordered the paying party to pay to it. Rather, in relation to the issue of "*manifest injustice*" it relied on two decisions. The first, Hillview v Botes [2006], alluded to the possibility that the claimant might, inter alia, simply choose not to repay the sum awarded in the summary judgement application. In relation to the second, Galliford Try v Estura [2015], the headnote in the Building Law Reports states that "*where there was a risk of manifest injustice there was jurisdiction in adjudication cases to grant a stay. In this case if the adjudicator's decision was enforced in full the unusual combination of factors gave rise to a risk of irreparable prejudice to the defendant ….*" (§§30–33)

In Fraser J's judgement there were no such unusual factors in this case. There was no evidence that the defendant was in a precarious financial position, nor of potentially serious or irreparable prejudice if it were unsuccessful in obtaining the stay which it sought. (§33)

However he points out at (§34) that there is a danger that a defendant applying for a stay and having recourse to the concept of manifest injustice might use it for the purposes of conducting a wider examination of the supposed "*merits*" of the underlying dispute. If that were to occur it would frustrate the purposes of the Act.

In the final paragraph of the judgement he returns to his fundamental observation that if an adjudication decision has been issued within jurisdiction and without material breaches of natural justice, it will be enforced by way of summary judgement. Accordingly summary judgement was granted and the application for a stay was dismissed.

John McDonagh SC

In the matter of Xtrackers (IE) plc [2020] IEHC 330

Scheme of arrangement — application for sanction

The facts: This case concerned an application by the Applicant for orders pursuant to Section 453 of the Companies Act 2014 sanctioning a proposed scheme of arrangement between the Applicant and its shareholders. The Applicant is an investment company with variable capital. The Applicant was structured as an open-ended umbrella fund with segregated liability between its sub-funds. A separate pool of assets was maintained for each sub-fund and was invested in accordance with the investment objective and policy of that sub-fund. The Company used the Central Securities Depository settlement system executing trades in the Company's shares and that is known as the CSD model. The purpose of the proposed scheme was to centralise the settlement of trading in participating shares of all sub-funds in the International Central Securities Depository settlement model, known as the ICSD model. The ICSD model provides for centralised settlement in Euroclear Bank SA/NV and in Clearstream Banking SA for shares traded across multiple stock exchanges. The proposed scheme, the subject of the application, sought to adopt the ICSD model in place of the existing CSD model. The scheme provided for the transfer of the legal, but not the beneficial, interests in the relevant scheme shares to the common depository's nominee, in consideration of the nominee agreeing to hold the scheme shares as nominee for the common depository.

The summary: The court applied a five-stage test to an application for a scheme of arrangement and acceded to the Applicant's application to sanction the scheme of arrangement.

The judgment: The scheme meeting and extraordinary general meeting were held on 21 May 2020, the requisite majorities were obtained and the Applicant then applied to the Court for sanction of the scheme.

Barniville J stated (§17) that the applicable test was recently restated by him in *Re Allergan plc* [2020] IEHC 214 ("*Allergan*"), where he held that (§12):

> "*In summary the test requires the court to be satisfied that the following five requirements have been fulfilled, namely, that:*
>
> *1. Sufficient steps have been taken to identify and notify all interested parties;*
>
> *2. The statutory requirements and all directions of the court have been complied with;*
>
> *3. The class of members (in the case of a scheme of arrangement between the company and its members) has been properly constituted;*
>
> *4. There is no improper coercion of any of the members concerned; and*
>
> *5. The scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.*"

Additionally, in *Allergan*, Barniville J reasoned that (§13):

> "*In addition to those five requirements, the court must also be satisfied that the scheme is not ultra vires the company the subject of the application. That might be the case where the scheme at issue involved the sale of the entirety of a company's undertaking, in circumstances where there was no power in the company's*

constitution permitting such a radical alteration in its position (for example: Re Oceanic Steam Navigation Co. Ltd [1939] CH 41 ("Re Oceanic Steam"))."

The Court proceeded to consider each of these requirements in turn. In respect of requirement 1, the Court held that it was satisfied on the basis of all of this evidence that proper notice of the fresh scheme meeting was provided, as required by the terms of the order made on 1st April 2020. In respect of compliance with the statutory requirements and all directions of the court, Barniville J further held (§41) that it was satisfied that these conditions were satisfied.

As outlined above, requirement 3 above requires that the class of members had been properly constituted. The Court held that the legal principles applicable to class composition were most recently considered in *Allergan*, where Barniville J held (§47):

"*The proper focus is on the legal rights possessed by the members of the company. If those rights are not so dissimilar as to make it impossible for the members to consult together with a view to their common interest, then it is appropriate to treat the members as a single class*."

The Court then held on the evidence before it that it was appropriate for the scheme shareholders to meet as a single class and, accordingly, the Court concluded that the class composition was correct.

As to requirement 4, ensuring that there is no improper coercion of the members concerned, the Court referred to the test set out in *Allergan* (§53):

"*... every scheme in a sense involves an element of coercion where a dissenting member may be bound by the scheme, notwithstanding its opposition to it. However, what this particular requirement is focused on is improper coercion or pressure by one group or section of members on another, similar to the oppression of a minority interest in a company*."

The Court concluded on the facts that there was no question of coercion in the present case.

In respect of requirement 5, the Court referred to the dicta of Barniville J in *Allergan* where he stated (§58):

"*That said, however, the court will be slow to reach a different view in respect of the scheme to that reached by experienced persons involved in the relevant market or industry, relevant to the company who voted in favour of it*."

The Court concluded that (§66) on the evidence that the scheme is fair and equitable and the Court had no hesitation in concluding that the scheme is one which an intelligent and honest person, being a member of the class voting at the meeting, acting in his or her own interest, might reasonably approve of. Accordingly, the Court proceeded to sanction the scheme.

Michael Judge BL

J Tomlinson Ltd v Balfour Beatty Group Ltd [2020] EWHC 1483 (TCC) 29 April 2020

Adjudicator's award - enforcement application - restatement of general principles in relation to challenging adjudicators' awards - 'smash and grab' adjudications - meaning - principle of 'temporary finality' - meaning - 'pay now and argue later'.

The facts: The claimant, JTL, and the defendant, BB, had entered into a subcontract under which JTL was engaged by BB to provide design, labour, materials and supervision and carry out electrical works for a subcontract price of approximately £435,000. The dispute between the parties, which was referred to the adjudicator, related to a claim for an interim payment sum which was applied for by JLT. The adjudicator awarded JLT the sum of £1.246M approximately in respect of the interim payment.

In the defendant's case reference is made to what is colloquially called a 'smash and grab' adjudication. This term describes a technical dispute in respect of whether certain notices which, under the 1996 UK Act, as amended by the 2009 Act, must be served by the paying party, have been served either within time or at all. The term 'smash and grab' is usually used by the paying party to portray an adjudication where the dispute does not relate to a substantive disagreement, for example about the value of the work performed, but rather technical compliance with the service of notices required under sections 110A, 110B and 111 of the 1996 Act as amended. (§6)

The principal thrust of the dispute in the TCC centred on a factual question as to whether the disputed interim application was part of a hand delivery of boxes to BB. The adjudicator had resolved that question in favour of JLT, which is partly why JLT had succeeded in the adjudication. (§7)

The law: At (§8) Fraser J points out that the defendant was not challenging the jurisdiction of the adjudicator, nor was it alleging any material breach of natural justice by him. Its challenge to the decision was based on contractual requirements, primarily that an interim application had to be posted and emailed in order to be valid under the contract provisions.

At (§10), in a return to fundamentals, he states that it is trite law that adjudicators' decisions will be enforced unless they are made without jurisdiction, or made in material breach of the requirements of natural justice. If the adjudicator has decided the issues that were referred to him, whether he is right or wrong in fact or in law, and has broadly acted in accordance with the rules of natural justice, his decision will be enforced by summary judgement. If these broad requirements are met the paying party will have to 'pay now and argue later'. That phrase has appeared in a large number of authorities in the UK, and refers to the fact that the adjudicator's decision has a curious status at law, being one of so-called 'temporary finality'.

By 'temporary finality' is meant that the paying party, dissatisfied with an adjudicator's decision, may embark upon a substantive resolution of the dispute either by litigation, or by arbitration where there is an arbitration clause in the contract, but is expected to comply with the adjudicator's decision in the meanwhile, in order that the winner in the adjudication process effectively has the use of the funds. (§10)
At §11 he points out that there are two narrow exceptions to this general principle which are referred to in a decision of Coulson J in Hutton Construction v Wilson Properties [2017]. The first is an admitted error, and the second what is effectively a short, self-contained point which requires no oral evidence, which can be dealt with rapidly, and which it would be unconscionable for the court to ignore.

Also at §11 he refers to one further point of general application, which it is useful to bear in mind, being the dictum of Stuart-Smith J in PBS Energo v Bester Generacion [2018] that "*adjudication is all about cash flow, and it is routine to enforce decisions that require substantial allocations of cash to one party or another, in the knowledge that it may prove to be merely an interim measure*". As he states further on in that paragraph that "*very usefully sets out …… the principle of adjudication*". At §12 and onwards he refers to BB's two main challenges to enforcement.

The first was that the interim application had to be made on a specific date but had not been not been. That point had been rejected by the adjudicator. The next was that the interim application had not been served in accordance with the contract, and had been issued prematurely in any event.

At §27 he states that whether the interim application had been properly served, which in his judgement it had been, was not relevant to enforcement, but perhaps would be if and when the substantive dispute came to be resolved by litigation or arbitration. As regards the timing point, to require applications to be made only on very specific dates in order to be valid would have required much clearer and stronger wording than was present in the contract.

At §30 Fraser J states that in summary the resistance by BB to enforcement in this case, which was not based on a challenge to jurisdiction, or a material breach of natural justice, and was also not one which fell within the very narrow exceptions identified by Coulson J in Hutton Construction. The remedy for a disgruntled party, such as BB in this case, is to have the dispute resolved substantively, here possibly on the basis that there seemed to be very real disputes of fact relating to the delivery of the application itself. However to avoid undermining the ethos of the 1996 Act the correct outcome was to grant summary judgement to JLT for the amount awarded to it by the adjudicator.

John McDonagh SC

Redmond v An Bord Pleanála [2020 IEHC 322]

Invalidity of planning permission — whether to remit the underlying planning application to An Bord Pleanála for reconsideration — Alternatively, whether to set aside the planning permission simpliciter

The facts: The Court in its principal judgment in *Redmond v. An Bord Pleanála* [2020] IEHC 151("Principal Judgment") held that the proposed development involved a material contravention of the development plan policies and objectives applicable to institutional lands in respect of (i) housing density, and (ii) public open space. The decision to grant planning permission was held to be invalid in circumstances where An Bord Pleanála did not seek to invoke its statutory power to grant planning permission in material contravention of the development plan (section 9(6)(c) of the Planning and Development (Housing) and Residential Tenancies Act 2016). This case concerned whether the High Court, having found a particular decision to grant planning permission to be invalid, should then remit the underlying planning application to An Bord Pleanála for reconsideration or whether it should set aside the planning permission *simpliciter* so that the developer would have to make a fresh application for planning permission to An Bord Pleanála.

The summary: Having found a particular decision to grant planning permission to be invalid in its Principal Judgment, the Court refused to remit the underlying planning application to An Bord Pleanála for reconsideration. As the requirement to give public notice is triggered where a proposed development materially contravenes the relevant development plan and, as this did not take place in this case, this application was fatally flawed from its outset. Accordingly, a case of this nature is not suitable for an order for remittal.

The judgment: Order 84, Rule 27(4) of the Rules of the Superior Courts state that:

> *"[w]here the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."* (Emphasis added)

Simons J then considered the principles governing the exercise of this discretion and, in particular, he referred to Clarke J (as he then was) in *Christian v. Dublin City Council* (No. 2) [2012] IEHC 309 (§12):

> *"It is not necessary for a court which quashes an order or measure made or taken at the end of a lengthy process to necessarily require that the process go back to the beginning. Where the process is conducted in a regular and lawful way up to a certain point in time, then the court should give consideration as to whether there is any good reason to start the process again. Active consideration should be given to the possibility of remitting the matter back to the decisionmaker or decision-makers to continue the process from the point in time where it can be said to have gone wrong…"* (Emphasis added)

Simons J observed that (§15) the principles underlying the exercise of this discretion emphasise that in considering whether to remit a planning application to An Bord Pleanála, the court should treat the board as a disinterested party which has no stake in the commercial venture being pursued by the developer. Additionally, where the board, as the statutory decision-maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it for a fresh decision, the court should not lightly reject such an application to remit in favour of simply quashing the decision simpliciter with the result that the application goes back to square one.

Simons J stated that (§23):

> *In determining whether or not to make an order for remittal, the High Court must first identify the point in time at which the earlier decision-making process went awry. This is because the objective of remittal is to reset the clock, and to allow the decision-making process to resume from a point in time prior to the happening of the error of law which ultimately led to the setting aside of the original decision. Of course, it will not be possible to do this in all cases. In some instances, the decision-making process may have been flawed from the very outset or the error of law may be subsisting.* (Emphasis added)

The developer in this case argued that this case should be remitted to An Bord Pleanála on the basis that the point in time at which the processing of the planning application could be said to have first fallen into error was at the time of the preparation of the inspector's report.

The Court disagreed and stated that this view failed to recognise that the proposed development represented a material contravention of the development plan which resulted in non-compliance with the procedure prescribed for such applications. Accordingly, the public were not notified that a planning application was being made for a development that would materially contravene the development plan, nor were they given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding that material contravention.

Simons J stated (§38) that the requirements of Section 8(1)(a)(iv)(II) of the Planning and Development (Housing) and Residential Tenancies Act 2016 are "*unequivocal*" and that the requirement to give public notice is triggered where the proposed development materially contravenes the relevant development plan. Simons J concluded that (§40), accordingly, it behoves an applicant for a strategic housing development to address their mind properly to the question of material contravention in advance of the making of a planning application. If the developer misinterprets the plan and fails to recognise that a material contravention is involved, then the legal consequence is that the planning application is invalid.

The Court concluded that cases of this nature are not suitable in which to make an order for remittal. This matter cannot be remitted to a decision maker for reconsideration because the planning application was fatally flawed from the outset.

Michael Judge BL