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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 July 2022. Please contact a member of the editorial team if you would like to submit a case note or article for consideration.

John McDonagh SC
Michael Judge BL

John Paul Construction Limited v Tipperary Co-Operative Creamery Limited [2022] IEHC 3 Simons J 11 January 2022

These proceedings concerned an application for leave to enforce an adjudicator's decision.

The paying party sought to resist the application on two grounds. The first was that the adjudicator had failed to comply with the requirements of fair procedures and natural justice. Specifically it was alleged that the adjudicator had ignored the substantive defence put forward by the paying party, and also allowed the claiming party to introduce a new claim during the course of the adjudication process. Secondly it was alleged that he had purported to reopen an issue which he had already decided in an earlier adjudication between the parties.

At paragraphs [3] to [13] Simons J reviews the general principles governing applications for leave to enforce and the policies behind the underlying legislation.

At [13] he points out that in the present case the principal ground put forward to resist the application for enforcement is that the adjudicator failed to consider the defence put forward by the paying party. If that defence was made out on the facts it would justify the refusal of leave to enforce the adjudicator's decision. He states that fair procedures demand that a party be afforded a right to be heard before a decision is reached requiring that party to make a payment under a construction contract. The right to be heard does not necessarily extend to a right to an oral hearing, and it will be rare, if ever, that an adjudicator is required to convene an oral hearing.

The High Court will adopt a pragmatic approach in assessing an allegation that there has been a breach of fair procedures by reason of a failure properly to consider the defence made to a claim. The decision will be looked at in the round; it will not be looked at line by line. Where a respondent has sought to raise a number of distinct defences, the adjudicator's decision should record his findings on each of the distinct defences. Where a single line of defence has been pursued it is sufficient that the substance of the defence has been addressed in the decision. [15]

In the present case at [26] the Judge was satisfied that the adjudicator did properly consider and determine the defences raised. He again refers to the governing principle that an adjudicator must consider the substance of the defences raised.

At [42] he states that it was readily apparent from the adjudicator's decision that he fully understood the overall nature of the defence put forward by the employer, and ultimately attributed responsibility for most, but not all, of the delay events alleged by the employer to it. These findings were ones made within jurisdiction, and if the employer was aggrieved with those findings it had a right to refer the matter to arbitration. The matter would be considered de novo by the arbitrator, and the adjudicator's decision would not have any status before him.

At [49] Simons J states that it was difficult to understand what more the adjudicator could have done. In truth what the employer sought was to get the court to embark on a reconsideration of the underlying merits of the adjudicator's decision [50], and at [51] he states that he was satisfied that the adjudicator properly considered and determined the substance of the defence put forward by the employer.

John McDonagh SC

Matthew Rogerson (t/a Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Limited [2021] EWHC 1807 (TCC)

The application concerned the jurisdiction which permits a Court to allow a party to change its expert witness.

The plaintiff in this dispute was the owner of a golf and country club that suffered a disastrous fire in 2018. On the day of the fire, the Defendant's employees were working in a first-floor room known as the barn store. The Plaintiff's case is that the fire was most probably caused by a cigarette discarded by one of the Defendant's employees.

The claim was advanced in negligence and breach of contract.

Experts for each the plaintiff and defendant were deployed within days of the fire to inspect the location, interview witnesses and discuss matters between themselves. This was over two years before the issue of proceedings and before any pre-action protocol process.

At the first Case Management Conference, the defendant indicated that it wished to deploy a different expert. In essence, the Plaintiff's case is that this amounted to a clear case of expert-shopping.

The Court considered the applicable principles commencing with *Beck v Ministry of Defence* [2005] 1 WLR 2206.

In *Beck*, the Court of Appeal emphasised that expert shopping was to be discouraged because it was undesirable. To prevent the practice occurring, it concluded that any permission to instruct a new expert should be on terms that the report of the previous expert be disclosed.

Subsequent case law in the UK determined that there is no difference in principle between privileged pre-issue of proceedings reports and privileged post-issue of proceedings reports.

Further, subsequent case law also determined that in cases of clear "expert shopping", or at least a very strong appearance of it, more extensive disclosure including documents such as solicitors' attendance notes of telephone calls with the expert which record (or purport to record) the substance of his/her opinions may be disclosable.

In its analysis, the Court stated that (§35):

> *"The Court plainly has the power to impose a condition in respect of the changing of experts even if it means disclosing privileged documents. This is not achieved by directly overriding privilege but by presenting the party with a choice in which the price to be paid for the leave of the Court to rely on Expert B is waiver of privilege in relation to Expert A"*

The Court continued to state that (§47):

> *"… there would seem to be a sliding scale where, at one end, might sit a flagrant case of expert shopping simply because a party does not like the damaging views expressed by his current expert, and at the other end might be the unexpected need to replace the expert for objectively justifiable reasons such as illness or retirement of the expert in question. The closer the circumstances are to the former, the more likely it is that a Court will impose conditions commanding a high price e.g., in respect of the waiver of any privilege and the scale of material to be disclosed. The closer they are to the latter, the less onerous such conditions, if any, as may be imposed will be. A faint appearance of expert shopping would not justify the disclosure of solicitor's attendance notes of telephone calls with the expert, not least because of the risk that they do not properly record the expert's actual words".*

The Court concluded that expert shopping occurred in this case, for tactical reasons.

Accordingly, the Court imposed a condition that an attendance note of a call in which the original expert set out his views on causation be disclosed.

Michael Judge BL

John Graham Construction Ltd v Tecnicas Reunidas UK Ltd [2022]EWHC 155 (TCC) 27 January 2022

This was an application by the Claimant to enforce an adjudicator's decision that Tecnicas should pay to the Claimant certain sums. Tecnicas paid some of the money ordered to be paid by the Adjudicator but did not pay a disputed contra charge of £355,724.95 which related to provisional costs incurred appointing another subcontractor to carry out works which had been abandoned by the Claimant.

The Facts

The Claimant was employed by Tecnicas under a sub-contract. There were a number of disputes between the parties, resulting in

four adjudications and two arbitrations. The first arbitration concluded in early 2021 and by two partial awards made a final determination of matters which had been referred to the arbitral tribunal. That award overturned the decision of the adjudicator in the first adjudication.

Tecnicas had not paid the contra charge as it contended that it was a severable and distinct part of the 4th adjudication and as by reaching the decision that the sum was payable by it the Adjudicator had exceeded his jurisdiction. It submitted that the Adjudicator had wrongly decided that the decision in the first adjudication, despite being overturned by the arbitration award, continued to have effect, and in doing so exceeded his jurisdiction.

During the course of 2018 the Claimant and Tecnicas were in dispute as to the scope of the works covered by the subcontract. The Claimant considered that the subcontract works were limited to works necessary to achieve certain milestones set out in the contract and began to refuse to carry out works which it considered extended beyond those milestones and/or refused to carry them out for the rates and prices agreed in the subcontract.

In February 2019 the Claimant referred the dispute as to scope of the works to adjudication in what was adjudication 1. The Adjudicator in that adjudication agreed with the Claimant and declared that the scope of the subcontract works was limited as the Claimant alleged.

Tecnicas referred the dispute about the Claimant's scope of works to arbitration for final resolution. The outcome of Arbitration 1 was that the decision in Adjudication 1 was held to be wrong. It decided that the scope of the work was not limited as the Claimant alleged, but was wider, as Tecnicas had contended.

Thereafter a dispute between the parties crystallised as to the true value of the Claimant's interim application no. 47. As part of its payment notice in response Tecnicas applied the contra charge, which represented its provisionally quantified costs of others undertaking the works (falling within the scope as determined by Award 1) and claimed damages for breach of contract on the part of the Claimant in having failed and/or refused to carry out those works.

In March 2021 the Claimant gave notice of its intention to refer to adjudication a dispute as to the correct value of interim application no. 47, thereby commencing Adjudication 4. It contended that the contra charge was invalid.

In his decision in Adjudication 4 the adjudicator decided that Tecnicas was not entitled to levy the contra charge. Tecnicas resisted the application for enforcement on the ground that the adjudicator acted in excess of jurisdiction in that his decision overrode Award 1 and had answered the wrong question.

The Law

At [29] the Judge states that the effect of a prior adjudicator's decision in a subsequent adjudication is generally that the parties cannot seek a further decision by an adjudicator if the dispute or difference has already been the subject of a decision by an adjudicator. The extent to which a decision is binding depends on an analysis of the terms, scope and extent of the decision made in the first adjudication. The relevant question is whether the dispute or difference is the same or substantially the same. The second adjudicator has no jurisdiction to determine a dispute which is the same or substantially the same as a dispute determined in an earlier adjudication; if he purports to do so the decision is a nullity.

Those principles also apply to the effect of a prior arbitration award upon a subsequent adjudication. For the exclusion of jurisdiction to apply, the second decision must override or undermine the first, in the sense of deciding again something which has already been decided. [31]

As regards the issue of answering the wrong question, at [32] he restates the traditional legal position that if an adjudicator decides a dispute which was not referred to him, then his decision is outside his jurisdiction. But if he decides a dispute which was referred to him, but that decision was mistaken, it remains a valid and binding decision, even if the mistake is of fundamental importance. The adjudicator is entitled to give a wrong answer to the right question which was referred to him.

At [34] he states that the issue is what "dispute" has been referred to the adjudicator and not what particular question or sub-question or issue falls to be determined. The key question is "did the adjudicator decide the dispute that had been referred to him?".

Ultimately the court decided at [54] to [58] that the decision in Adjudication 4 did not undermine or override Award 1 and at [64] that in finding that Tecnicas was not entitled to levy the contra charge the Adjudicator did not exceed his jurisdiction. Also, at [60] to [[63] he decided that the Adjudicator had answered the correct question.

John McDonagh SC

TRW Ltd v Panasonic Industry Europe GBMH and Another [2021] EWHC 19 (TCC)

This is a case in which both parties purported to conclude an agreement pursuant to each of their own terms and conditions of sale. Both party's terms and conditions contained provision in respect of the applicable law and exclusive jurisdiction of any dispute arising.

The Plaintiff is a supplier of parking brakes and electronic stability control assemblies in the automotive industry, of which the Plaintiff's products include resistors made by the Defendants.

By way of background, the Second Defendant was included in this action as there was an argument that an agreement existed which may have transferred the First Defendant's liabilities to the Second Defendant. Nothing fell on this distinction in the present action and, accordingly, the intricacies of the distinction between the Defendants is immaterial for present purposes.

The Plaintiff issued this action in the TCC claiming that certain resisters supplied by the Defendants between 2015–2017 were defective.

The Defendants responded by applying to set aside service and for a declaration that the English courts have no jurisdiction over the matter. In this regard, the Defendants relied on provisions in the recast Brussels I Regulation.

The Defendants claimed that the parties agreed to German law and exclusive jurisdiction of the Hamburg court over any claim by the Plaintiff arising from supply of the resistors.

Unsurprisingly, the Plaintiff maintained the parties agreed to English law and jurisdiction.

The facts are as follows, customers of the First Defendant were requested to sign a "Customer File" document. The Customer File recorded payment terms and delivery conditions. Under the heading "Special Agreements", there was a declaration which stated "[*w*]*e have received and acknowledged the General Conditions of* [*Panasonic Europe*]."

In turn, the First Defendant's General Conditions stated that contracts concluded with the First Defendant are subject to German law.

In 2015 and 2016, the Plaintiff placed two large orders for resistors.

However, the purchase order asked for the goods to be delivered in accordance with the Plaintiff's conditions of purchase. Additionally, a website reference was included as to where to find the Plaintiff's conditions of purchase. The purchase order went on to state:

> "*Commencement of any work or delivery of any goods or service under this order or delivery schedules or releases shall constitute your confirmation that you are aware of and accept such terms, conditions and requirements*."

Similarly, the 2016 purchase order repeated the wording of the 2015 purchase order.

The Plaintiff's terms in the purchase orders provided that the order would be governed by the laws of the country shown in the Buyer's address on the Order. Further, the terms provided that the Buyer and Seller agree irrevocably to submit to the personal jurisdiction of the courts shown in the Buyer's address on the Order. The First Defendant was not asked to sign and return the purchase orders, nor otherwise to confirm in writing its agreement to the Plaintiff's terms.

In referring to precedent, the Court stated that (§30) ""*the ultimate issue is what objectively did the parties intend* …".

The Court observed that documents relied on as establishing agreement to the jurisdiction clause must be ones that have contractual force, i.e. have effect in the making of a contract, rather than in the execution of the contract. Documents such as time sheets, invoices or statements of account tend to be relevant to the execution of a contract, not its formation.

In assessing the applicable standard, the Court stated (§37) that the question is, broadly, which side can raise a good arguable case and has the better of the argument on jurisdiction.

In this regard, the Court considered (§38) the guidance by Lord Sumption JSC in his judgment in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192.

The Court paraphrased this judgment and stated (§39) that the three limbs are, in shorthand:

(1) whether there is a plausible evidential basis for the jurisdictional gateway;

(2) the court must take a view of any factual issue on available material; and

(3) if no reliable assessment can be made, a good arguable case must be made to propel the claimant through the gateway.

In respect of when Article 25 of the Recast Brussels Regulation is at play, the Court referred to the dicta of Browlie LJ in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de* " and stated (§40) that the 'clear and precise' test arising in EU law must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation".

In his application, the Court stated (§52) that in respect of the first limb of the test, the evidence available to the Court consisted mainly of documents and appeared not to leave much, if any, scope for cross-examination.

In respect of the second limb, the Court stated (§53) that it was in a good position to take a view on the documents before it, being reasonably confident that it was not missing any of importance.

The third limb – if an assessment cannot be made, whether either side can establish a good arguable case (§56). The Court stated that this limb applied in the present case. Accordingly, the three limbs merge into a single question: which party, if either, has the better of the argument for exclusive jurisdiction?

The Court considered (§62) that it must approach its task "*applying judicial pragmatism*" and common sense, melding together the "*clear and precise*" test derived from decisions of the Court of Justice and the three limbed formulation of the standard test set down by the Supreme Court.

The Court came to the clear conclusion that the defendants had the better of the argument, by a comfortable margin.

The Court, in particular, noted the fact that the Plaintiff signed the First Defendant's customer file and in so doing clearly acknowledged the First Defendant's General Conditions. While the signing of the customer file document with the General Conditions did not, of themselves, create any obligation on the parties to buy or sell Panasonic products. The Court held that (§67) the signing of that document was not wholly devoid of contractual effect either. It placed the parties under an obligation, if they later chose to enter into supply contracts, to do so on the basis of the First Defendant's General Conditions unless the First Defendant should agree otherwise in writing.

The Court crucially noted (§68) that the First Defendant's General Conditions protected the First Defendant against falling victim to what in English law is called the last shot doctrine.

The words used in the General Conditions were that:

> "*the [c]onditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation*".

The Court concluded by stating that it could see no reason why these words should not mean exactly what they say.

Finally, on 28 October 2021, the Court of Appeal upheld Mr Justice Kerr's judgment in full: [2021] EWCA Civ 1558.

Michael Judge BL

Bilton & Johnson (Building) Co Ltd v Three Rivers Property Investments Ltd [2022] EWHC 53 (TCC) 14 January 2022

This was an application to enforce an adjudicator's award. He had decided that the Claimant was entitled to an extension of time for works it had contracted to perform for the Defendant and that the

latter should pay £228,273.48 which it had previously deducted from the contractual payments due to the claimant by way of liquidated damages.

The Defendant resisted the claim on two grounds. First, that the Adjudicator's findings on the applicable contractual grounds were made in breach of natural justice, as they were based on arguments that had not been advanced by either of the parties and which were not canvassed with the parties. Second that in refusing to accept the defence of rectification regarding the contractual rate for liquidated damages, the adjudicator took a restrictive view of his jurisdiction which he did not canvass with the parties, thereby breaching natural justice and failing to exhaust his jurisdiction.

The Law

At [5] onwards the Deputy Judge referred to the relevant law.

O'Farrell J had recently stated in *Global Switch Estates v Sudlows* [2020] EWHC 3314 (TCC) at [44] that "it is important to emphasise that the courts take a robust approach to adjudication enforcement". As had been stated in *Carillion v Devonport Royal Dockyard* [2006] EWHC at [85] "The objective which underlies the Act requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair". [6]

The principles of natural justice require that the parties to an adjudication are confronted with, and given a fair opportunity to respond to, the main points which are relevant to the dispute and the decision. [7]

An adjudicator is not required to consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions. But where an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision. [8]

For instance in *Corebuild v Cleaver* [2019] EWHC 2170 (TCC) there was a breach of natural justice of this nature where the Adjudicator determined the question of repudiation decisively against the defendant, not on the basis advanced by the claimant, but on the basis of a factual finding which had not been argued for, for which there was no evidence or submission in support of, and upon which the defendant had had no opportunity to comment or adduce evidence.[9]

Failure of an adjudicator to consider part of a defence to a claim may render his decision unenforceable, but for that result to obtain the failure must be deliberate. Such a failure must be material, in that it must have a potentially significant effect on the overall result of the adjudication. [10]

In this case the adjudicator agreed with the claimant that the governing contractual terms were those set out in the contract which was ultimately signed and returned by the Claimant and not those set out in the contractual document which had initially been provided by the Defendant's agent to the Claimant and which the latter had refused to sign. That the Adjudicator's precise reasoning – that the parties had entered into the first contractual arrangement first and then the formal contract – did not appear to have been put forward by either party did not come close to establishing that there was a breach of natural justice. The Defendant had had a full opportunity to make submissions as to which contractual terms applied and why, and did not suffer any unfairness. [15]

As regards the second aspect of the defence relating to rectification of the contract and the assertion that the Adjudicator had taken a restrictive view of his jurisdiction which he had not canvassed with the parties, and thereby acted in breach of natural justice, the Judge, having referred to and analysed the Adjudicator's decision at [18] to [21], at [22] concluded that it was not arguable that the adjudicator had failed to address the rectification defence or did so in a manner which was unfair to the defendant. He had directed himself that he should consider and rule upon that defence and proceeded to do so. [22]

Whether or not his reasoning in rejecting the rectification defence was correct as a matter of law was not material to whether his decision should be enforced. Only a deliberate failure on his part to address the rectification defence could avail the defendant, and manifestly there was no such failure. The Adjudicator had considered and rejected the arguments made by the defendant. In the circumstances the challenge to the application to enforce failed.

John McDonagh SC