CONSTRUCTION LAW PERIODICAL

Editorial Committee's Note

The Construction Law Periodical provides members of the Construction Bar Association, the legal profession in general and anyone interested in construction law with a regular summation of recent judgements 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 Periodical is due for release in March 2020. We are always looking for members of the Bar, in particular, members of the legal profession in general, and those involved in the construction industry with a particular interest in and knowledge of construction law to contribute to the Periodical. If you would like to submit an article or case note for consideration, please contact any member of the of the editorial committee and we will be delighted to consider it for inclusion.

John McDonagh SC
Deirdre Ní Fhloinn BL
Michael Judge BL

LJH Paving Limited v Meeres Civil Engineering Limited [2019] EWHC 2601 (TCC) 10 October 2019

Adjudication - jurisdiction - whether dispute had crystallised - submission that insufficient information provided by contractor to the employer - enforcement - waiver of right to advance argument on enforcement application not made before the adjudicator.

General: This concerned an application for summary judgement by LJH in relation to the enforcement of four adjudicators' decisions. There was no dispute that three of the Awards ought to be enforced. As regards the fourth, Meeres resisted enforcement of the decision on the ground that the alleged dispute had not crystallised at the time when the Notice of Adjudication was served. It contended that a contractor claiming payment must provide sufficient information for its claim to be assessed by the paying party before a dispute can crystallise. Meeres contended that in this case LJH had failed to provide such information prior to service of the Notice, and that therefore the Adjudicator lacked jurisdiction.

LJH contended that the point was bad in law and in fact, and also that as this way of putting its jurisdictional dispute had not been advanced in front of the Adjudicator Meeres had waived its right to do so on enforcement.

Meeres contended that various requests by it for information remained unanswered, and LJH responded that no further information was required by Meeres as LJH was relying on information or quantities which had been provided by Meeres or because the relevant documentation had already been provided.

The Law: At [14] the Judge states that the law relating to the circumstances in which it can be argued that a dispute has not crystallised is now well established. In *Amec Civil Engineering v The Secretary of State for Transport* [2004] Jackson J had at [68] set out seven principles which gave useful guidance as to whether a dispute had crystallised for the purposes of arbitration or adjudication.

More recently Coulson J had dealt with the issue in *AMD Environmental v Cumberland Construction* [2016] in which he stated that it would be an unusual case in which the claim presented was so nebulous and ill-defined that the respondent could not sensibly respond to it. It was wrong in principle to suggest that a dispute had not arisen until every last particular of every last element of the claim had been provided. In an ordinary case the paying party could not put off paying up on a claim forever by repeatedly requesting further information; a fortiori the paying party cannot suggest that there is no dispute at all because the particularisation of the claim was potentially inadequate.

At [18] the Judge in *LJH v Meeres* stated the obvious: it remains a question of fact in each case whether the claim presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it. In the instant case the types of request made by Meeres were clear evidence that the claim presented was far from nebulous or ill-defined. The claim made was well understood. The fact that it considered that there should be supporting evidence which it had not seen might be a justification for disputing the claim: it was not a reason to argue that no dispute existed.

At [22] he stated that it was abundantly clear that LJH disputed Meeres' contention as to the need for further information. It was not for a Court on an enforcement application to engage with the detailed merits of each sides stated position as to what substantiation was or was not provided or relevant. It was enough to conclude that there was unarguably a clear dispute between the parties, part of which centred over the need for and existence of supporting documents.

It followed that Meeres' defence to summary judgement on the grounds of a dispute not having crystallised was rejected.

At [25] the Judge stated that had he not concluded as above he would in any event have rejected the defence on grounds that it had not been properly raised in the Adjudication itself as a jurisdictional defence, and as a result its right to do so upon enforcement was lost. The question was whether Meeres had properly objected to jurisdiction, or reserved its right to do so, on grounds that no dispute had crystallised due to insufficient substantiation. No specific objection had been made in the adjudication in relation to the precise point on absence of jurisdiction, and in accordance with the Court of Appeal decision in *Bresco Electrical v Lonsdale Electrical* [2019] Meeres was precluded from taking the objection on enforcement.

John McDonagh SC

Electricity Supply Board v Desmond Boyle & Kenneth Payne (Notice Party) [2019] IEHC 475

Judicial review - property arbitrator – case stated – point of law – Applicant seeking order directing property arbitrator to state point of law – previous payment by acquiring agent to landowner – previous payment taken into account

Summary: The High Court found that a decision of a property arbitrator was amenable to judicial review as he was exercising a public law function. The background related to whether a previous payment of 66,000 made to a landowner by the ESB in connection with the landowner's co-operation with the laying of lines across his lands should be taken into account by the arbitrator in calculating the amount of compensation payable to the landowner for the reinstatement works. The ESB asked the property arbitrator to refer this question on a point of law to the High Court. The property arbitrator refused. The ESB sought an order of certiorari quashing the property arbitrator's refusal. The Court quashed the refusal and held that the property arbitrator should have stated a case to the High Court.

The Facts: In Mr Payne, the landowner, claimed compensation against the applicant, the Electricity Supply Board (ESB), in relation to land owned by him in Cappaboggan, Moyfenrath, Co. Meath. The ESB paid Mr. Payne an initial amount of 66,000 in recognition of the disruption caused by such construction. Where there is a subsequent failure to agree the compensation figured claimed by the landowner for the reinstatement works, he can apply for the appointment of an arbitrator to determine the dispute under s.1 of the Acquisition of Land (Assessment of Compensation) Act, 1919 ("the 1919 Act"). Mr. Payne applied for compensation. Mr. Desmond Boyle was appointed as the property arbitrator.

The ESB asked the property arbitrator to exercise his discretion to state a case to the High Court pursuant to s.6 of the 1919 Act to determine whether the prior payment of 66,000 should or should not be taken into account in the assessment of Mr. Payne's compensation. The property arbitrator refused on the basis that the issue was not "a point of law germane to this Arbitration" and that he lacked the jurisdiction "to state a case of that nature". The ESB sought an order of certiorari quashing the decision of Mr. Boyle taken on 4th December 2018 refusing the ESB's application to have a special case stated for the opinion of the High Court on a point of law.

Twomey J. referenced the decision of Clarke J. (as he then was) in *Shackleton v Cork County Council* [2007] IEHC 241 as authority for the view that a property arbitrator's decision could be judicially reviewed on the basis that he carried out a statutory and therefore public law function.

The Court then applied the prerequisites to be satisfied before a property arbitrator could state a case as set out in *Halfden Greig & Co. v Sterline Coal Ltd* [1973] QB 843:

> *'The point of law should be real and substantial and such as to be open to serious argument and appropriate for a decision by a court of law…as distinct from a point which is dependent on the special expertise of the arbitrator or umpire…*
>
> *The point of law should be clear-cut and capable of being accurately stated as a point of law – as distinct from the dressing up of a matter of fact as if it were a point of law.*
>
> *The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance'.*

Applying the first pre-requisite of whether a real and substantial point of law existed, the Court accepted that the question of whether the landowner could be "doubly compensated at the expense of the public purse" was a "not insignificant issue". The Court referred to correspondence from the landowner's solicitor referring to the "critical interests" of the landowner as well as the potential detriment arising from a decision against his interests, as reasons for satisfying the first pre-requisite.

Applying the second pre-requisite, the Court accepted the question for consideration was clear cut and capable of being accurately stated as a point of law on the basis that it could be answered on a "yes" or "no" basis.

Applying the third pre-requisite, the Court held that it was self evident that the point of law in question was of such importance that its resolution was necessary for the proper determination of the case, since the final amount of compensation could only be finalised once a decision is taken as to whether or not to take account of the previous FOA payment.

The Court also referred to the effect of the Arbitration Act 2010 on the question of whether a property arbitrator could be judicially reviewed. Article 5 of the UNCITRAL Model Law is adopted in Irish law by s. 6 of the 2010 Act. Article 5 states that no Court shall intervene in matters governed by the Model Law unless provided for within the Model Law.

However, the Arbitration Act 2010 only applies where it is not inconsistent with pre-existing statutory regimes. Section 29 of the Arbitration Act 2010 states that the 2010 Act shall apply to every arbitration under any other act "*except in so far as this Act is inconsistent with that other Act*". Since the entitlement of

the High Court to intervene in a property arbitration under the 1919 Act is inconsistent with Article 5, the Court held that Article 5 of the Model Law did not apply to property arbitrations under the 1919 Act and therefore a decision made by a property arbitrator under the 1919 Act may be subject to judicial review.

Anita Finucane BL

Willow Corp S.A.R.L. v MTD Contractors Limited [2019] EWHC 1591 (TCC) 25 June 2019

Adjudication - enforcement - meaning of practical completion - construction of contract - natural justice - severability of good portions of adjudicator's decision from obviously flawed portion

Summary: By an adjudication decision dated 19 December 2018 Willow Corp was ordered to pay MTD £1.174 million. No payment was made. Willow issued proceedings seeking declarations as to the proper construction of a supplementary agreement between the parties and that the adjudicator's decision was unenforceable in light of what was contained in that agreement. Ten days later MTD issued enforcement proceedings.

The Facts: In September 2015 MTD entered into a contract with Willow to design and build a hotel in Shoreditch, London. The contract price was £33,500,000. The project was delayed, and in June 2017 the parties agreed a revised date for practical completion of 28 July 2017. The works were not completed by the revised date.

The adjudicator decided that on a true construction of the June 2017 agreement the Employer's Agent was required to certify practical completion on 28 July 2017 provided there was an agreed list of outstanding work. As there was such a list he concluded that Willow was not entitled to claim liquidated damages of £715,000 for the further delay between 28 July and 13 October 2017 in completing the hotel. Having rejected the claim for liquidated damages he ordered that Willow should pay £1.174,000, comprising the balance payable under the building contract, less MTD's liability to Willow of £841,000 in respect of defects, professional fees and loss of profits.

Judgment of the Court: As pointed out by the TCC Judge, Pepperall J, at [27] onwards summary judgement is the usual means by which parties enforce adjudication decisions in their favour made under the statutory scheme in the UK. The decision of the adjudicator is binding upon the parties and must be complied with unless their underlying dispute is finally determined by litigation, arbitration or agreement. Adjudication is founded on the "pay now, argue later" principle, and the need to have the "right" answer is subordinated to the need to have an answer quickly.
He then refers at [29] to Coulson J in *Caledonian Modular Ltd v Mar City Developments* [2015] in which the latter stated that while that is the general rule there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration.

Coulson J also stated in *Hutton Construction v Wilson Properties* [2017] that where a defendant seeks to argue such a short and self-contained point the defendant must be able to demonstrate that the issue is one which, on a summary judgement application, it would be unconscionable for the court to ignore. [30]

Coulson J in Hutton Construction went on to state that what that meant in practice is, for example, if the adjudicator's construction of a contract clause is beyond any rational justification, or his calculation of the time periods is obviously wrong, or his categorisation of a document is on any view not capable of being described as such a document. In a disputed case anything less than that would be contrary to the principles in Macob [1999], Bouygues [2000] and Carillion v Devonport [2005]. It was also axiomatic that such an issue could still only be considered by a court on enforcement if the consequences of the issue raised by the defendant were clear-cut. If the effect of the issue that the defendant wished to raise is disputed, it will be most unlikely that the court will take it into account on enforcement.

In this case Pepperall J took the view that the contractual construction issue was short, self-contained and well suited to being determined in summary proceedings and proceeded to do so.

At [41] he points out that Practical Completion can be an elusive concept. Coulson LJ had considered it in The Court of Appeal in *Mears Ltd v Costplan* [2019] and provided a useful summary of the law on practical completion at para [74] of his judgement.

As regards the construction of the contract Pepperall J referred primarily to the principles identified and restated in the judgement of Neuberger Lj in *Arnold v Britton* [2015], and ultimately concluded that upon its true construction the June 2017 agreement did not require Willow to accept that Practical Completion had been achieved simply upon agreement of a list of outstanding works. Rather, MTD was required to achieve Practical Completion by 28 July 2017, save only in respect of works identified in specific clauses in the schedule to the June 2017 agreement.

In addition to the foregoing Willow resisted enforcement on the basis of a number of alleged breaches of natural justice identified in para [52] of the judgement.

Pepperall J again provides a useful run through of some of the principle cases in this area at paras [56] to [62], and in particular refers to the summary of Fraser J in *Beumer Group v Vinci Construction* [2016]. In that case Fraser J states that it is clear that for breaches of natural justice to be sufficient to justify the court declining to order summary judgement enforcing an adjudicator's decision they must be the plainest of cases; the adjudication proceedings must have been obviously unfair. Combing through what has occurred or concentrating on the fine detail of the material before the adjudicator to allege a breach of natural justice will not be encouraged or permitted by the court. Adjudications are conducted very quickly and the framework within which adjudicators have to reach decisions has to be taken into account when complaints are made by losing parties.

The next issue which arose in this case was that since Willow failed in its challenge on the basis of natural justice, but the adjudicator erred in his construction of the June agreement, could the court order severance of the adjudicator's decision.

At [68] he points out that the issue of severance had been reviewed by Akenhead J in *Cantillon v Urvasco* [2008] and in a number of subsequent cases referred to at paragraphs [69] to [72]. He also refers to the fourth edition of Coulson LJ's book on adjudication in which he states that in the right circumstances the court may be prepared to enforce a part of the decision of the adjudicator, if that part is clearly and obviously untainted by any jurisdictional or natural justice problem and is readily identifiable.

At [74] he states that the proper question is whether it is clear that there is a part of the decision that can be safely enforced once one disregards that part of the decision which has been found to be obviously flawed. 16. Ultimately, in this case Pepperall J was satisfied that the effect of the contractual construction issue error was limited to the adjudicator's dismissal of the claim for liquidated damages and that error did not infect the balance of the decision. He therefore deemed it correct to sever the good from the bad, deducted the liquidated damages sum of £715,000, and enforced the balance of the decision.

John McDonagh SC

XPL Engineering Ltd. v K & J Townmore Construction Ltd. [2019] IEHC 665 (Barniville J.)

Arbitration – Article 8 (1) UNCITRAL Model Law – application to refer disputes to arbitration - whether disputes governed by arbitration agreements

The Facts: The plaintiff was engaged as a sub-contractor by the defendant under two contracts for mechanical works on two separate projects. In each case the 1989 RIAI/CIF form of sub-contract had been used by the parties, which provided for arbitration of disputes arising. Disputes arose in each contract relating to payment. The plaintiff issued plenary proceedings against the defendant for payments under both contracts in 2014. The defendant instructed solicitors, who notified the plaintiff that the sub-contracts required disputes to be referred to conciliation and arbitration, and that an application would be made to the High Court to refer the disputes to arbitration if the plenary proceedings continued. Four years passed. In 2018, the plaintiff brought a motion for liberty to enter final judgment for payment of the amounts claimed. The matter came before Barniville J. by way of an application by the defendant to have the matter referred to arbitration pursuant to Article 8 (1) of the UNCITRAL Model Law.

Judgment of the Court: The first issue considered by the Court was whether there was a "dispute" between the parties in respect of that portion of the claim under one of the sub-contracts which had apparently been acknowledged and agreed by the defendant. The Court noted that there are various pre-conditions to the engagement of Article 8 (1) of the Model Law:

> (i) An action must have been brought before the court in respect of a dispute between the parties;
> (ii) The action must concern a 'matter which is the subject of an arbitration agreement';
> (iii) 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 each of the above requirements is satisfied, then the court must refer the dispute to arbitration. The court noted that the obligation to refer does not arise where the court finds that the arbitration agreement is either null and void, inoperative, or incapable of being performed, noting that the onus of establishing that one of these factors applies lies on the party seeking to rely on them (citing *Sterimed Technologies International v Schivo Precision Ltd.* [2017] IEHC 35, per McGovern J.). Barniville J. further noted that the court has no discretion with regard to the application to refer the dispute to arbitration where one of these criteria is satisfied. The defendant claimed that none of the three criteria applied and that there was further no dispute between the parties. The plaintiff, in turn, claimed that the defendant had failed to request the reference to arbitration '*not later than when submitting its first statement on the substance of the dispute*' as is required by Article 8 (1), that the defendant delayed almost three months in bring its application to refer the dispute to arbitration following delivery of its replying affidavit in the summary proceedings, and that the court had a discretion to stay the proceedings in the absence of compliance with a mandatory criterion of Article 8 (1). The plaintiff further claimed that there was no dispute in respect of the amount which it claimed the defendant had acknowledged as due and owing under one of the sub-contracts.

On the first of the plaintiff's arguments, the court found that the defendant's replying affidavit to the summary proceedings did not constitute a statement of the 'substance of the dispute' within the meaning of Article 8 (1):

> *"A mere reference to the fact of a dispute could not, in my view, amount to a "statement" on the "substance" of that dispute. The defendant's replying affidavit in the summary proceedings does not refer at all to or engage with the "substance of the dispute between the parties…the plaintiff is ignoring the fact that the particular statement must address the "substance" of the dispute and not merely refer to the fact of a dispute."*

The court then considered the affidavit grounding the defendant's motion to refer the disputes to arbitration under Article 8 (1), and found that it clearly amounted to a statement on the substance of the dispute which was accordingly brought not later than when the defendant submitted its first statement on the substance of the dispute in accordance with Article 8 (1). The court further rejected the plaintiff's claim that there had been unreasonable delay by the defendant in bringing the application, noting that "*Article 8 (1) of the Model Law does not impose any particular time limit within which an application for an order under that provision must be made*", and noted that Clause 13 (a) of the sub-contract did not impose a time limit for service of a notice to refer to arbitration.

The remaining issue, therefore, was whether there was a 'dispute' between the parties for the purposes of both the sub-contracts and the Model Law. Barniville J. stated in this regard the principles that had governed the existence of a 'dispute' prior to the Arbitration Act 2010 had been articulated by Kelly J. in Campus and Stadium Ireland Development Ltd. v Dublin Waterworld Ltd. [2006] 2 IR 181 and considered whether the defendant had established an arguable case and so could obtain leave to defend summary proceedings. This had changed with the passing of the Arbitration Act 2010. Adopting the principles applicable to similar applications under s 9 (4) of the Arbitration Act 1996 of England and Wales, Barniville J. stated as follows:

> *"In my view, once a dispute has arisen between the parties, which is the subject of an arbitration agreement, it is not the role of the court to assess the merits of the parties' respective positions in that dispute. That is the role of the arbitrator. To adopt the position for which the plaintiff contends and to confer upon the court a role in determining the merits or otherwise of the parties' respective positions in the dispute would, in my view, impermissibly usurp the proper role of the arbitrator and fundamentally undermine the arbitral process which the parties signed up to when entering into the relevant subcontract."*

Barniville J. outlined five principles applicable interpretation of the term 'dispute', emphasising that the term be considered in context, that it be given a broad interpretation, that the ICS principles should be applied in its interpretation, and that the court should 'be willing readily to infer that a dispute exists' in the context of an arbitration agreement and should lean in favour of a finding that a dispute exists where the parties disagree in this respect, and finally that the court should not '*get involved in the exercise of deciding whether the position of one party is stateable, credible or tenable'*. The court concluded that the defendant had demonstrated that the requirements of Article 8 (1) had been made out and that a dispute existed, and made the order referring the parties to arbitration.

Deirdre Ní Fhloinn BL

Ohpen Operations UK Limited v Invesco Fund Managers Limited [2019] EWHC 2246 (TCC) 16 August 2019

Dispute resolution clause in contract - court proceedings issued - whether same should be stayed.

Summary: The issue before the court in this case was whether the issue of proceedings in the TCC by Ohpen was in breach of a contractually agreed dispute resolution procedure, and if so whether the proceedings should be stayed pending referral of the dispute to mediation.

The Facts: By an agreement made in July 2016 Invesco engaged Ohpen to develop a digital online platform through which Invesco's customers could buy and sell investments. Delays occurred and in October 2018 Invesco issued a notice of termination on the grounds of material and/or repudiatory breach. Ohpen disputed any such breach and issued proceedings claiming damages for wrongful termination.

Following the institution of the proceedings Invesco sought an order staying the claim pending compliance with the contractually agreed dispute resolution procedure. Invesco submitted that the relevant clause in the agreement was a valid, binding and applicable dispute resolution clause which prescribed a mandatory mediation procedure prior to the commencement of proceedings. Ohpen had commenced the proceedings in breach of that provision.

The Law: It was common ground that a clause requiring the parties to follow a specified dispute resolution process could in principle create a condition precedent to the commencement of court proceedings. A contractual agreement to refer a dispute to Alternative Dispute Resolution (ADR) could be enforceable by a stay of proceedings. The reference to ADR is analogous to an agreement to arbitrate. As such it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of proceedings or by injunction absent any pending proceedings.

At [32] the Judge, Mrs Justice O'Farrell, having referred to relevant authorities at paragraphs [28] to [31] of her judgement distilled from them four central principles as applicable where a party seeks to enforce an ADR provision by means of an order staying proceedings:

(i) The agreement must create an enforceable obligation requiring the parties to engage in ADR;
(ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration;
(iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties;
(iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the Court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

At [51] to [53] she stated that for the reasons given in her judgement the Agreement between the parties contained a dispute resolution provision that was applicable to the dispute between the parties and created an enforceable obligation requiring the parties to engage in mediation. Compliance with the relevant clause was identified as a condition precedent to the parties' entitlement to commence court proceedings. The clear purpose of the clause was the mandatory requirement to operate the dispute resolution procedure before the parties became entitled to institute proceedings, and while the term "condition precedent" was not used the words used were clear that the right to commence proceedings was subject to the failure of the dispute resolution procedure, including the mediation process. She therefore concluded that the Agreement contained a dispute resolution provision that operated as a condition precedent to the commencement of legal proceedings.

There is a clear and strong policy in favour of enforcing ADR provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving actual or potential disputes between the parties, it will usually be necessary for them to follow that machinery, and a court will not permit an action to be brought in breach of such agreement. [58]

The court had to consider the interests of justice in enforcing the agreed machinery under an agreement, and the Judge concluded that it was appropriate for the Court to stay the proceedings to enable the mediation to take place.

John McDonagh SC

Lidl Ireland GMBH v Bilo Property Holdings Ltd

Discovery – Injunction – Restrictive covenant – Defendants seeking discovery – Whether the categories of documents sought were relevant and necessary to the defendants' defence of the action

Summary: This case relates to discovery in a dispute over the interpretation of a restrictive covenant in a commercial lease. In the deeds of transfer of a commercial property, the defendant agreed to a restrictive covenant in favour of the plaintiff to the effect that the premises wouldn't be used for a "restricted use", which included using the store for "food retail". The second and third defendants entered into a lease of the property and, subsequently, began to sell food items. The parties disputed the meaning of the restrictive covenant. The question then arose for consideration as to whether discovery of documents as to the meaning of this term could be sought. The argument was based on relevancy as courts have long held that they cannot have regard to parol evidence when interpreting written contracts, as the subjective belief of either party as to the meaning of a term in a contract was irrelevant. The Court held that if there was a document which showed what the parties agreed was meant by a particular term in a contract, that document would be admissible as evidence of the true interpretation of the term in the contract. Accordingly, discovery may be sought for documents which would establish what was the agreement between the parties as to the scope of the restrictive covenant in the contract.

Facts: The Plaintiff was the owner of a shop unit in Nenagh, Tipperary and the First Defendant was the owner of a nearby site. The Plaintiff agreed to purchase the First Defendant's site and the First Defendant agreed to purchase the Plaintiff's shop. In the Deeds of Transfer, the First Defendant agreed to a restrictive covenant in favour of the Plaintiff which prohibited the carrying out of any "*restricted use*" in the shop. "*Restricted use*" was defined as "*food retail and/or off–licence and/or any illegal or immoral use or noisy, noxious or offensive trade including but not limited to sex shop, methadone clinic, cattle market or abattoir*".

The Second Defendant and the Third Defendant became tenants of the shop in question and openly engaged in the sale of food in this premises. The Plaintiff alleged that this was a breach of the restrictive covenant and instituted proceedings and sought interim injunctive relief. The Second and Third Defendants agreed to stop selling any food products at the premises pending the trial of the action.

The First Defendant disputed the Plaintiff's interpretation of the restrictive covenant. The First Defendant pleaded that the natural and ordinary meaning of the words "*for the use as a food retail and/or off-licence*" meant that the premises as a whole cannot be used for food retail and/or off-licence. However, the First Defendant contended that the restrictive covenant does not restrict the sale of food on part of the premises, provided the premises as a whole does not constitute a food retailer. The Second and Third Defendants adopted a similar interpretation and contended that their activities would not breach the restrictive covenant as long as their selling of foodstuffs does not constitute the predominant offering of the defendants at the store.

The Second and Third Defendant argued that as they are strangers to the contracts entered into as between the Plaintiff and the First Defendant, they are entitled to see any documentation from the pre-contract stage which touches upon the meaning of the restrictive covenant and/or the meaning of the term "*food retail*".

Law: Counsel for the Second and Third Defendants stated that this would allow them to see the context of the negotiations and to this effect they relied on the dicta of Clarke CJ in *Jackie Green Construction Ltd v Irish Bank Resolution Corporation in special liquidation* [2019] IESC 2, which stated that:

> *"In all cases the text is important, but part of the context in which that text needs to be considered is the manner in which that text was arrived at, and the circumstances which led to the text being required and/or agreed"*

Counsel for the Plaintiff stated that it was well established that a Court cannot have regard to parol evidence when interpreting the terms of a written contract and that the subjective belief of either party as to the meaning of a term in the contract was irrelevant when interpreting the terms of a written contract. To this effect, the Plaintiff relied on the dicta of Hogan J in *Point Village Development Ltd (in receivership) v Dunnes Stores* [2017] IECA 159:

> *"The meaning of clause 11(c) of the 2010 agreement will, however, ultimately be determined by the High Court employing standard interpretive techniques used in construing commercial contracts of this kind. One of these basic rules is the parol evidence rule which – subject admittedly to exceptions – precludes the Courts receiving evidence from the parties as to what their subjective beliefs as to the meaning of the agreement actually was. This is not some technical rule of evidence, but rather reflects the preference of the common law for the written word as the most straightforward way in determining the nature of the contractual bargain which the parties actually arrived at."*

While Barr J accepted the Plaintiff's submission that evidence as to the subjective intention or understanding of a party during negotiations is not admissible, he reasoned that if there was a document which showed what the parties agreed was meant by a

particular term in a contract, that document would be admissible as evidence of the true interpretation of the term in the contract.

Barr J reasoned that while there is unlikely to be a document of this kind, as if there was a document in existence which tended to show that "food retail" did not encompass the activity carried on by the Second and Third Defendants, it would likely have been pleaded by the First Defendant in its defence. Nevertheless, the Second and Third Defendants are entitled to discovery under this heading. Barr J held that the Second and Third Defendants are entitled to have sight of any document or series of documents that would establish what was the agreement or understanding reached between the parties as to the scope of the restrictive covenant in relation to the selling of food products at the store.

Michael Judge BL

MG Scaffolding (Oxford) Limited v Palmloch Limited [2019] EWHC 1787 (TCC) 9 July 2019

Adjudication - jurisdiction - enforcement - respondent incorrectly named in the adjudication notice but correctly named in the enforcement proceedings in the TCC

Summary: This was an application for summary judgement to enforce an adjudicator's decision. The central issue was whether the adjudicator lacked jurisdiction in circumstances where the adjudication was commenced, and pursued, by MG Scaffolding (Oxford) Limited (MGS) against a Respondent, MCR Property Group (MCRPG), a trading name, and where, as MSG accepted at enforcement stage, the correct contractual counterparty was a company called Palmloch Limited (Palmloch).

Facts: In December 2018 MGS commenced an adjudication against "MCR Property Group" by a Notice of Adjudication. The entitlement to payment was based on the absence of a valid pay less notice following an application for payment.

An employee of Palmloch by letter to the Adjudicator stated that MCR was no more than a brand name and had no assets. The letter stated that Palmloch had no debt outstanding to the referring party, and that any claim should be directed to the company with which the referring party had the dispute. The letter did not suggest that the proper responding party to the claim was Palmloch, but in a later letter he identified Palmloch as the contracting party, and stated that when the name was amended to the name of the correct responding party (Palmloch) it would serve a response to the Notice of Adjudication. MGS did not amend the name and proceeded with the adjudication with "MCR Property Group" as the named respondent.

Law: The Judge states at [25] that the starting point is that in order for an adjudicator to reach a decision that the courts will subsequently enforce, the parties to the adjudication must also be the parties to the relevant construction contract, and, the subsequent enforcement proceedings. A legitimate dispute , on the facts, as to who the correct party to the contract is is a valid reason for refusing summary judgement.

It was common ground in the enforcement proceedings that the correct contracting parties were MGS and Palmloch, and that the adjudication was commenced and pursued against "MCR Property Group", which was a trading name for Palmloch, with no legal existence of its own.

This was not therefore a case where the referring party had started an adjudication against the "wrong" contracting party i.e. a different legal entity to that with which it was in contract with. MGS has started an adjudication using the trading name of a legal entity which the defendant accepted was the correct contracting counter-party. The enforcement proceedings were brought, correctly, in the name of the contracting legal entities. It was not therefore a case where the defendant to the enforcement proceedings was able to contend that it was not a party to the contract in respect of which the adjudication decision was rendered. Instead, the issue arose out of the fact that the adjudication was commenced and pursued using the trading name of the legal entity, rather than the name of the legal entity itself.

At the heart of the dispute was the proper construction of the Notice of Adjudication, and whether an adjudication has been validly commenced against a particular party is a question of interpretation of that notice.

In terms of the proper approach of the court the cases of *Jawaby v The Interiors Group* [2016] and *Easybiz v Sinograin* [2011] referred to at paragraphs [31] and [32] of the judgement provided useful guidance as to how the court should approach the construction of the Notice of Adjudication. The exercise is to assess the notice as a whole against its contractual setting to see how it would have informed a reasonable recipient. There might be situations where a precise description of the relevant party could be critical; all would depend on the particular circumstances of the dispute [35] and [36].

In this case the Notice of Adjudication referred to Palmloch by the trading name it accepted that it used. There was nothing inherently fatal about the commencement, pursuance and issuance of the decision of an Adjudication in the trading name of a legal entity, where the decision is subsequently enforced in the courts against the true legal entity.

A misdescription of a party in a Notice of Adjudication does not of itself affect the validity of the Notice, although it may be different if there is a genuine lack of clarity as to the proper parties.

In this case there could not possibly have been any lack of clarity to the reasonable recipient as to the identity of the legal entity intended to be the responding party on a proper construction of the Notice of Adjudication. Although in theory, use of the trading name could have been a reference to one of a large number of legal entities, when the Notice was construed as a whole any possible ambiguity did not exist in reality.

Summary judgement was given in favour of the Claimant.

John McDonagh SC

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The Construction Bar Association of Ireland (CBA), founded on the 23rd of April 2013, is a specialist association of Irish lawyers involved in practice in construction law matters and the resolution of construction related disputes.

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