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 June 2021. 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

Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [UK Supreme Court 17 June 2020]

Adjudication - Jurisdiction - Referring party in liquidation - Injunction granted by the TCC and the Court of Appeal restraining further conduct of adjudication as futile - Injunction discharged by Supreme Court - General review by Supreme Court of operation of construction adjudication.

The facts:

Bresco and Lonsdale were electrical works contractors. By a sub-sub-contract dated August 2014 Bresco agreed to perform electrical installation works for Lonsdale. The 1996 Act applied to the contract. In December 2014 Bresco ceased to attend the site, alleging that it did so as a result of repudiatory breach of the contract by Lonsdale. In March 2015 Bresco went into creditors' voluntary liquidation. Bresco and Lonsdale made claims against each other for breach of contract and each accused the other of repudiatory breach.

In June 2018 Bresco served on Lonsdale a Notice of Intention to Refer and an adjudicator was appointed. Lonsdale asserted that the adjudicator was without jurisdiction, as given the manner in which the UK insolvency regime operated there was no longer in being a dispute under the construction contract, so that the adjudicator's jurisdiction under the 1996 Act was not engaged. It accordingly sought a declaration to that effect in the TCC and an injunction restraining the further conduct of the adjudication. In the TCC Lonsdale won on the jurisdiction point, while in the Court of Appeal Bresco succeeded on jurisdiction, but the injunction restraining the further conduct of the adjudication was continued on the basis that the adjudication would be an exercise in futility and a waste of time and money.

The law:

In dealing with the appeal Briggs LJ commenced by reviewing the construction adjudication regime at [10] to [26] inclusive.

At [10] he states that adjudication of construction disputes has been a conspicuously successful addition to the range of dispute resolution mechanisms. It operates with speed and economy and involves the making of a decision which is provisionally binding until the matter in dispute is later resolved by arbitration, by litigation or by agreement.

A very important underlying objective in bringing the legislation into being was the improvement of cash flow to fund ongoing works on construction projects. The motto which came to summarise the underlying approach was "pay now, argue later". Adjudication as a means of dealing with cash flow issues involved the application of rigorous time limits for the conduct of adjudications, the provisionally binding nature of the adjudicator's decision, and the readiness of the courts to grant speedy summary judgement by way of enforcement, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date, by arbitration, litigation or settlement agreement. [12]

The fact that Parliament chose to confer the right to adjudicate "at any time" has meant that it can be used to resolve disputes about final accounts rather than merely at interim stage. [13]
At [16] he turned to the mechanics of the regime, pointing out that the basic provision, section 108 of the Housing Grants, Construction and Regeneration Act 1996 had been slightly amended (and augmented by section 108A) by the Local Democracy, Economic Development and Construction Act 2009.

At [20] he pointed out that under the UK regime construction adjudication is semi-compulsory. The parties are not required to adjudicate every dispute. Rather each party is given a statutory and contractual right to require an adjudication of any dispute under a construction contract, and do so at any time, even after the contract has been fully performed or come to an end, whether by effluxion of

time or discharge, including discharge by breach.

That right is conferred upon every legal person who or which is, or was, a party to a construction contract (as defined). There is no exclusion of particular types of person, such as a company in liquidation. [21]

In the UK, (unlike under the 2013 Act in Ireland), the jurisdiction of the adjudicator extends to every dispute which arises under a qualifying contract which a party entitled to adjudicate chooses to include in their reference. [22]

Adjudication is remarkably speedy, because of the time limits imposed both on the parties and the adjudicator. A bespoke adjudication framework which does not include those time limits will not be in accordance with section 108(2), and will be overridden by the time limits in the default framework (s. 108(5)) [23]

At [26] Briggs LJ points out that when compared with arbitration and litigation, speed and economy come with an inevitable price in terms of reliability. There is no formal avenue of appeal against an adjudicator's decision, and the court will generally summarily enforce it, regardless of whether it is correct on the merits, provided the adjudicator acted independently and within jurisdiction. But a dissatisfied party can insist on having the dispute redetermined de novo in court or by arbitration (if available) even though the adjudicator's decision will continue to bind in the meantime.

Having carried out this useful review of the construction adjudication regime he carried out a short review of the insolvency set-off regime in the UK. Lonsdale submitted that construction adjudication was incompatible with the operation of the insolvency code in general, but Briggs LJ rejected that submission at [42].

In the Court of Appeal, an injunction which had been granted in the TCC restraining Bresco from prosecuting the adjudication was continued on the basis that a reference to adjudication of a claim by a contractor in insolvent liquidation, in circumstances where there is a cross-claim, would be incapable of enforcement and therefore an exercise in futility.[54]

At [60] the Judge stated that it is wrong to suggest that the only purpose of construction adjudication is to enable a party to obtain summary enforcement of a right to interim payment for the protection of its cash flow. In the context of construction disputes adjudication has become a mainstream method of ADR, leading to speedy, cost effective and final resolution of most of the disputes referred to adjudication. Dispute resolution was therefore an end in its own right. [60]

At [64] he stated that it is no answer to the utility (rather than futility) of construction adjudication in the context of insolvency set-off to say that the adjudicator's decision is unlikely to be summarily enforceable. The reasons why summary enforcement would frequently be unavailable are set out in detail in the Court of Appeal decision in Bouygues v Dahl-Jensen [2001] in which Chadwick LJ had stated that the court is well-placed to deal with those difficulties at summary judgement stage, simply refusing it at an appropriate stage as a matter of discretion, or by granting it, but with a stay of execution.

In those circumstances there was no need for an injunction, still less a need to prevent the adjudication from running its speedy course, as a potentially useful means of ADR in its own right.

Where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security for its cross-claim, then the court will be astute to refuse summary judgement. [67]

The end result was that the appeal from the Court of Appeal decision was allowed. Construction adjudication, on the application of the liquidator, is not incompatible with the insolvency process. Nor is it an exercise in futility.

John McDonagh SC

Clarington Developments Limited v HCC International Insurance Company Plc [2019] IEHC 630

Background

This decision concerned an application by the Defendant to dismiss the Plaintiff's claim on the grounds that it disclosed no reasonable cause of action, or in the alternative staying the proceedings on the basis that the claim was bound to fail. The proceedings were brought for enforcement of a bond that had been entered into between the parties to secure performance of a building contract entered into between the Plaintiff and a building contractor. The Plaintiff, in seeking to make a call on the bond, argued that the damages payable pursuant to the bond in respect of the building contractor's default could be assessed and determined by the High Court by way of plenary proceedings; the Defendant claimed that liability pursuant to the bond was contingent on damages being ascertained in accordance with the contractual mechanism for dispute resolution, which in this case required the damages to be established following conciliation or arbitration. This note considers the finding of the Court with regard to the basis upon which liability arose pursuant to the bond.

Decision

The Court noted the "*fundamental disagreement between the parties as to the mechanism by which damages are to be quantified*". Having considered the normal meaning of the words "*established and ascertained pursuant to and in accordance with the provisions of*" the building contract, Simons J. held that the language clearly required the quantification of damages due under the contract to be carried out in accordance with the contractual dispute resolution provisions:

"*The employer's interpretation, which would allow for damages to be determined in parallel proceedings before the High Court, simply cannot be reconciled with the contractual language*".

Simons J. accordingly held that: "*Not only does the rival interpretation of Clause 1 advanced on behalf of the employer drain the phase "established and ascertained pursuant to and in accordance with" of its ordinary and natural meaning, it also necessitates imputing to the parties an intention that there be two parallel mechanisms by which the quantum of damages sustained could be established and ascertained….No sensible explanation has been offered as to what should happen in the event that the two procedures produce different figures*."

Discussion

The security in question in the case was a secondary obligation contingent on default by the contractor. A crucial feature of a guarantee of performance of contractual obligation is that the guarantee is co-extensive with the contractual obligations to which it relates. The guarantee did not create an independent obligation on the surety to pay an amount assessed by the Court that could be at variance with the contractor's own obligation. To the extent that the Employer's argument in *Clarington* could have potentially resulted in the surety paying out more than the contractor, therefore (if the Court's assessment had awarded a greater figure for damages than might have resulted in an arbitration against the contractor under the contract), the argument could not succeed. It is also noteworthy that in the decision of the Technology and Construction Court in *Yuanda v Multiplex & Ors* [2020] EWHC 468, the decision of an adjudicator was held to have been "ascertained in accordance with the contract", which might prompt Irish parties to consider seeking an adjudicator's decision in order to trigger a call on a bond.

Deirdre Ní Fhloinn BL

Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Ltd) (In administration), BRM Construction LLC and Argo Global Syndicate 1200 [TCC 16 March 2021]

Multi-party building contract - Design checker - Economic loss - Whether duty of care owed by design checking consultant to main contractor with which it had no contractual relationship - Voluntary assumption of responsibility - Negligent misstatement.

The facts: The Claimant, Multiplex, was the main contractor concerning a sizeable construction project at Bishopsgate, London. Bathgate, formerly known as and hereinafter referred to as "Dunne", was engaged as a sub-contractor for the design and construction of the concrete package of works to one of the main buildings in the project. Dunne had, under the terms of the sub-contract with Multiplex, full design responsibility for the concrete core and temporary works. BRM was a specialist design and engineering consultancy, and was appointed by Dunne in respect of the design of the slipform rig. This was part of the temporary works, and was a constantly moving piece of equipment which permitted the concrete core to be constructed incrementally. BRM was based in Dubai, and was not insured.

RNP Associates Ltd ("RNP") was an independent third party design checking consultancy and was engaged by Dunne to provide independent third party design checking services relating to the design of the slipform rig, as was required by the relevant British Standard. It went into liquidation in October 2018. It was insured by the third named defendant, Argo, that party being joined in the proceedings pursuant to the UK Third Parties (Rights Against Insurers) Act 2010.

When Dunne went into administration Multiplex terminated its sub-contract and hired an alternative specialist sub-contractor, Byrne Brothers Ltd ("Byrne"), to replace Dunne and to complete the sub-contract works. Byrne investigated the slipform rig and concluded that it was unsafe and should not be used. Multiplex had the rig replaced and also carried out other remedial steps. Its total claim including remedial works, delay, disruption and consequential losses came to over £12 million. Default judgements were obtained by Multiplex against Dunne and BRM. RNP was insured by Argo up to £5 million, and as it was in liquidation any recovery against it was effectively limited to that figure.

Multiplex claimed that it was entitled to proceed directly against Argo under the 2010 UK Act because its insured, RNP, owed it a duty of care and/or had provided warranties direct to Multiplex. Unless RNP did owe such duties, or provide such warranties directly to Multiplex, then Multiplex's claim directly against Argo could not succeed.

Two preliminary issues were ordered to be tried:

i) Did RNP owe any duties to Multiplex in respect of design certificates provided by it to Multiplex?; and

ii) Did RNP provide warranties to Multiplex?

At [25].5 Fraser J concludes on the facts there was a contract between Dunne and RNP. The terms upon which the parties were agreed were that RNP would, at Dunne's request, perform the relevant check on the design brief for the slipform rig for the agreed fee of £3,978, and would provide Dunne with the relevant certificate. It was an implied term of that contract that RNP would use reasonable care and skill in performing that design check.

At [55] to [62] he points out that given the contractual arrangements, were Dunne and BRM still solvent and/or insured, the main thrust of Multiplex's case would be against them. As a matter of law, Multiplex had a cause of action against Dunne for the same matters advanced against RNP, and Argo/RNP pleaded that Multiplex had constructed an artificial claim against Argo in respect of the work carried out by RNP. The phrase used in some of the authorities is "gap filling", by which is meant where there is a gap in terms of a claimant's contractual relations the law of tort might fill it.

Argo/RNP maintained that the nature of the parties roles and relationship were

such that RNP did not assume responsibility to Multiplex, did not owe duties of care in tort to Multiplex, and did not provide warranties to Multiplex. It maintained that Multiplex's rights in respect of the relevant checks were against Dunne, with whom it had contracted for the entirety of the temporary works package including the design of the slipform rig and the provision of the necessary design checks under the relevant British Standards. It also denied that if it had a duty to Multiplex that it extended to holding Multiplex harmless from economic loss. [60]

Multiplex claimed that RNP owed it a duty of care in carrying out the relevant check because there was a voluntary assumption of responsibility by RNP to Multiplex. Multiplex also brought an alternative claim against RNP for negligent misstatement, again on the basis of an alleged assumption of responsibility by RNP to Multiplex for the making of statements contained in the certificates issued by it. [73-74]

The law:

Fraser J commenced his in-depth examination of the duty of care issue at [115], stating that the case had to be approached from a consideration of first principles. He referred initially to Galliford Try v Mott MacDonald [2008] in which Akenhead J had summarised the applicable principles in determining whether a duty of care was owed in the construction context. At [190] in that judgement Akenhead J had stated "it is necessary for the party seeking to establish a duty of care to establish that the duty relates to the kind of loss which it has suffered. One must determine the scope of any duty of care". He agreed with that analysis.

The issue should not be approached by considering whether RNP owed any duty; but whether RNP had a duty of care related to the kind of loss which Multiplex had suffered and which it sought to recover in the proceedings. The type of damage suffered by Multiplex in this case was economic loss. It was with this in mind that one had to approach consideration of whether RNP owed Multiplex the duty of care alleged. It could not be considered in the abstract. [119]

A survey of further leading cases was carried out and at [128] and [129] he referred to Henderson v Merrett Syndicates [1994] in which Goff LJ used the example of a building project in which to exemplify a particular issue in the following terms:

> "*let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to the property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner …… But if the sub-contracted work or materials do not conform to the required standard it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the Hedley Byrne principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any assumption of responsibility*".

As regards the meaning of the phrase "voluntary assumption of risk", at [144] Fraser J refers to Caparo v Dickman [1990] in which Oliver LJ stated that it meant no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon.

At [155] he points out that the statement within the relevant certificate that the check had been carried out using reasonable skill and care was not given by RNP to Multiplex; it was given to Dunne. RNP had not been asked to give, and had not given, advice to Multiplex at all.

As regards the UK "three-fold" test for the presence of a duty of care, at [159] he states that he accepts that in some contexts the defendant's knowledge of and consent to the fact that his advice is being passed on by his client to a third party, who will rely on it for a specific purpose, may be sufficient to enable the third party (here Multiplex) to demonstrate sufficient foreseeability and proximity, and that the context may also show that it is fair, just and reasonable in such circumstances to impose a duty of care owed by the defendant to that third party. However that is more likely to be the case when the third party claimant is a consumer and the context is an ordinary transaction. It is not likely to be the case where the third party is a main contractor, with detailed contractual provisions governing all of its relationship with others such as the employer, sub-contractors, and its own professionals, that do not include the defendant.

At [160] Burgess v Lejonvarn 2017] is referred to. The Court of Appeal held there that there was a duty of care, on the assumption of responsibility basis, owed by a professional garden designer to neighbours and social friends, for whom she had performed gratuitous services. The features of that case which led to the conclusion that there was an assumption of responsibility were all very fact specific, and although the judge at first instance had found that there was no contract between the parties, the services that she had undertaken had to be performed with reasonable care and skill. While there was no contract between the parties their relationship was "akin to contract", and the services had been provided in a professional context and on a professional footing**.**

At [162] Fraser J refers further to Burgess in which it was stated that a duty expressed in those terms does not trespass on the realm of contract, and he concludes that that case demonstrated the careful and justified reluctance of the

courts to allow the law of tort to be used by claimants to "trespass" on contracts entered into freely by the parties.

At [164] he states that as a general proposition a review of the cases indicates that although the existence of a contract is not entirely determinative, it is a highly relevant feature. The closer the situation under scrutiny is to a more conventional business-like relationship governed by contractual terms agreed by the parties, the less likely the law will be to answer the questions concerning assumption of responsibility and fairness, justness and reasonableness in favour of a claimant such as Multiplex, who has no contractual relationship with RNP.

The issue of reliance is dealt with at [164] to [171]. At [166] he points out that to recover in the tort of negligent misstatement the claimant must show that he relied on the statement in question. In terms of legal reliance Multiplex did not allow the issuing of the certificate to operate on its mind in such a way that the economic loss that was suffered by it was on account of that reliance. [170] Multiplex plainly had not relied upon the certificates. [171]

At [172] he considered that RNP did not assume responsibility to Multiplex for the statements in the certificates, and to the largest extent relies upon the contractual relationship between the various parties, which did not include a direct contractual link between RNP and Multiplex. Further relevant issues were that Multiplex was not involved in the selection of RNP as an independent design checker, and that there had been no direct contact between RNP and Multiplex at all prior to the issue of the second certificate. He also points out that this construction project had a large number of participants and a detailed and careful contractual structure between the employer and Multiplex, and Multiplex and Dunne. To find that there was an assumption of responsibility on the part of RNP direct to Multiplex would "short circuit the contractual relations". It would also be inconsistent with the contractual structure to make such a finding in Multiplex's favour.

At [173] he points out that the outcome as determined by him is sensible and just. It results in a situation where RNP is not held liable for a potentially unlimited liability on a major and very complex construction project. All RNP had ever been provided with was a very limited set of design information so that it could check calculations.

Expanding further upon why it would not be fair, just or reasonable to impose a duty of care upon RNP of the type contended for by Multiplex, he points out that Multiplex chose to contract with Dunne on highly detailed terms. Parties choose with whom they contract, and they also choose whether they require those parties to have any insurance for their design obligations. Multiplex had a cause of action against Dunne and although enforceability of that remedy might present difficulties, the law does not determine matters such as justness and fairness based on the financial durability of a sub-contractor such as Dunne. [174]

In addition Fraser J states that he is reinforced in his conclusions that RNP did not assume responsibility to Multiplex by considering the very modest fee charged by RNP. This was part of the factual circumstances of the case. [175] He also states that it is inconceivable that a reasonable businessman would have considered that RNP was voluntarily assuming an unlimited responsibility towards the main contractor on a highly complex construction project, or to any other party involved in that project, other than the one with whom RNP was in direct contract, namely Dunne. [177]

At [179] he states that while he accepts that RNP knew that the certificates were intended to be forwarded to the temporary works co-ordinator, that was not sufficient to justify the imposition of a duty of care. He did not accept that Multiplex satisfied the proximity test in any event. On a major construction project such as this, with a careful and interlinked series of different contracts between various parties, RNP was not sufficiently proximate to the main contractor. In any event he had found that it would not be fair, just and reasonable to impose a duty of care on RNP which could result in unlimited liability to Multiplex, when it would have been obvious to all concerned that RNP had chosen only to contract with Dunne.

A further point identified by Fraser J is that the insurance costs that would undoubtedly occur in terms of increased premiums payable by a checker such as RNP would be formidable. The checker would potentially be incurring liability directly to a main contractor for economic loss due (for example) to delay to the entire project. Such a liability could be vast. This was a policy consideration, and also a factor to be considered when deciding whether it is just, fair and reasonable to impose a duty of care to Multiplex upon RNP. [181]

As regards the second preliminary issue which had been referred, the warranties issue, the Judge found that RNP did not provide any to Multiplex. There was no contractual purpose in so doing, and in the Reply Multiplex had specifically pleaded that "……..it is admitted that RNP had a contractual relationship only with Dunne, and gave no collateral warranties …….".

John McDonagh SC

Case Note: Gravity Construction Ltd v Total Highway Maintenance Ltd [2021] IEHC 19

An application was brought before the High Court seeking to enforce an adjudication award made pursuant to section 6(10) Construction Contracts Act 2013 ("2013 Act"), which states as follows

> The decision of the adjudication shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.

The applicant in these proceedings was granted an adjudication award on 28 of April 2020 which directed the sum of €135,458.92 was payable by the

respondent to the applicant within fourteen days of the date of the decision, together with the fees of the adjudicator. After the respondent did not comply with the judicator decision, the applicant instituted the proceedings. The respondent initially responded to the application to enforce the adjudication decision by stating that the matter should be referred to arbitration and the payment of the award stayed pending the determination of such arbitration. However, sometime thereafter the respondent then indicated that it was prepared to pay the award together with the adjudicator costs and interest. This was without prejudice to the respondent's right to prosecute arbitration proceedings. Simons J in the High Court indicated that this change in position on the part of the respondent had the effect that there are only two issues which remained for determination by him. He posited that the first issue was whether the court should make an order against the respondent where the respondent solicitor (through counsel) indicated it was prepared to give a formal undertaking to the court that monies would be paid within two weeks. The second issue concerned the allocation of the costs of the proceedings.

In addressing the first issue concerning the order, the court held the appropriate form of the order would be an "unless order". This order would provide that the applicant would have leave to enforce the adjudicator's decision in the same manner as a judgment or order of the High Court and that judgment is be entered against the respondent in favour of the applicant in the sum claimed unless the sum is paid to the solicitors acting on behalf of the applicant within seven days of the date of his judgment (26 January 2021). The court made this order pursuant to section 6(11) of the Construction Contracts Act 2013.

The respondent had submitted that, in circumstances where an undertaking could be given that the award would be paid within two weeks, the matter should be adjourned for two weeks. In rejecting this submission, the court held that, having regards to the legislative intent underlying the Construction Contract Act 2013 and in particular the need for expedition, the applicant was entitled to have the matter ruled upon by the High Court.

At paragraph 11, Simons J held:

> "The framing of the order as an "unless" order represents an appropriate compromise in that it respects the statutory entitlement of the applicant to relief, while affording the respondent a very short period of time within which to make the payment without a judgment being formally entered against it (with all the negative implications thereof)"

The second issue the court had to decide on was the appropriate allocation of the costs of the proceedings. The court referred to Part 11 of the Legal Services Regulation Act 2015 ("LSRA") which provides that the party who has been entirely successful in the proceedings has a *prima facie* entitlement to costs. The court also alluded to its discretion to make a different form of costs, drawing particular relevance from section 169(1)(f) of the LSRA which stated:

> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer.

And Order 99, rule 3 of the Rules of the Superior Courts (2019 version) provides as follows.

> 3.(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.
>
> (2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.

By way of letter dated 23 December 2020 the respondent communicated a without prejudice offer to pay the award together with the fees of the arbitrator. In respect of the applicant's legal costs it stated "*and furthermore a reasonable contribution to your client's legal fees in these proceedings, to be taxed in default of agreement*."

Simons J held that the appropriate approach to be taken when indicating a settlement offer is that in principle the settling party is prepared to pay the other sides costs but reserves the right to challenge specific fee items either before the trial judge if necessary or before the legal costs adjudicator. He concluded that the position adopted by the respondent in the present case fell short of this and the letter of 23 December 2020 only put forward a "reasonable contribution" to costs. Therefore, the court held, pursuant to its discretion under section 169 of the LSRA and order 99 of the Rules of the Superior Courts, the appropriate order in the case was that the applicant recover from the respondent its costs on a party and party basis such costs to be adjudicated upon the legal costs adjudicator pursuant to the LSRA 2015. The court provided the following three reasons in coming to his decision concerning costs:

> (I) The timing of the assessment was in effect made some three weeks prior to long standing hearing date of 26 January 2021. The reality was that most of the costs would have already been incurred well advance if events in January 2021;
>
> (ii) The wording of the 23 December 2020 offer letter was ambiguous and the term "reasonable contribution" is a term of art which indicates something less than the full of the costs which would be recovered on a party and party basis;
>
> (iii) The respondent's offer for settlement was not saved by reference to taxation of costs. The court indicated there was a lack of certainty concerning the wording of the letter of 23 December 2020 and the matter was only clarified when the respondent's solicitor sent a further letter the day prior to the hearing of the action that disavowed the reference to "reasonable contribution" and explained that the

> real intention was at the cost would be taxed in default agreement. The court held this was too late to affect the costs of the proceedings in any meaningful way.

In respect of this third and final reason concerning costs, the court had specific regard to the Construction Contract Act 2013 and in particular the need for expedition. Simons J stated as follows:

> It seems to me that this court has to have some regard to the legislative intent underlying the Construction Contracts Act 2013, and, in particular, the need for expedition. The simple fact of the matter is that by raising grounds of opposition which it ultimately did not pursue, the respondent successfully delayed these proceedings for a period of some six months. (It also successfully objected to the fixing of an earlier hearing date on 17 September 2020). In allocating costs, I am entitled to have some regard to the conduct of the respondent. The conduct of the proceedings is a matter specifically referenced in section 169 of the LSRA 2015.

Patrick Crowe BL

Global Switch Estates Limited v Sudlows Limited [TCC 3 December 2021]

Adjudication - Breach of natural justice - Failure of adjudicator to consider and deal with matters presented by way of defence - Enforcement denied.

This was an application by the claimant, GSEL, for summary judgement to enforce an adjudication decision directing the defendant, Sudlows, to pay GSEL £5 million approximately plus the adjudicator's costs.

Sudlow resisted enforcement on the grounds that the adjudicator had failed to consider and deal with matters relied on by Sudlows as defences to GSEL's claim, thereby acting in breach of natural justice, and that the adjudicator wrongly came to decisions contrary to the decision of a previous adjudicator, thereby acting in excess of jurisdiction.

The facts:

The dispute arose out of a project to fit out and upgrade GSEL's specialist data centre. Sudlows was engaged by GSEL to carry out the works pursuant to a JCT Design and Build 2011 form of contract.

Disputes arose between the parties and there were four adjudications. The first three were commenced by Sudlows, the fourth by GSEL. In the first three, sizeable monetary awards were made to Sudlows in two, and a significant extension of time was granted in the third. In the fourth adjudication GSEL sought a decision as to the true value of parts of Interim Application 27, and that Sudlows should pay GSEL approximately £7 million or such other amount as the adjudicator determined in respect of overpayments made by GSEL.

The adjudicator determined that the true gross value of the works in issue was £17 million approximately and awarded GSEL £5 million approximately and directed Sudlows to pay the adjudicator's fees and expenses. Sudlows failed to pay those sums.

The law:

In reviewing the applicable legal principles O'Farrell J stated at [44] that it is important to emphasise that the UK courts take a robust approach to adjudication enforcement. The relevant principles were well established and clear and she referred at [44] and [45] to the TCC and Court of Appeal judgements in Carillion v Devonport Royal Dockyard [2005].

At [46], in relation to the issue of what would amount to a breach of the rules of natural justice in the context of adjudication, she referred to the leading decisions of Akenhead J in Cantillon v Urvasco [2008] and of Coulson J in Pilon v Breyer [2010]. She also referred at [48] and [49] to Kitt v The Laundry Building Ltd [2014] and Bresco v Lonsdale [2020] in relation to the principle that the Notice of Adjudication cannot so circumscribe or delineate the dispute set out in it as to exclude particular defences.

Applying the legal principles to the circumstances that arose in the case before her O'Farrell J made the following helpful observations at [50]:

i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.

ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.

iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By doing so, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.

iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.

v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.

vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.

vii) If the adjudicator asks the relevant question, it is irrelevant whether the

answer arrived is right or wrong. The decision will be enforced.

viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.

ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced.

In this case the Judge held that determination of GSEL's claim for payment required the adjudicator to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation. The adjudicator's failure to take into account Sudlow's defence based on its additional claims for loss and expense amounted to a breach of the rules of natural justice. [56]

The breach of natural justice was plain and obvious on the face of the adjudicator's decision. It arose as a result of GSEL's erroneous submission that the adjudicator did not have jurisdiction to consider Sudlow's claims for loss and expense. The adjudicator's jurisdictional error precluded any consideration of a very substantial part of the defence, and in those circumstances that amounted to a material breach of the rules of natural justice which rendered the decision unenforceable. [57]

The second defence put forward by Sudlows was that the adjudicator wrongly came to decisions that were contrary to the decisions of a previous adjudicator and thus exceeded his jurisdiction.

It was common ground that once an adjudicator has reached his decision then unless and until challenged in arbitration or in the courts it is binding on the parties. With regard to this O'Farrell J at [67] referred to the judgement of Akenhead J in Balfour Beatty v Shepherd Construction [2009], in which he stated that once an adjudicator has decided the first dispute that dispute cannot be referred to adjudication again because it has already been resolved. The later adjudication may be wholly or partly unenforceable if materially it purports to decide something which has already been effectively and validly adjudicated upon.

It is the decision that binds the parties, and that includes the essential components or basis of the decision, but not the adjudicator's reasoning for the decision: Hyder Consulting v Carillion [2011] and Thameside Construction v Stevens [2013] [68]
In order to determine what a previous adjudicator decided, it is necessary to look at the terms, scope and extent of the decision, and not just the adjudication in isolation: Harding v Paice [2015] and Brown v Complete Building Solutions [2016][69]

In this case the judge held that the adjudicator had not trespassed on an earlier adjudication, and while that defence therefore failed, the fact that the adjudicator had been misled by GSEL and wrongly failed to consider and deal with matters relied on by Sudlows as defences to GSEL's claim, meant that he had acted in breach of the rules of natural justice. The jurisdictional error was critical to the determination of the dispute, and in those circumstances she refused to enforce the adjudication decision.

John McDonagh SC