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1. Introduction: Nicholas Higgs

Those of our readers involved in construction adjudication will well recognise Coulson J's (as he then was) description of the process as 'rough and ready'.[1] Generally, however, this system of interim justice seems to work well enough that it has been adopted, in various forms, in jurisdictions around the world. Notwithstanding its apparent effectiveness, not all parties are willing to submit to the adjudication process, or they seek means by which enforcement of an adjudicator's decision can be avoided. One method which is all too common is to submit to the process whilst maintaining a general reservation as to the jurisdiction of the adjudicator. This has certainly been the experience of Gaynor Chambers, as she outlines in our first article. The effectiveness of such an approach has been the subject of recent consideration in the Court of Appeal. Gaynor examines the decision and its implications for those who seek to rely on a general reservation of rights in construction adjudication.

Our second article also reviews a recent Court of Appeal decision, this time concerning the effectiveness of liquidated damages following termination. As Melissa Shipley identifies, the court's decision still leaves some difficulties for employers in the event that a contractor leaves work unfinished. Her conclusion is that clarity of drafting will be key to ensuring that the effects of termination on the liquidated damages provisions do not come as a surprise to either employers or contractors.

Tom Coulson in the third article considers the vexed topic of recovery for economic loss in a tort action against a builder. This is an area which perhaps requires further clarification by the Court of Appeal or Supreme Court, particularly as the industry has moved on significantly in the last 40 years – with the boundaries between designers and contractors becoming increasingly ill-defined. For the moment, however, the law appears to be unchanged, as set out in the decision of *Thomas* v. *Taylor Wimpey*[2] which Tom takes us through in careful detail.

Our final piece, from Dr Jim Mason, builds on the previous consideration of blockchain technology in December 2018's *Construction Law Quarterly*.[3] As Jim identifies, the opportunities for change within the industry are wide, particularly for those who are able to adapt and apply new technology. Jim's article certainly provides food for thought; perhaps adjudication will become redundant once contracts have been codified and their execution and resolution automated. Do respond with thoughts on this, or any of our other articles; and indeed if you have a short article or legal update of your own that you would be interested in submitting, you can contact the journal editor at journals@icepublishing.com.

2. General reservations of rights in adjudication after *Bresco Electrical Services* v. *Michael J Lonsdale*: Gaynor Chambers

2.1 Introduction

The author has dealt with various challenges to her jurisdiction following appointment as an adjudicator. Some are simple, others relatively complex, particularly those arising out of power generation projects and the exemption within section 105(2) of the Housing Grants, Construction and Regeneration Act 1996.[4]

Even if no specific challenge is made, it is common practice for respondents to include a general reservation of rights within their adjudication submissions. The wording used is often very wide, stating that the responding party's position in respect of the reference is fully reserved, and that it further reserves all rights in respect of jurisdictional or other issues in the adjudication or any other proceedings (or words to that effect).

2.2 Challenges in practice

This practice appears to have its roots in cases such as *Allied P & L Limited* v. *Paradigm Housing Group Limited*,[5] in which the responding party took various points on jurisdiction during the course of the adjudication, each of which failed. Although the responding party discovered a much better argument after the adjudicator had reached a decision, it was not allowed to rely on it to resist enforcement as the responding party had not previously referred to it or reserved its position in respect of it. However, Akenhead J left open the issue as to whether a general reservation without any hint or suggestion as to what the grounds are could be effective.

Ramsey J then considered the issue further in *GPS Marine Limited* v. *Ringway Limited*,[6] concluding by analogy with authorities in the context of arbitration prior to the provisions of section 73 of the Arbitration Act 1996[7] that if the words of a reservation were sufficiently clear they could prevent a party's subsequent participation in an adjudication from amounting to a waiver or ad hoc submission.

Therefore, many respondents appear to view a general reservation of rights as offering a more effective means of protecting their

position in due course than a specific challenge, particularly in situations where the commencement of the adjudication has been a surprise and so the responding party does not want to risk missing a point and being subsequently precluded from relying on it. Others take specific points but also add a general reservation of rights as a fall-back position, hoping to then be able to bring up other issues on enforcement.

Whilst it is understandable that a responding party would want to use a general rather than specific approach in order to try to keep all options open, this approach raises difficulties for both the adjudicator and the referring party. The adjudicator cannot investigate the grounds for resisting jurisdiction as none are identified and cannot therefore decide whether or not to proceed. Similarly, the referring party cannot decide whether the responding party has made a good point and take steps to remedy the situation by, for example, starting a new adjudication.

2.2 *Bresco Electrical* v. *Michael J Lonsdale*

The Court of Appeal recently tackled this vexed topic head on in *Bresco Electrical Services Limited (in liquidation)* v. *Michael J Lonsdale (Electrical) Limited*.[8]

That case was primarily concerned with the interplay between adjudication and the insolvency regime (see also the subsequent case of *Indigo* v. *Razin*[9]), but Lord Justice Coulson also took the opportunity to set out his views on jurisdictional matters, stating that 'arguments about waiver and general reservations of position arise much more often in adjudication cases than they should' (paragraph 82[8]).

As Coulson LJ pointed out, the difficulty with a general reservation of jurisdiction is that it means that a party can participate in an adjudication, decide it is not keen on the result, and then 'comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour' (paragraph 91[8]).

Cannon, the responding party in *Bresco Electrical*, had emailed the adjudicator on 17th March 2018, noting the agreed timetable for the adjudication and then stating '… the Responding Party (Cannon) reserves its right to raise any jurisdictional and/or other issues, in due course, whether previously raised or not and whether within the forum of adjudication or other proceedings' (paragraph 93[8]).

Cannon subsequently emailed the adjudicator again repeating the general reservation of rights but also raising two specific challenges to the adjudicator's jurisdiction, first that the responding party had cherry-picked parts of the account in their claim and second that there was no crystallised dispute. These two points were rejected by the adjudicator and subsequently by Judge Waksman QC.

In its application for permission to appeal, Cannon sought to raise an argument that the adjudicator did not have jurisdiction because the referring party Primus was the subject of a company voluntary arrangement for the first time.

Coulson LJ was firmly against Cannon on this point, stating that any proper jurisdictional objection was limited to the two points which the adjudicator decided against Cannon, and that either the general reservation was 'too vague to be effective' (paragraph 99[8]) or ought to be regarded as having been superseded by the two specific arguments which had been raised and failed.

The judge differed from Ramsey J in *GPS Marine* by finding that the reasoning in cases dealing with general waivers in the context of arbitrations were not of direct application, and that this informed the starting point when considering the applicable principles on waiver and general reservations in an adjudication context. His analysis of those principles at paragraph 92 of the judgment[8] makes interesting reading.

(*i*) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L*).

(*ii*) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit (*GPS Marine*).

(*iii*) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (*GPS Marine*).

(*iv*) A general reservation of position on jurisdiction is undesirable but may be effective (*GPS Marine*; *Aedifice*). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:

- (*i*) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (*Aedifice*, *CN Associates*);
- (*ii*) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open (*Equitix*).

2.3 Conclusion

So, what does this mean in practice? Whilst the judgment does not entirely preclude general reservations of rights from being effective, it means that the prospects of successfully relying on any such general reservation are greatly reduced. Any such reservations could almost invariably be construed on enforcement as being attempts to try to ensure that all options are being kept open, falling foul of the principle at paragraph 92(iv)ii)).[8]

It also means that responding parties and those representing them need to take care to consider specific grounds rather than simply relying on a carefully worded general reservation, as even careful wording will not assist if the argument being raised on enforcement is one which ought to have been known about and raised before the adjudicator. The issue of what a responding party should have known may therefore prove to be a key issue in future enforcement applications in the light of Coulson LJ's analysis.

3. The fall of orthodoxy? Discussion of *Triple Point Technology*: Melissa Shipley

3.1 Introduction

The application of liquidated damages clauses where the original contractor never achieves completion of the works has been a matter of some debate, and conflicting decisions, over the last century. Whilst the result in each case will always depend on the precise wording of the clause in question, the orthodox position was widely considered to be that liquidated damages would apply to the termination of the original contract and general damages thereafter. But the result in *Triple Point Technology Inc* v. *PTT Public Company Ltd*[10] signals the end of that orthodoxy.

3.2 The facts

PTT Public Company Ltd ('PTT'), a commodities trader, wanted to acquire a new commodities trading, risk management and vessel chartering system ('CTRM'). Triple Point Technology Inc ('Triple Point') was the successful bidder to design, develop and implement the CTRM.

The project was broken down into two phases: phase 1 was the replacement of the existing system; and phase 2 was the development of the system to incorporate new types of trade. Phases 1 and 2 were further broken down into nine stages, and the parties agreed completion dates for each stage.

The CTRM contract included the following at article 5 (paragraph 16[10]).

> …If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work, provided, however, that if undelivered work has to be used in combination with or as an essential component for the work already accepted by PTT, the penalty shall be calculated in full on the cost of the combination.

Triple Point only achieved completion of stages 1 and 2 of phase 1 on 19 March 2014, 149 days late. They invoiced and were paid for this work. However, Triple Point then invoiced for work that had not yet been completed. When PTT refused to pay, Triple Point walked off site. PTT subsequently terminated the CTRM contract on 15 February 2015.

3.3 *British Glanzstoff* returns

The High Court awarded PTT liquidated damages pursuant to article 5 for

- the delay on stages 1 and 2 of phase 1 from 13 October 2013 to 19 March 2014 (the 149-day delay)
- the delay on all other elements of the work from the specified completion dates in the CTRM contract to 15 February 2015, the date the contract was terminated.

In the Court of Appeal's judgment, Sir Rupert Jackson reviewed the relevant authorities going as far back as *British Glanzstoff Manufacturing Co Ltd* v. *General Accident, Fire and Life Assurance Co Ltd*.[11] *Glanzstoff* had not been cited in most of the decisions after 1992, which perhaps accounts for the different approaches that have been taken by the courts.

Sir Rupert Jackson found that, in cases where the contractor fails to complete and a second contractor steps in, three different approaches have been taken to clauses providing liquidated damages for delay.

- First, the clause does not apply at all (see, for instance, *British Glanzstoff*).
- Second, the clause only applies up to the date of the termination of the first contract (see, for instance, *Shaw* v. *MFP Foundations and Pilings Ltd*[12])
- Third, the clause continues to apply until the second contractor achieves completion (see, for instance, *Hall* v. *Van Der Heiden No 2*[13])

Unsurprisingly, Sir Rupert Jackson found that the result would depend on the precise wording of the liquidated damages clause in question. But, more interestingly, he cast doubt on cases following the third approach above. He said that, if that was correct, the employer and the second contractor would be able to control the period for which liquidated damages would run.

Even more significantly, Sir Rupert Jackson went on to say that the second approach, that the liquidated damages clause only applies up to the termination of the first contract, was the 'orthodox analysis' in the textbooks. However, it was 'not free from difficulty'. He considered that it may be 'artificial and inconsistent with the parties' agreement' to apply liquidated damages until the termination of the contract and general damages thereafter. It may be more logical to assess all of the losses flowing from termination in accordance with the ordinary rules for assessing damages for breach of contract (paragraph 110[10]).

On the wording of article 5, Sir Rupert Jackson found that 'up to the date PTT accepts such work' means 'up to the date when PTT accepts completed work from Triple Point' (paragraph 112[10]). Article 5 was therefore not applicable to work that was not completed by Triple Point and handed over to PTT. Liquidated damages were only recoverable for the delay to stages 1 and 2 of phase 1. PTT was not entitled to any other liquidated damages because no other work was

completed by Triple Point. That was the same approach as taken by the House of Lords in *British Glanzstoff*.

3.4 The difficulties of *Triple Point*

Although the Court of Appeal emphasised that the result would depend on the wording of the liquidated damages clause in question, there was a clear move towards the first interpretation of liquidated damages clauses: that they do not apply where the original contractor fails to complete the works and a second contractor steps in.

Given the conflicting decisions, it is clearly useful to have a Court of Appeal judgment dealing with this issue. However, in the author's view, the approach in *Triple Point* creates a number of difficulties for both contractors and employers, of which the following are examples.

- Employers will be left with the difficulty of proving general damages: the time and cost of proving which liquidated damages clauses are designed to avoid.
- It could also create a perverse incentive for a contractor in delay to act in such a way that the contract would be terminated by the employer. It would also leave employers in the unenviable position of choosing between terminating the contract or preserving their claim for liquidated damages for incomplete work. In rejecting the defendant's submission in *Hall* v. *Van Der Heiden No 2* that liquidated damages ceased when the original contract was terminated, Coulson J (as he then was) concluded: 'If the defendant was right, the contractor would be better off not coming back on site to carry out the works because, if he refused to do so, the contract would then be terminated and his liability to pay liquidated damages would automatically come to an end. That would not be a commonsense interpretation of this (or any) construction contract' (paragraph 76[13]).

If parties wish to avoid the difficulties of the approach in *Triple Point*, the best advice is to include clear drafting in the contract which addresses the effect of termination on a liquidated damages clause.

4. A Bridge too far: a builder's liability for economic loss in tort: Tom Coulson

4.1 Introduction

As every law student knows, following the double volte-face which took place in England and Wales' higher courts in the 20 years preceding the decision in *Murphy* v. *Brentwood*[14] in 1991, a builder is liable in tort only for damage caused to persons or property by defects in its work but not for the purely economic loss of remedying the defect. However, in *Murphy*, having set out those general principles, Lord Bridge suggested a possible exception to them in the following terms (page 19[14]).

> The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties.

That suggested exception is not infrequently relied upon by parties and is the subject of conflicting first instance decisions. However, in *Thomas* v. *Taylor Wimpey*,[15] HHJ Keyser QC ('the judge') has decided that Lord Bridge's dictum does not represent the law.

4.2 *Thomas* v. *Taylor Wimpey*

The issue arose on the trial of a series of preliminary issues in proceedings between the claimants, who were owners of two adjacent properties, in which they claimed damages from the homebuilder ('the builder') in respect of what were said to be defective log retaining walls at the rear of the back gardens of the properties. Any cause of action in contract having become statute-barred, the claim was advanced *inter alia* as a claim in the tort of negligence.

In response to the builder's contention that the claim was one for pure economic loss, the claimants averred that the defects in the walls amounted to a potential source of injury to persons or property on neighbouring land. In other words, they sought to rely on Lord Bridge's exception as founding a claim where there would not otherwise have been one. The court ordered various preliminary issues to be determined, including an issue as to whether, on the assumption that the facts pleaded by the claimants were true, the builder owed the claimants a duty of care not to cause them the loss and damage claimed.

4.3 The previous first instance authorities

The judge reviewed the previous authorities at first instance in which the exception suggested by Lord Bridge had been considered.

In *Morse* v. *Barratt*,[16] a case from 1992 in which a wall adjacent to a highway had to be rebuilt after it was found to represent a danger to the public, HHJ O'Donoghue had taken Lord Bridge's suggested exception and applied it as correctly stating the law. However, as the judge observed, the reasoning in *Morse* was somewhat unsatisfactory: no legal basis for the exception was identified and the suggestion of one member of the Appellate Committee, on a point that did not arise for decision by the House of Lords in that case, was simply applied as representing the law.

The only other previous decision in which the point had arisen was *George Fischer Holding Ltd* v. *Multi Design Consultants Ltd*,[17] in which *Morse* had not been followed. In that case, HHJ Hicks QC had concluded (albeit *obiter*) that Lord Bridge's dictum was properly to be regarded as a minority *obiter* dictum which was contrary to the *ratio* of the decision of the House of Lords in *Murphy*. In HHJ Hicks' view, the decision in *Murphy* was premised on the rejection of the reasoning in the older cases (*Dutton* v. *Bognor Regis*[18] and *Anns* v. *Merton*[19]) that it was anomalous to award damages for a realised injury but not for the cost of averting it. In his view, it was difficult to see why the exception

suggested by Lord Bridge should 'linger on where the danger averted is that of liability to a neighbour or passer-by rather than of injury to the Plaintiff himself' (paragraph 89[17]).

4.3 The judge's reasoning in *Thomas* v. *Taylor Wimpey*

The judge decided that Lord Bridge's suggested exception to the rule that loss suffered as a result of the need to remedy a defect was irrecoverable in tort did not represent the law. Interestingly, although his conclusion was the same as that of HHJ Hicks QC in *George Fischer Holding*, his reasoning was rather different.

The judge disagreed with the suggestion that Lord Bridge's qualification was itself inconsistent with the *ratio* of the House of Lord's decision in *Murphy*. As the judge observed (paragraph 26[15]), it would be 'surprising indeed' if Lord Bridge had said something inconsistent with the *ratio* of a decision in which he himself expressed his full agreement with the leading speech, in a speech with which a number of other members of the committee also agreed. In the judge's view, the point was simply not one that had arisen to be decided in *Murphy*.

The judge also differed from Judge Hicks in suggesting that there was a real distinction between the possibility of causing injury to those on neighbouring land, on the one hand, and the possibility of causing injury to a claimant or his visitors on his own land. If the condition of a property amounts to a danger to those on it, the owner of that property is in a position to obviate that danger by taking necessary precautions including, ultimately, vacating it altogether. By contrast, the judge reasoned, the owner of the defective property has no right to control the use of the adjacent land and thereby obviate the risk to those upon it; all he can do is remedy the defect.

Having conducted a careful review of the authorities and the academic discussion of the point, the judge summarised his own reasoning for concluding that Lord Bridge's exception did not represent the law in a series of six propositions as follows.

- First, it was propounded in a single *obiter* dictum in *Murphy*.
- Second, it was unsupported by authority, other than *Morse* in which there was no persuasive analysis.
- Third, it is not supported by the *ratio* or reasoning in *Murphy*; indeed, it is not supported by any specific reasoning on the part of Lord Bridge.
- Fourth, it is contrary to the analysis of the Court of Appeal in *Robinson* v. *PE Jones*,[20] which concluded that the only basis for tortious liability for economic loss was on grounds of assumption of responsibility.
- Fifth, were the exception correct, it would suggest, logically, that a claimant ought to be able to recover the cost of moving out of his own home if forced to do so because of a dangerous defect, whereas such recovery was not permitted on the current state of the law.
- Sixth, builders have a potential liability by virtue of the Defective Premises Act 1972[21] and in respect of injury to persons or property under the common law. In those circumstances, there was no compelling policy justification for recognising the existence of Lord Bridge's qualification.

4.4 Conclusion

It might be said, albeit perhaps uncharitably, that this is not the first time that Lord Bridge has been found culpable of mooting possible exceptions or explanations in the field of tortious liability for pure economic loss which have not withstood subsequent analysis: see exhibit A – the 'complex structure theory'. What the decision in *Thomas* v. *Taylor Wimpey* does highlight is the difficulty in articulating a principled basis for exceptions or qualifications in this area, just as the contortions which were introduced into the law following the decision in *Anns* v. *Merton* over 40 years ago.

For practical purposes, however, the key point is that it is now going to be very difficult for claimants to seek to recover in tort on the basis of Lord Bridge's exception. Whilst definitive resolution of the point perhaps awaits a decision of the Court of Appeal or the Supreme Court, there is no doubt where the weight of first instance decisions now lies.

5. Smart contracts and collaboration: Jim Mason

Yogi Berra once said that 'Predicting is hard, especially about the future'. This joking truism counsels caution and a wait-and-see approach to what develops. This is particularly sage advice in the fast-paced world of technological innovation. However, part of the role of an academic is to predict and help to prepare the ground. The possibilities for new approaches to be adopted in the construction and engineering sectors currently feels limitless. Consequently, these are interesting times. This is partially because many of the innovations and initiatives are already commonplace in other industries. The leaders of today should therefore be exhorted to look to windward and set a course to deliver the improvements for which the construction industry has been crying out during the last century. A better way now appears within reach through the medium of smart contracts and enhanced collaboration.

A smart contract binds natural language text to computable code by way of a data model. The benefit is to deliver automation, or at least semi-automation. Let us take these components in turn, as follows.

1. Natural language text – the UK legal system is based entirely on the contract wording to deliver certainty and allow statutory and common/civil law regimes something to fix on. We, as humans, need to trust and understand the undertakings being exchanged. Ultimately, the words will not be needed as the focus moves from the contract to the transaction itself.
2. Computable code – computer code and law are not so very different. Both express 'logic' and need to be understood to be of use. The only real difference is that one is readable by a lawyer and one by a programmer. The Accord Project, which held its inaugural conference in the City of London in June 2019, is seeking to establish a language and a set of templates that are readable by both.

3. The data model – this can be planned and actual as an internet-of-things approach updates the model in real time. Essentially, each component of the build becomes its own mini-contract (think inchstone rather than milestone). The natural starting point for data programming and extraction is the building information modelling (BIM) software. This requires construction clients to finally appreciate that the value of the model is not only in the construction phase but much more so in the facilities management phase. The model can become the nerve centre for the building's performance and contribute to making it more sustainable in its use and maintenance.

The net effect of having these three components in one artefact provides a framework for constructing a building or civil engineering project. The sheer volume of mini-contracts being executed and performed probably means the involvement of a blockchain or similar distributed-ledger technology. People naturally associate blockchain with crypto-currency and conjure images of a lawless Wild West-style volatile commodity. Crypto-currencies represent only one of a thousand uses for blockchain that include uses as varied as tracking shipping containers around the world and a system of food provenance allowing perishables to be traced back to their farm of origin. The complexity of a building project would not faze such a sophisticated and vast resource as blockchain technology.

Collaboration is the other potential saviour of the construction and civil engineering industries. The sector has been implored for many decades to improve its attitudes and to end the adversarial approach. The reality is that disputes are as rife as ever. Positive and productive relationships are routinely burned as a consequence. The latest development in this area is the *Framework Alliance Contract – FAC-1*.[22] This contract innovation shows great promise in delivering lasting results. One of the features of the agreement is that it is standard-form agnostic in that it can sit alongside any underlying contract type. This standardisation of approach is mirrored in the smart contract, whereby there is no need individually to negotiate or amend the agreement.

A survey a few years ago of final-year quantity surveying students at the University of the West of England Bristol revealed a baffling outcome to a question. When asked whether they would prefer the construction industry as it is now – red in tooth and claw – or collaborative, they chose the former. The author repeated the exercise more recently substituting 'collaborative' with 'digitally enhanced' and the response was overwhelmingly the latter. Therein lies the paradox. Most professionals are aware that the collaborative approach has huge benefits but nevertheless remain sceptical at least until they have seen it work. However, no one wants to stand in the way of progress. The message for the legal community is also clear; and becoming involved and finding out more about the new initiatives makes perfect sense. There is a particular need for lawyers in this field to reassure their clients that their interests are protected and to facilitate the development of the law in its regulatory role. The rewards on offer, in terms of finally ridding the industry of its poor reputation as a wasteland, are extremely worthwhile.

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