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**Construction Newsletter**
**Issue No. 10**

**Important TCC guidance on procedure in uncontested adjudication enforcement proceedings**

***Coventry Scaffolding Co Ltd v Lancsville Construction Ltd*** [2009] EWHC 2995 (TCC)
Mr Justice Akenhead (with the approval of Mr Justice Ramsey) has given useful practical guidance for claimants seeking to enforce adjudication awards in circumstances where it is apparent that the defendant does not intend to participate in the proceedings. **James Leabeater** appeared for the Claimant in this case.

Coventry, a sub-contractor, had followed the standard TCC procedure (section 9.2 of the TCC Guide) to enforce two decisions by an adjudicator in its favour against Lancsville, the main contractor. Ramsey J had given standard directions, including the abridgement of time for service by Lancsville of an Acknowledgment of Service.

Lancsville did not serve an Acknowledgment of Service, either within the (abridged) time required by the directions or at all. Nor did Lancsville serve any evidence in response to the application for summary judgment, or any skeleton argument. Giving judgment at the hearing of the summary judgment application, Mr Justice Akenhead noted that it was clear that Lancsville was aware of the hearing, and that the parties had entered into some correspondence (albeit without prejudice correspondence, the substance of which he was unaware). It was therefore apparent that Lancsville had no intention of participating in the proceedings, for reasons which were unclear from open correspondence.

Mr Justice Akenhead emphasised that he made no criticism at all of Coventry for following the standard enforcement procedure in such circumstances. However, he observed that "*during the current economic recession the number of claimants seeking to enforce adjudication decisions in this Court has run up by a very substantial amount*". Having discussed this issue with Mr Justice Ramsey, Mr Justice Akenhead therefore gave the following guidance with a view to saving both costs and court time where it was "*very clear*" that a defendant was unlikely to take part in the proceedings.

First, Mr Justice Akenhead stated that, where no Acknowledgment of Service was served within the time specified (as was the case here), the TCC encouraged the claimant to consider applying for judgment in default. This would save the claimant incurring the costs of preparing for a summary judgment hearing, and would also save court time, in that the hearing could be vacated.

Secondly, if it became clear that a defendant was unlikely to participate in the hearing (regardless of whether any Acknowledgment of Service had been served), then the claimant could make an application on notice to the defendant to bring forward the hearing, with a reduced time estimate.

It is not yet known whether this guidance will be reflected in the new edition of the TCC Guide which is due to be published in 2010, but it is safe to assume that in future the TCC will expect claimants to follow this alternative procedure in circumstances where it is unlikely that the defendant will participate in enforcement proceedings, unless there is good reason for not doing so.

**TCC considers dispute resolution clause**

***Ericsson AB v EADS Defence and Security Systems Ltd*** [2009] EWHC 2598 (TCC)
Although this case concerns the supply of computer software, Mr Justice Akenhead's consideration of the contractual dispute resolution provisions in his determination of various applications for interim relief has wider application. **Alex Charlton QC** and **Matthew Lavy** appeared for Ericsson, whilst **Michael Douglas QC** and **Simon Henderson** represented EADS.

EADS was appointed to provide an emergency communications system to the Fire and Rescue Service in England. EADS employed Ericsson under a sub-contract to develop and supply software. A dispute arose between the parties over whether Ericsson was contractually obliged to deliver the Initial Supplied Software ("ISS") by 30 September 2009. On 29 September 2009, Ericsson served notices pursuant to the dispute resolution provisions of the sub-contract of its intention to refer this dispute to mediation. On 1 October 2009, EADS wrote to Ericsson purporting to give notice of Material Default under the Contract in respect of delay in supplying the ISS. On the same day, Ericsson purported to give notice of its intention to refer the dispute to adjudication.

There were two applications for injunctions before Mr Justice Akenhead: first, Ericsson sought to prevent EADS from terminating the sub-contract until the adjudication had run its course. Secondly, EADS sought to prevent Ericsson from taking any further steps in the adjudication, and sought a declaration that any adjudication decision would be invalid.

As to the first application, Mr Justice Akenhead refused Ericsson's application for an injunction to prevent termination. He found that there were serious arguable issues on both sides, and it could not be said that EADS' position (that it was entitled to terminate the sub-contract) was untenable. Applying American Cyanamid v Ethicon, the Judge held that he was not satisfied that damages would not be an adequate remedy in the context of two substantial commercial parties who had entered into a contract which mutually prevented them from recovering most types of economic loss, such as loss of profit or production. He commented that it was not unjust that a party be confined to recovery of such damages as the contract he freely entered into permitted him to recover.

In particular, Mr Justice Akenhead held that the dispute resolution provisions in the sub-contract did not suspend a party's rights to take whatever steps under the contract it was entitled to take. Hence it was not a breach of contract for the contract to be terminated whilst a dispute as to whether termination was valid was being referred to adjudication. The Judge noted that "*The effect of an injunction to restrain termination would be in effect to require two parties who have fallen out with each other…to continue to work together in circumstances where they have a sophisticated contract which purports to provide commercial solutions and remedies when a lawful or unlawful termination occurs.*"

As to the second application, Mr Justice Akenhead refused to restrain Ericsson from pursuing remedies in adjudication notwithstanding they had separately instituted mediation. Distinguishing the sub-contract from some international engineering contracts, the Judge noted that the dispute resolution provisions stated that disputes "*may*" (not shall) be referred to mediation or adjudication; this meant it was open to either party on a given dispute to mediate or adjudicate or to do both. He observed that the parties had chosen this means of dispute resolution "*doubtless for reasons of commercial flexibility*".

**Permission to defend enforcement proceedings given where factual dispute over contracting party**

***Estor Ltd v Multifit (UK) Ltd*** [2009] EWHC 2108 (TCC)
This was one of those rare instances where a responding party was given permission by the Court to defend proceedings to enforce an adjudicator's decision. **Alex Hickey** represented the responding party, Estor.

This case concerned two competing applications arising out of an adjudicator's decision. Estor was the holding company for a group of companies ("the Group") who had engaged a contractor to carry out substantial fitting out works on a shop in the Westfield shopping complex. The contractor sub-contracted some of the works to Multifit. The Group lost confidence in the contractor, as a result of which an offer by Multifit to complete the majority of the main contract works was accepted. Eventually a dispute arose concerning payment to Multifit and whether part of the works were defective. Multifit referred the dispute to adjudication, naming Estor as the responding party. Estor challenged the adjudicator's jurisdiction on the grounds that it was not a party to any contract with Multifit, and that, in any event, the contract with Multifit was not in writing. The adjudicator rejected Estor's jurisdictional challenge and determined the substantive dispute over payment and defects largely in Multifit's favour.

Estor issued proceedings in the TCC seeking declarations that there was no contract in writing between Estor and Multifit. Multifit brought a counterclaim seeking enforcement of the adjudicator's decision, and applied for summary judgment on its counterclaim. At the hearing of the applications, Mr Justice Akenhead gave Estor permission to defend Multifit's enforcement proceedings on the issue as to whether there was a contract between Multifit and Estor, on terms that Estor pay a sum of money into court.

Mr Justice Akenhead's reasoning was as follows. He found that the contract was in writing because it was evidenced by an exchange of emails and attachments, albeit the precise nature of the works to be carried out by Multifit had to be construed from those attachments in the context of the factual matrix that existed at the time. The Judge commented that, unlike the contract itself, "*the factual matrix does not have to be evidenced in writing*".

However, Mr Justice Akenhead found that there was an arguable issue as to whether Multifit had contracted with Estor or with the Group. He said he could not decide that issue on a procedural hearing, as this was an issue that could only be resolved by oral evidence. There was a factual dispute between the parties about the stated significance of a credit reference application form signed on behalf of Estor shortly before the contract was entered into. The factual dispute centred on what was said by the parties at a meeting. Multifit said that at the meeting it asked Estor to sign this form because it was concerned about Estor's credit worthiness and required a credit check as a precondition to contracting with Estor. Estor, on the other hand, said that Multifit had wanted comfort that the Group could pay for the works, and the owner of the Group (also the owner of Estor) had said that the credit worthiness of the Group would be apparent from a search of Estor. Accordingly, Mr Justice Akenhead gave Estor permission to defend the enforcement proceedings brought by way of counterclaim. However, he imposed a condition that Estor pay a sum of money into court that was equal to 50% of the amount of Multifit's counterclaim.

Editor: Lynne McCafferty
Lmccafferty@4pumpcourt.com

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