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 first UK decision considered below, S&T(UK) Limited v Grove Developments Limited, is a Court of Appeal decision handed down on 7 November 2018, which resolves the issue as regards whether an employer can pursue a claim in adjudication to determine the correct value of works on the date of an interim application for payment, if it hasn't served a Pay Less Notice.

The second UK decision considered is that of the TCC in Jacobs UK Limited v Skanska Construction UK Limited where the Court considered the circumstances in which a party can seek to prevent the other from launching a second adjudication dealing with the same issues having withdrawn the first one.

In terms of recent and noteworthy Irish decisions, the eagerly awaited Supreme Court decision in Brandley & Anor v Deane & Anor, where the Supreme Court clarified the time limits on property damage claims, and the Court of Appeal decision in DPP v Kilsaran Concrete Limited, which highlights the need for employers to proactively assess their current health and safety practices, are considered below.

Claire Cummins BL, John McDonagh SC and Barra McCabe BL

S&T(UK) Limited v Grove Developments Limited [2018] EWCA Civ 2448 (Court of Appeal (Civil Division), Sir Rupert Jackson, on 7 November 2018)

Adjudication – Failure to serve timeous Payment Notice or Pay Less Notice – Whether employer was entitled to refer to adjudication a dispute about the true value of a contractor's interim application in such circumstances – Employer must first pay.

This was an appeal by S&T, a building contractor, to the Court of Appeal against a decision by the TCC (Coulson J.) that it was not entitled to recover from Grove, as employer, an interim payment of approximately £14,000,000.

There were three issues in the appeal:

1. Whether the employer's Pay Less Notice sent in response to interim application 22 complied with the contractual requirements. [The TCC and Court of Appeal both decided that the Pay Less Notice was valid and affective.]

2. Whether the employer was entitled to pursue a claim in adjudication to determine the correct value of the works on the date of that interim application.

3. Whether the employer complied the contractual requirements in order to maintain its claim for liquidated damages. [Both the TCC and Court of Appeal decided that it had.]

At paragraph 3 of the judgment Jackson LJ., pointed out that the second of those issues is one of great importance to the construction industry. There are conflicting decisions of the TCC in relation to it, and while given the Court of Appeal's decision as regards the first issue the second issue became academic, the parties nonetheless asked the Court to decide it in any event as both the profession and the industry needed to know which of the TCC decisions were correct.

This report of the case focuses exclusively on the second issue.

Facts: By a contract dated 26 March 2015, Grove engaged S&T to design and construct a hotel at Heathrow. The contract was a standard form JCT Design and Build Contract 2011. The contract sum was £26,393,730. The relevant terms of the contract are set out in the judgment.

On 31 March 2017, S&T sent interim application 22 to Grove. It showed the total value of S&T's work was £39,707,085 and that the increase over Grove's valuation for interim application 21 was £14,009,906. The contract required Grove to send a Payment Notice to S&T within 5 days, i.e. by 5 April. Grove failed to do so. Instead, on 13 April Grove sent three documents to S&T, which showed that £1,407,748 was due. On 18 April, Grove e-mailed to S&T a Pay Less which stated that the sum due was £0.00, as the employer contended it was entitled to withhold from the sum which would otherwise be due the sum of £2,506,857 by way of liquidated damages.

A number of adjudications commenced, one of which had the effect that there was a balancing payment of £276,695 due to S&T. S&T took the view that the balancing payment was derisory, contending that the full sum shown on interim application number 22 was due. On 1 November 2017 it commenced a third adjudication, contending that Grove's Pay Less Notice was invalid.

The adjudicator held that Grove's Pay Less Notice was invalid because it did

not specify the sum due and the basis on which it was calculated. He accordingly ordered Grove to make an immediate payment of £14,009,906 to S&T.

Grove sought declarations in the TCC that the Pay Less Notice was valid, and that it was entitled to commence an adjudication to establish the true sum due to S&T in respect of interim application 22. S&T commenced a separate action in the TCC against Grove, seeking to enforce the adjudicator's decision and applied for summary judgement.

In the TCC Coulson J. held that the Pay Less Notice was valid; that Grove was entitled to commence an adjudication to determine the 'true' value of S&T's interim application 22; and was also entitled to recover liquidated damages for S&T's delay. S&T appealed to the Court of Appeal.

The Court of Appeal (Jackson LJ.) held as follows:

- At paragraph 42 of his judgment Jackson LJ. points out that the UK statute requires the employer to pay the notified sum by the final date for payment, unless it has specified a lesser sum in a timeous Payment Notice or a timeous Pay Less Notice. It also requires that a Pay Less Notice shall specify the sum the employer considers to be due and how it is calculated. He concluded that what had been served constituted a valid and effective notice (at paragraphs 46, 57 and 59).

- Having done so the second issue was academic, but given its importance the Court of Appeal dealt with it. It will be recalled that the issue was whether Grove was entitled to pursue a claim in adjudication to determine the correct value of an interim application. For the purposes of dealing with the issue and for the purposes of providing guidance to the profession and the industry Jackson LJ. proceeded on the assumption that the Pay Less Notice was invalid, and had also been served out of time.

- Jackson LJ., reviewed all of the relevant authorities commencing at paragraph 62. At paragraphs 70 to 72 and paragraph 79 he referred to three recent decisions of the TCC being *ISG Construction Ltd v Seevic College* [2014] EWHC 4007; *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 512; and *Kersfield Developments (Bridge Road Ltd) v Bray & Slaughter Ltd* [2017] EWHC 15. In each of those cases the employer failed to serve timeous Payment Notices or Pay Less Notices, and in each the TCC effectively held that as a result the employer was not entitled to launch second adjudications seeking to establish the actual value of work at the valuation date of the interim application in question.

- At paragraph 102 Jackson LJ., stated that he found it impossible to reconcile all of the TCC decisions with one another and concluded that the analyses in the aforesaid three cases were incorrect. He referred to the recent decisions of Coulson J., in the case with which the appeal was concerned, and the comprehensive review of the authorities by Fraser J., in *Imperial Chemical Industries v Merit Merrell Technology Ltd (No. 2)* [2017] EWHC 1763, and concluded that the analyses of the Coulson J. and Fraser J. were correct.

- Earlier he had stated at paragraph 99 his view that an employer, having failed to serve a Pay Less Notice is nevertheless entitled to adjudicate the true value of an interim application.

- At paragraph 104 he asks the question: if the employer has a right to dispute by adjudication the valuation contained in an interim application notwithstanding the failure to serve a timeous or valid Pay Less Notice, when can he exercise that right? and pointed out that Coulson J., had held that he can only do so after he has paid the notified sum. He agreed with that view, and at paragraph 107 he again states that the employer can only embark upon an adjudication to obtain a re-valuation of the work having complied with the obligation to first pay the adjudicator's award.

- At paragraph 109 the Court observed that while it may be argued that his conclusion on the timing issue may operate harshly in situations where the contractor is veering towards insolvency, his answer is that in any case where there is a perceived risk of insolvency the employer should be scrupulous to protect itself by serving timeous Payment Notices or Pay Less Notices.

- At paragraphs 110 and 111, Jackson LJ., summarises the Court's position as follows: although an employer may have failed to serve any timeous Payment Notice or Pay Less Notice, he is nevertheless entitled to embark on a 'true value' adjudication, but must make payment in accordance with the notified sum in the interim application before he can commence it.

Accordingly, the Court of Appeal dismissed the appeal.

John McDonagh SC

***DPP v Kilsaran Concrete Limited* [2017] IECA 112 (Unreported, Court of Appeal, Edwards J on 6th April 2017)**

Safety Health & Welfare at Work Act 2005 – Sections 8(1) and 77(9)(a) – sentencing– gravity of the offence - allowance to be made in mitigation – proportionality – sentencing policy issues

Facts: At some time in 2010, the Respondent purchased a fully automated piece of machinery for the manufacture of pre-cast and standardised concrete products. When the machine was in use for the purpose for which it was designed, manual intervention was not necessary at any point during the manufacturing process. Instead the process was controlled externally by an operative using a control panel and a second individual carrying out a visual inspection of the finished product. The production line was fully enclosed in a safety cage that was designed to prevent access to the unguarded moving parts. Access to the caged area was controlled by a safety gate, the opening of which would cut off power to the machine. Over the course of 16 months decisions were made by the Respondent, its servants or agents, to use the production line in an unorthodox manner for the purpose of manufacturing bespoke products that would have been too big to be produced with the machine in automatic mode. In order to do so, operators of the machine would be required to carry out work within the safety cage and further, part of the machine (a mechanical cleaning arm) would have to be disengaged prior to operators working within the safety cage.

In September 2011, three of the Respondent's operatives were working with the machine, one at the control panel and the other two inside the safety cage. The operator at the control panel forgot to disable the cleaning arm of the machine, which descended and crushed one of the operatives inside the safety cage, killing him instantly.

The Respondent was charged with and pleaded guilty to one count of failing to manage and conduct work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of its employees, that resulted in personal injury to an employee, contrary to Section 8(2)(a) and 77(9)(a) of the Safety Health and Welfare at Work Act 2005. Under Section 77(9), the Respondent was exposed to a maximum fine of €3,000,000.00.

At the sentencing hearing in the Circuit Court, evidence was heard from two witnesses, the first being a student who had worked at the Respondent's plant over the previous summer and had been involved in a "near miss" incident involving the same procedure in which he was almost killed. The second witness was the most experienced operative at the Respondent's plant who stated that he had previously expressed concerns over the safety of the unorthodox way that the production line was being used, but that he had been overruled by a production engineer employed at the time by the Respondent – a co-accused in the Circuit Court with the Respondent company. Victim Impact Evidence was also given by the deceased man's father, speaking on behalf of his family. The Court had also heard that a civil claim had been brought by the deceased man's family against the Respondent, which had been settled promptly by the Respondent who was, owing to a substantial excess on its insurance policy, effectively self-insured.

Circuit Court Decision: In sentencing the Respondent company, the Court considered the following mitigating factors:

i. The Respondent had fully cooperated with the investigation into the deceased's death;

ii. The Respondent had entered its guilty plea to the charges at a very early stage, which was very helpful to the deceased's family;

iii. The Respondent company had one previous conviction but other than that, the company had not been prosecuted and there were no other convictions; and

iv. The Respondent company had been required to pay almost 98% of the civil claim, owing to a substantial excess on its insurance policy.

This being said however, the Court was conscious of the seriousness of the offence and the fact that as the deceased's employer it had a duty to ensure his health and safety at work. By directing and allowing the deceased to work inside the safety cage, the company had exposed him to a significant risk of injury and his death had had a profound impact on his family. The Court added that in respect of the proportionality of any fine that was to be imposed, regard was to be had to the financial circumstances of the company. Accordingly, the Court imposed a fine of €125,000.00 on the Respondent company and a fine of €10,000.00 on the co-accused former employee.

The DPP appealed the fine imposed on the Respondent only, claiming that the fine was unduly lenient in all the circumstances of the case.

The Court of Appeal (Edwards J): in analysing the law and assessing the fine imposed on the Respondent company, the Court of Appeal considered the case under the following four headings:

i. **The assessment of the gravity of the case:** The Court assessed this with reference to the available range of penalties and locating where the case falls to be located having regard to the culpability of the offender and the harm done. In this case, the Court was of the view that the Respondent's culpability was very high indeed, involving an "***egregious failure to maintain or enforce safety standards.***" This was, the Court stated, a deliberate breach of the law in order to maximise profits that involved a conscious and deliberate dismissal of safety concerns raised by an experienced employee and a previous near-miss was simply disregarded and ignored. The practices that culminated in the accident had been adopted incrementally over a period of in excess of a year and created a very high level of risk and a significant danger, which also had to be considered. In addition, the impugned practices were not merely condoned but were actively encouraged and required by a member of senior management within the Respondent. The fact that these practices were not identified on a safety audit or by the safety officer within the Respondent's organisation was also a cause for concern to the Court. Accordingly, considering all of the above, the Court was of the view that a headline sentence towards the top-end of mid-range or the bottom-end of the high range, namely €1,750,000.00 to €2,000,000.00, was appropriate.

ii. **The allowance that should be made for mitigation**: The fact that the Respondent was effectively self-insured with respect to the civil claim was not a material factor that should be considered by the Court, although it can be seen as evidence of genuine remorse and as such, "*some account*" may be had to it. In this case the Court stated there was little basis for taking into consideration they payment of compensation beyond the question of remorse. But remorse had been separately taken into consideration and it was clear that the actual payment made did not impose significant hardship on the Respondent considering its resources. Proper allowance in this respect should be made for the plea of guilty, the Respondent's cooperation, remorse, remedial steps taken and the Respondent's generally good safety record. Considering all of the above, nothing more than a 50% discount could have been legitimately applied by the Court in this case.

iii. **Proportionality**: Under the 2005 Act, there are a myriad of potential offences, but only one penalty section and as such, identical penalties are provided for all potential offences whether they involve venial or mortal sins. As such, a Court should approach sentencing under the 2005 Act with reference to what it considers to be the realistic range so that cases involving moderate culpability and resulting in moderate harm would rarely attract a fine in excess of a six figure sum. A criticism of the sentencing judge's approach was that he gave no indication in his judgment as to what he considered the realistic range to be, or the criteria based on which he has determined that range. The most potentially relevant considerations should be to the financial resources available to the Respondent and the Respondent's ability to pay the fine. The sentencing judge had disregarded the full available range of fines in favour of an unspecified, manifestly lesser, range of fines that he considered to be realistic. But this was in error where the circumstances of the case at hand were truly egregious and the

Respondent had sufficient resources and ability to meet any fine imposed on it.

iv. **Sentencing policy issues**: The fine imposed by the Circuit Court failed to adequately address the need for deterrence, both general and specific. The 2005 Act was designed to protect and promote public welfare and particularly the welfare of employees within their place of work. The Court added that the Respondent's "*reckless disregard for safety in pursuit of profit drove a coach and four through the policy of the legislature and requires to be punished and future conduct of that sort requires to be deterred.*" The fine imposed of €125,000.00 was entirely inadequate in the circumstances to communicate the appropriate message.

Accordingly, in re-sentencing the Respondent company, the Court considered that given the gravity of the case, the Respondent's very significant culpability and the substantial harm done, a headline sentence imposing a fine of €2,000,000.00 was merited. The Court allowed a 50% discount for the mitigating factors in the case and imposed a final sentence in the sum of €1,000,000.00 on the Respondent.

Comment: This case clearly demonstrates that it is incumbent on employers to take a proactive role in the assessment of the risks involved in the workplace. Further, having carried out an assessment, and having identified any unsafe practices, employers must discontinue such unsafe practices forthwith. Failure to do so could expose employers to a far more significant fine. It is also worth considering that unsafe practices in the workplace that remain in place with a view to maximising profit will be dimly viewed when it comes to sentencing.

Lydia B. Bunni BL

***Liam Brandley and WJB Developments Limited (Plaintiffs/Respondents) v Hubert Deane trading as Hubert Deane and Associates and John Lohan trading as John Lohan Groundworks Contractor (Defendants/Appellants)* [2017] IESC 83 (Unreported, Supreme Court, Clarke C.J., McKechnie J., MacMenamin J., Dunne J., and O'Malley J., on 15 November 2017)**

Negligence – section 11(2)(a) of the Statute of Limitations, 1957, as amended - Six-year limitation period – Property damage claims – Date when time starts to run – Manifestation of damage

Facts: The plaintiffs/respondents ("the plaintiffs") developed two houses in County Galway. The first named defendant/appellant ("the first named defendant") is a consulting engineer and was retained by the plaintiffs to supervise the construction of the foundations of the houses and to inspect them when they were originally laid. He was also retained to certify, which he did, that the foundations and the houses built thereon were in compliance with the relevant planning permissions and building standards. The second named defendant/appellant ("the second named defendant") is a groundworks contractor and he was retained by the plaintiffs to, *inter alia*, construct the foundations of the houses.

The plaintiffs' case was that the two houses developed cracks in December 2005. It was their contention that this happened as a result of the use of inadequate materials in the foundations, in that the wrong type of stone was used.

The Defendants had admitted that the damage to the Plaintiffs' houses was caused by their negligence but they both pleaded that the claims against them were statute barred. In the circumstances, the matter at issue before the court was whether the proceedings were issued in time by the plaintiffs or whether they were, in fact, statute barred.

The relevant dates were as follows:

- The foundations were completed in March, 2004;
- On the 4 September, 2004, the first named defendant issued his Certificate of Compliance with planning permission and building regulations;
- The houses in question were completed in January/February, 2005;
- In December, 2005, the first named plaintiff observed that cracks had appeared in the houses;
- The plaintiffs issued their plenary summons on the 30 November, 2010.

The two houses in question were part of a small terrace of three houses which were constructed on one common raft foundation. The third house in the terrace was not the subject of this litigation but it was the subject of separate litigation. That third property had been constructed at the behest of a third party and that third party had instituted litigation against both defendants as well as against the second named plaintiff. Those proceedings did not involve any limitation issue and the proceedings had been settled as between the purchaser and the defendants, in effect for the full amount paid for the house, with a claim over against the second named plaintiff herein having been dismissed by the High Court.

The plaintiffs' claim in the present case was founded in common law negligence. The general limitation period for actions founded on tort (subject to several exceptions such as personal injuries and defamation actions) is six years from the date on which the cause of action accrued (section 11 (2)(a) of the Statute of Limitations 1957, as amended).

The critical question to be determined by the Supreme Court was when did the cause of action accrue: if the relevant date was March or September 2004, then the proceedings were out of time and the claim was statute-barred. On the other hand, if, as the plaintiffs contended, the cause of action accrued when the cracks appeared in December 2005, then the proceedings commenced within time. These were the same issues that had been addressed in both the High Court and the Court of Appeal.

Kearns P. in the High Court held on the 16 April 2015 that the plaintiffs' claim was statute barred. The plaintiffs appealed to the Court of Appeal and by its judgment delivered by Ryan P (Irvine and Hogan JJ. concurring) on the 2 March 2016 the Court of Appeal allowed the plaintiffs' appeal.

The Defendants appealed to the Supreme Court who gave a unanimous decision delivered by McKechnie J (with Clarke C.J., MacMenamin J., Dunne J. and O'Malley J. concurring) on the 15th November 2017. The Supreme Court upheld the Court of Appeal's decision that the plaintiffs' proceedings were not statute barred.

In the Court of Appeal Mr. Justice Ryan stated that:

"*…It is clear that negligence by itself without the accompaniment of damage or loss is not actionable. The plaintiffs did not suffer damage at the time when the defective foundations were installed. When the defective*

foundation was put in, the only complaint that the plaintiffs could have had was that the foundation was defective. They had not suffered any damage at that point - there was merely a defective foundation - but that is not damage of a kind that is actionable in tort.

Mr. Justice McKechnie observed in the Supreme Court decision that:

"*…central to the resolution of the key issue* (in the case) *is the question of when 'damage', for the purpose of the law of negligence can be said to have occurred in* (the) *case, for the same will determine when the cause of action can be said to have accrued."*

The plaintiffs contended in the Supreme Court that the damage in this case occurred and manifested itself in December 2005 and that the summons therefore issued within time. There was no evidence of damage occurring or manifesting at an earlier date. The plaintiffs submitted that the defendants were asking the court to hold that time ran from a period in which a defect was not manifest and was, as a matter of practicality, undiscoverable. The plaintiffs further submitted that the presence of a defect in the foundations did not equate to damage having been suffered by them.

The defendants contended in the Supreme Court that the Court of Appeal had, in substance, applied a test of discoverability in the case, despite stating in its judgment that such was not the relevant test.

McKechnie J. considered that five possible starting points for the limitation period emerge from the relevant case law and these were:

(a) when the wrongful act is committed;
(b) when the damage occurs, regardless of whether or not it is manifest;
(c) when the damage is manifest;
(d) when the damage is discoverable and could reasonably be discovered;
(e) when the damage is discovered.

The Supreme Court considered each of the possible starting points and concluded, *inter alia*, that time begins to run from the date that the damage (not the defect) becomes manifest. McKechnie J. noted that, in his view, the Supreme Court had determined in *Hegarty v O'Loughran* [1990] 1 I.R. 148 that the relevant start date in personal injuries cases is the date on which the personal injury was manifest. He stated as follows:

"*I do not see any reason why the manifestation of the damage should not therefore also be the proper start point in property damage claims, particularly as it is well understood that the potential for injustice to a plaintiff is every bit as real in such cases as it is in personal injuries claims*."

The Supreme Court was careful to distinguish the concept of damage being manifest from the 'discoverability test' in personal injuries actions and expressly re-affirmed the position that a discoverability test does not apply in non-personal injuries claims.

McKechnie J. considered the question of what constitutes damage and he noted that there is a definite distinction between a 'defect' and the subsequent 'damage' which it causes. He stated that time runs from the manifestation of the damage, rather than the underlying defect. Thus, it is not the latent defect which needs to be capable of discovery; rather, it is the subsequent physical damage caused by the latent defect.

The Supreme Court (McKechnie J, Clarke C.J., MacMenamin J., Dunne J. and O'Malley J.) held that:

i. Time begins to run in respect of property damage cases from the date of manifestation of damage, which means it runs from the time that the damage was capable of being discovered by the plaintiffs, and the Act of 1957 should be construed accordingly;

ii. It is not the latent defect in the property that needs to be capable of discovery in property damage cases, rather it is the subsequent damage caused by that latent defect;

iii. The date of the occurrence of the wrongful act is not the relevant date for limitation purposes in property damage claims arising from the tort of negligence;

iv. The cause of action does not accrue in property damage cases until damage is manifest;

v. There is, at least in principle, a distinction between the date of occurrence of damage and that of manifestation of the damage.

Accordingly, the Supreme Court dismissed the defendants' appeal.

Micheál Munnelly BL

***Jacobs UK Limited v Skanska Construction UK Limited* [2017] EWHC 2395 (TCC) (O'Farrell J., on 29 September 2017)**

Adjudication – application for injunction – defendant withdrawing from earlier adjudication – whether defendant entitled to refer same dispute to a second adjudication – injunction not granted -- defendant's behaviour needs to be both unreasonable and oppressive – breach of ad hoc agreement -- claimant entitled to wasted or additional costs.

The facts: Skanska engaged Jacobs to provide design services for the design and replacement of street lighting in Lewisham and Croydon. A dispute arose as to the adequacy of the services provided by Jacobs. In February 2017 Jacobs served its adjudication notice. The parties reached an agreement as to the applicable procedural rules and timetable.

The adjudicator was appointed, and the referral and response documents were served in accordance with the agreed timetable. Jacobs incurred substantial costs in responding to Skanska's claim in the adjudication. Skanska's counsel became unavailable, as a result of which it was unable to serve its reply within the agreed timetable. Skanska requested an extension of time from Jacobs. This was refused. It then requested the adjudicator to grant an extension, but he refused unless both parties agreed.

In April 2017 Skanska withdrew its reference to adjudication and invited the adjudicator to resign, which he did. In June 2017 Skanska gave a fresh notice of an intention to refer the dispute to a second adjudication. The second adjudication contained the same claims against Jacobs but one of them had been withdrawn, the scope of the dispute had narrowed, and the quantum of the damages claim had been revised.

In July 2017 Jacobs applied to the TCC for orders a) restraining Skanska from taking any further steps in furtherance of the second adjudication, b) requiring Skanska to withdraw from that

adjudication, and c) a declaration that Jacobs were entitled to be paid its costs of the first adjudication.

The High Court (TCC) (O'Farrell J.) held:

- At [27], [28] and [29], O'Farrell J., held that there is no express or implied restriction in the 1996 UK Act or Scheme that precludes a party from withdrawing a disputed claim which has been referred to adjudication and that the entitlement of a party to withdraw a claim persists even after the referral, regardless of the motive for withdrawal, and does not necessarily preclude that party from pursuing the claim in a later adjudication.

- The Court also held that while the principle of abuse of process does not apply to adjudication, does not mean that a court will never intervene to restrain a party from launching or continuing an adjudication.

- At [32] O'Farrell J., held that the court's jurisdiction to grant an injunction extends to a power to grant an order restraining a party from commencing or continuing an adjudication that is unreasonable and oppressive.

- At [35] the Court held that the Court had power in this case to grant an injunction to restrain the second adjudication if it was unreasonable and oppressive. Such power could be exercised where the adjudicator did not have jurisdiction (such as where the dispute had already been decided in an earlier adjudication), where the referring party had failed to comply with the adjudication agreement (such as failure to pay awards or costs of earlier adjudications), or where the further adjudication is vexatious (such as serial adjudications in respect of the same claim).

- O'Farrell J held that Skanska's withdrawal from the claim was unreasonable. The unavailability of counsel was rarely a good excuse for failing to meet an agreed timetable, especially where the party in default is the referring party who controls the timing and scope of the reference. However unreasonable behaviour by one party will not automatically deprive it of the right to adjudicate the dispute in question in a subsequent reference. The Court would not intervene unless the further review was both unreasonable *and* oppressive.

- In this case the substance of the claims remained the same and Jacobs would be able to rely in large part on work already done. The inconvenience and additional costs suffered were not so severe or exceptional as to require the Court to restrain the continuation of the second injunction.

- Jacobs was entitled to any wasted or additional costs caused by Skanska's failure to comply with the February 2017 agreement and timetable.

- While it was common ground that in the absence of an agreement giving the adjudicator jurisdiction to award costs a party's costs of adjudication proceedings are not recoverable, this case was different. The parties had entered into an *ad hoc* agreement under which the procedure and timetable to resolve the referred dispute in the first adjudication were agreed and fixed. That went beyond mere agreement as to the timetable to be directed by the adjudicator in respect of an existing contractual or statutory adjudication and imposed new enforceable obligations on the parties.

John McDonagh SC

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