JUDGMENT : MR. JUSTICE COULSON: TCC. 11th December 2008

1. This dispute gives rise to interesting questions about the interrelationship between construction adjudication, CPR Part 7 and CPR Part 8. I apprehend that these are matters which will become commonplace over the next year or so, as parties to construction contracts seek a quick resolution of their disputes in an uncertain economic climate.

2. By a contract executed as a deed on 28th May 2004, and subsequently varied, the defendant engaged the claimant to build Plot C, Bolton's Place in Earls Court. The claimant was obliged, pursuant to that contract, to supply American Black Walnut ("ABW") natural timber veneers to various rooms in the property. A dispute arose when the ABW veneer faded and in September 2007 some £90,000 was withheld from the claimant in consequence. It was and remains the claimant's case that the fading was a natural occurrence and part of the natural characteristics of the wood selected by the defendant.

3. The dispute was referred to adjudication in late January 2008. The adjudicator's decision of 21st May was in these terms:

   "1. The duty was to supply and install a specific, identified and ascertained material being the chosen log veneer.

   2. The buyer has chosen the goods and the characteristics of the goods being colour, grain, appearance are intended to form part of the description by which they are sold.

   3. This was not a supply of future goods or generic goods or unascertained goods.

   4. After installation the goods changed colour; the identity was lost.

   5. The colour identity and characteristic identity was fundamental to the supply.

   6. The loss of identity was caused through the ordinary circumstances of use. It was natural light which caused the colour change.

   7. The loss of identity is a breach of contract."

4. The claimant's concern was that, although the adjudicator found that the colour change was due to natural light, he had also found that this constituted a breach of contract on their part. Although I am told that the particular terms of the contract of which it was said the claimant was in breach were argued about in detail in the adjudication, the adjudicator makes no reference to them. Furthermore, despite a subsequent request by the claimant, the defendant's new contract administrator also refused to identify the terms of the contract with which it was said the claimant had failed to comply.

5. Thus, in those circumstances, the claimant issued Part 8 proceedings. In those proceedings the claimant seeks a declaration that:

   "Any natural fading of the American Black Walnut veneer supplied and installed by the claimant does not constitute or give rise to a breach of contract by the claimant."

   This morning is the hearing of the claimant's claim for that declaration, pursuant to CPR Part 8.

6. The defendant's first contention is that the Part 8 application should not be entertained because it is effectively an appeal from the adjudicator. As discussed with Mr. Sears QC during argument, I do not accept that submission. It seems to me that, although the adjudicator has reached a decision, and that decision is temporarily binding on the parties, it is thereafter open to either party to come to court for a final decision on the point considered by the adjudicator. That is what the claimant has done by these proceedings.

7. Subject to the nature and scope of the point in issue, and the amount of evidence or argument required to deal with it, the TCC endeavours to deal promptly with any dispute arising out of an adjudicator's decision. In that respect Mr. Lofthouse QC rightly drew my attention to the decision of His Honour Judge Humphrey Lloyd QC in ***Jarvis Facilities Limited v. Alstom Signalling Limited*** [2004] EWHC 1285 (TCC). That is the attraction of Part 8: it offers the means by which a dispute can be finally determined in a speedy and cost-effective way. But, of course, it is always necessary for a claimant who wants to avail himself of the possible short-cut of Part 8 to be able to demonstrate that the dispute in question fall within its relatively tight confines. That is the point to which I now turn.

8. The defendant maintains that this action is not suitable for determination under the Part 8 procedure and ought to continue as a Part 7 claim. In the helpful statement of Victoria Russell, the defendant's solicitor, at paragraph 6 she sets out what she describes as the significant disputes of fact which arise in this case. They include:

   (a) The circumstances in which the selection of the ABW wood veneer was made;

   (b) Whether the wood actually supplied was in fact wood from the log allegedly selected and/or whether it was the same quality as and in conformity with the sample as to all of its essential characteristics;

   (c) The type of finish used on the ABW wood veneer and whether or not it was suitable;

   (d) The nature and extent of the discolouration over a short period of time;

   (e) What is the cause of the discolouration;

   (f) Whether the discolouration from dark brown to orange should have been expected or was abnormal;

   (g) Whether in the circumstances, which are to be established as a matter of fact, the claimant was in breach of contract.

   Clearly, to the extent that these factual matters arise out of the claimant's claim for the declaration, then this dispute is not suitable for CPR Part 8.

9. On behalf of the claimant, Mr. Lofthouse QC says that none of these matters of fact arise for determination. He says that the claimant's claim for a declaration in these proceedings is the essence of simplicity. The adjudicator has found that the fading was the result of natural light. On that basis he says that the only remaining question is: how can the claimant be in breach of contract in consequence? He says that his position is strengthened by the fact that, since the adjudication, nobody has identified the terms with which it is said the claimant has failed to comply.

10. However, on that important aspect of the case, the position has changed significantly following the provision of the skeleton argument by Mr. Sears QC and Mr. Hickey. That skeleton argument carefully sets out a list of terms of the contract with which it is said the claimant failed to comply. It also sets out in outline the points that arise in respect of each of those alleged breaches.

11. When I considered that skeleton argument prior to the hearing, it became apparent to me that the defendant's case as to breach was *not* based on the adjudicator's conclusion that the only cause of the fading was natural light. That was a point which I put to Mr. Sears QC at the outset of the hearing this morning, and he confirmed that the defendant's case is that the cause of the fading was not, or was certainly not limited to, the occurrence of natural light and that, importantly, the defendant maintained that there were inherent deficiencies in the ABW veneer supplied by the claimant.

12. As a result of these early exchanges, I concluded that the parties were not in fact as far apart as the papers might have suggested. For his part Mr. Lofthouse QC accepts that there may well be arguments as to the existence of such inherent deficiencies in the ABW, and that those are not suitable or appropriate for Part 8 determination, although he says that they are outside his narrow Part 8 claim. He maintains, on behalf of the claimant, that all he seeks is a declaration that takes out of account what he described as the 'res ipsa loquitur' point; in other words, that the mere fact that the ABW faded could not, of itself, constitute a breach of contract. For his part, Mr. Sears QC accepts that, for the defendant to establish a liability on the part of the claimant, a breach of contract must be shown.

13. Accordingly it seems to me that I ought to record that uncontroversial summary of the position by way of a declaration which would be in these terms:

"For the claimant to be liable for the fading of the American Black Walnut there must be a breach of an express or implied term of the contract on the part of the claimant. The fading of the ABW cannot, in the absence of an identifiable breach, give rise to a liability on the part of the claimant."

14. I accept that it might be said that such a declaration was self-evident. However, in the light of the nature of the disputes that have existed in this case in the past, it seems to me that it might be helpful to grant such a declaration. It will, I think, be important to ensure, to paraphrase Mr. Lofthouse's QC expression, that the effect 'tail' does not wag the breach 'dog'.

15. As to the declaration sought by the claimant, which I have set out in paragraph 5 above, I consider that, as drafted, it is too wide. Mr. Sears QC submitted that it might give rise to all kinds of difficulties and might indeed cut across a number of the arguments that he set out in his skeleton argument. I accept that submission. The essential difficulty with it is that it presupposes that the fading is natural, and that it was only caused by something (natural light) which is not now a part of the defendant's case. The actual cause of the fading is not something which I can decide this morning.

16. During the course of submissions I postulated another declaration which it seemed to me might meet a point at issue between the parties. That was in these terms:

"If the only cause of the fading was natural light (as found by the adjudicator) then such condition, on its own, could not render the claimant in breach of contract."

Mr. Lofthouse QC was content with that wording, but for two specific reasons that he set out in his oral submissions Mr. Sears QC was not. I therefore turn to deal with those two specific matters.

17. First, he relied upon clause 300(a) of the NBS specification for purpose-made joinery. That clause was dealing with material samples. It obliged the claimant to provide such samples. It went on to stipulate:

"Such samples are to be sufficient in number, size and nature to indicate an acceptable range of natural characteristic (refer also to clause 302(a)) and be delivered to the architect for approval in good time and prior to the submission of any samples of finished work required by clause 410a."

18. Mr. Sears QC submitted that the defendant's case was that the claimant was in breach of that term of the contract, because it failed to provide samples that demonstrated that one of the natural characteristics of the ABW was that it faded over time. It is plain that such an alleged breach is arguable, and it cannot be determined in these Part 8 proceedings.

19. However, I am not persuaded that it cuts across the declaration that I have outlined in paragraph 16 above. The argument depends on a comparison between the samples that were provided to the defendant, and the samples that should have been provided. In those circumstances, it seems to me that the *actual* fading of the ABW is nothing to the point. If, however, the natural fading is relevant, it could only be relevant as part of the background, to demonstrate the difference between the samples that should have been given and the samples that were given. In other words, the actual fading itself is not relevant to the alleged breach.

20. Secondly, Mr. Sears QC submitted by reference to the **Supply of Goods and Services Act 1982** that the ABW actually supplied was not what the defendant had chosen, so that there was a breach of the term dealing with sale by description. It is apparent that this was the basis of the adjudicator's decision. Again, it seems to me that that argument is plainly open to the defendant; again, it is not capable of being dealt with by way of these Part 8 proceedings this morning. I should add that, if I had had to consider them under CPR Part 24, I would have concluded that both this, and the preceding argument, were matters upon which the defendant had a realistic prospect of success.

21. Again, therefore, I have to consider whether that second argument is affected by the declaration that I have formulated. It seems to me that the argument would require a comparison between the description of the ABW as supplied, and the actual ABW delivered. Again, therefore, whilst that may involve a consideration of the degree to which the ABW has faded, that would again be as part of the background factual material relevant to the breach. The argument about description would be unaffected by my proposed declaration, which merely highlights the point that the mere fact of fading cannot, on its own, constitute a breach of contract. That, of course, leaves it open to the defendant to argue the description point by reference to the implied term and the comparison between what was described and what was provided.

22. The question was also raised as to the purpose of granting the declarations, particularly given that the declarations that I have identified are of much narrower compass than the declaration originally sought. It is always a difficult question for the judge to decide whether or not what he is minded to do is ultimately going to be of any assistance to the parties. All I can say, having looked at the papers, is that it seems to me, potentially at any rate, that the granting of these declarations may be of some assistance to the parties in setting out more clearly the parameters of the dispute between them. I also consider that one of the benefits of these Part 8 proceedings is that it has led to a very clear and cogent case advanced by the defendant as to the alleged breaches of contract on the part of the claimant, in circumstances where no such case (certainly not one in this form) had previously been identified. Accordingly, it seems to me that, in response to the rhetorical question ('Is there any point in granting the declarations identified?'), the answer is Yes.

23. Therefore, for those reasons, I grant the two declarations that I have identified above. I make it plain that the granting of those declarations has no effect upon the defendant's ability to raise and argue any of the points identified in the skeleton argument produced by Mr. Sears QC and Mr. Hickey. I am also content that, in all the circumstances, the declarations may have some utility and should, therefore, be ordered.

24. Of course, whether or not they have in fact any utility will depend on future events. I understand that this decision leaves open a number of issues between the parties as to the ABW veneer. There is also a suggestion in the papers that there may be other issues between the parties. They will therefore need to consider how they want to deal with those matters and that will be a matter for them. I would not wish to make directions in any ongoing Part 7 claim unless and until the parties were sure that that is what they wanted me to do.

25. The other point that arises out of my view that the utility or otherwise of these declarations can only be demonstrated by reference to future events, touches on the question of costs. I have not heard the parties on costs and will therefore listen carefully to what they say, but in all the circumstances of this case I would be minded, at least at this stage, to order that the costs should be reserved so that they can abide the event. My preliminary view is that that would be the right order to make in all the circumstances.

MR. SIMON LOFTHOUSE QC (instructed by Reynolds Porter Chamberlain LLP) for the Claimant
MR. DAVID SEARS QC and MR. ALEXANDER HICKEY (instructed by Fenwick Elliott) for the Defendant