## The Role of the TCC in Construction Cases.

The Honourable Mr Justice Jackson, in **Machenair Ltd v Gill & Wilkinson Ltd** [2005] EWHC 445 made the following observations about the conduct of litigation in the Technology and Construction Court.

56. *"The case which I am currently dealing with is typical of many which come before the Technology and Construction Court ("the TCC"). Two perfectly reputable companies have been unable to reach agreement on the final account between them and on certain contra charges at the end of a construction project. There are of course many forms of dispute resolution available to contractors and sub-contractors in that situation. The options include mediation, arbitration, adjudication and litigation. Each of these procedures has its place, and each has its own particular advantages. In the case of litigation the advantages are that the decision is binding rather than persuasive, and the avenues of appeal are limited. In short, litigation has the advantage of finality. A further advantage of litigation is that there is a specialist court, namely the TCC, which is available to manage and try all actions concerning the construction industry. The chief disadvantage of litigation is the level of costs which will be run up if the parties and their lawyers do not exercise the utmost vigilance.*

57. *With this in mind I wish to make three observations arising from the present case:*
    - *(1) Costs would have been reduced if at an early stage the device of a Scott Schedule had been used to set out the parties' contentions in respect of variations. This should either have been proposed by the parties or, alternatively, ordered by the court as a matter of case management. Furthermore, the existence of a Scott Schedule would have made my task easier at trial.*
    - *(2) Much relevant evidence was omitted from the witness statements - in particular, that of Mr. Friend. The consequence was prolonged oral examination-in-chief. If I had not imposed a guillotine on the length of evidence-in-chief, this trial would have overrun its estimate, thus generating substantial further costs.*
    - *(3) The purpose of cross-examining witnesses is not to elicit their opinions about points of law or about the nature of the legal obligations imposed on the parties, nor is it the purpose of cross-examination to obtain a witness's general comments on the merits of the case. The purpose of cross-examination is to elicit factual or expert evidence which is within the witness's personal knowledge or expertise, and which is relevant to the issues before the court. In a case like the present, where the volume of fact is almost infinite, both restraint by counsel and occasional intervention by the court are necessary in order to confine the trial to its proper length.*

58. *I hope that none of my observations in this case are taken as personal criticism. They are certainly not intended as such. Both counsel responded constructively and with good humour to my efforts to confine this trial to its proper length. What I say in this part of the judgment is intended to give guidance for future cases.*

59. *There is one other point which I should make about cases like this. Once the trial starts, the parties have already incurred substantial costs. It is to be presumed that sensible attempts to settle have been made and have failed. What the parties want at this stage, and what the parties are entitled to, is the decision of the court. It is not generally a wise use of time or resources during the trial to send the parties out into the corridor to negotiate on the basis of some judicial indication of view.*

60. *Next may I say something about the TCC in Leeds. The Court Centre in Leeds designates three fortnights in the year for shorter TCC cases. During these fortnights TCC cases are listed back to back. Indeed, I shall be starting the next TCC trial later this morning. It not only saves costs, but also assists other litigants, if TCC trials can be confined to their estimated lengths. Furthermore, both the parties, the witnesses and counsel plan their diaries on the basis of the trial dates and estimates of length which have been given. The longer TCC cases in Leeds may be heard at other times of the year. These cases are assigned special fixtures.*

61. *The construction sector is a major contributor to this country's economy. It produces about 10 per cent of the gross domestic product. The TCC is the specialist court of the construction industry. The TCC provides an essential service to the industry in resolving its disputes. Very many of those disputes are like the present case. The sums in issue are modest in comparison with the potential costs. Both the court and the profession must be constantly examining the procedures which we use, in order to achieve justice in construction litigation at a proportionate cost. This is in accordance with the overriding objective contained in Part 1 of the Civil Procedure Rules. These observations are just as true in Leeds as they are in London. Leeds is a major financial and commercial centre, with a flourishing construction industry."*

The underlying factors in both this case and **Burchell v Bullard**, discussed below, concern the disproportionate costs involved in dispute resolution and the attitude of the parties. However, the approach of Mr Justice Jackson could not be more different from that of Ward LJ and Rix LJ.

The dispute concerned a mainly labour only sub-sub-contract with a small portion of supply and fix at the Macaulay Hall refit for Leeds Metropolitan University. In dispute were whose terms applied, whether an extension of time was due or alternatively there was late completions, the valuation of variations and items of counterclaim for alleged defects/damage. The claimant substantially prevailed in his claims and one of four heads of counterclaim was granted. There is nothing remarkable in all of that.

The significance of the case thus lies in the comments of the judge on the conduct of the litigation by the parties. He observed at the outset that the parties had attempted but failed to negotiate a compromise. The court assumes that all reasonable steps were taken, yet whilst mentioning the existence of mediation, there is little reflection on the fact that the defendant was really pushing out the boat on the bulk of the counterclaims, which failed on the basis of absence of causation yet absorbed most of the trial time. The nub of the main issue lay in whether or not A or B's terms applied, a short sharp issue to determine.

Rather the judge concentrated on the absence of a Scott Schedule, missing evidence and experts straying into the territory of legal opinion – typical trial problems as his central remit whilst commending the court as the most appropriate forum for the determination of construction disputes. It is not clear why this is preferable to ADR or indeed to adjudication or arbitration, unless one accepts that judges are of a higher calibre than adjudicators and arbitrators.

Whilst there is some level of dissatisfaction with the quality of adjudicators, it would be wrong to assume that judges are always superior. Most adjudication enforcement actions successfully survive resistance on the grounds of judicial review and breach of due process. A number of first instance judgements have been recently overturned by the Court of Appeal. Clearly, it is desirable that everything possible is done to ensure the highest standards amongst arbitrators and adjudicators, particularly to avoid judicial criticism However, the suggestion that they do not have a valuable contribution to make to the settlement of construction disputes is one that should be stoutly resisted.

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