

# The need for restraint

Guest editor **Vijay Bange** of **Trowers & Hamblins** argues that a recent Technology and Construction Court case opens up the possibility of a new attack for those intent on disrupting an adjudication process. In trying to support adjudication the court may have opened the door to parties seeking to avoid the process altogether.

**T**he courts have a wide power to stay litigation on the basis that a party is acting unreasonably, oppressively or in a vexatious manner. Adjudications though have often been seen as something of a 'wild west' in terms of the behaviour of the parties. True, the normal rules of natural justice apply but the courts have accepted that the procedure is somewhat rough and ready. A recent case in the Technology and Construction Court (TCC), however, has shown that the courts are willing to intervene in certain circumstances. It remains to be seen whether this is a potential new avenue for disrupting the adjudication process or whether the outcome was the result of the unusual facts.

## The facts

In *Mentmore Towers and others v Packman* [2010] EWHC 457 (TCC), the three claimants (Mentmore) were property developers based in Jersey. They employed the defendant (Packman) as engineers on various projects in London, which were all suspended in 2007 due to planning difficulties.

Packman had run up outstanding fees of over £400,000 and when these were not paid, they commenced a series of adjudications against Mentmore. They were successful in these; the adjudicator accepted that Mentmore had failed to serve the relevant withholding notices and could not now challenge the amount due to Packman. Packman might have thought that this would be the end of the matter; there are, after all, hundreds of decisions in the TCC in which the courts have paid short shrift to any suggestion that an adjudicator's decision could simply be ignored. Provided the adjudicator has been validly appointed, has given his decision in time and reached it impartially, the decision will be binding on the parties.

Mentmore, though, refused to pay. Packman issued enforcement proceedings and was successful. The court ordered the claimants to pay up, but still Mentmore refused. Packman, no doubt somewhat exasperated by this point, was left with little option but to apply for charging orders over Mentmore's property. However, before this application could be heard by the court, Mentmore issued their own proceedings seeking declarations of the amounts due to Packman.

## The ruling

Packman applied for a stay of these proceedings, on the grounds that they were unreasonable and oppressive in circumstances where Mentmore had failed to honour the adjudicator's decisions and the court judgment enforcing them. Mr Justice Akenhead agreed and stayed the action. In summary, his decision was based upon the following grounds:

- Mentmore were simply ignoring their contractual and statutory requirements to pay the interim decision of the adjudicator;
- they were gaining a commercial advantage over Packman which the 'pay now, argue later' approach inherent under the *Housing Grants, Construction and Regeneration Act 1996* (HGCRA 1996) did not permit;
- Mentmore knew that Packman would not be insured with regard to fee recovery claims;
- Mentmore were acting in bad faith in putting forward claims in respect of which they had no knowledge.

The decision of the court was, in short, unequivocal. Mentmore, however, were not done yet. This time they issued three notices of adjudication pursuing their

claims against Packman. Packman, in response, issued another application for a stay; this time in respect of the adjudications.

**The points of principle**

There were two key points of principle before the court:

- (i) did the court have the power to grant an injunction restraining a party from pursuing a referral to adjudication; and
- (ii) if so, what test should the court apply in deciding whether to grant the injunction?

The first question was not, in the event, contested by Mentmore who accepted that the court did have jurisdiction but argued that this should be exercised sparingly. Such an argument is not, perhaps, without basis. After all, the *HGCRA 1996* states that a party to an adjudication can adjudicate at *any time*, and there are numerous decisions in the TCC which demonstrate that the court will not prevent a party from commencing an adjudication just because there is a related claim in the courts. The judge, however, found:

*'I can see no reason why a referral to adjudication that is unreasonable or oppressive should not be restrained by the application of the same principles that would apply to an application made on similar grounds ... by way of litigation.'*

In short, the court was entitled to adopt the same considerations as had Mr Justice Akenhead when considering the same questions in respect of the litigation. The court did accept that, in principle at least, the fact that a claim was being pursued by way of adjudication, rather than by litigation, was a relevant factor as to whether or not behaviour was unreasonable or oppressive. However, the judge said that this argument might also work against Mentmore and gave the example that, since a party will usually be unable to recover its

costs of an adjudication, the unreasonable pursuit of a claim by way of adjudication might be more oppressive than litigation.

On the one hand, this decision might be seen as contrary to the principle that a party can adjudicate 'at any time'. The judge dismissed this suggestion on the basis that 'litigation is no different'; anyone can bring litigation proceedings at any time, provided they did not do so vexatiously in which case the court could intervene and restrain that party. Adjudication is no different.

Yet, one cannot help wonder whether this might offer some encouragement to parties to seek to prevent adjudications by way of court action in circumstances where that party considers an opponent's case has little prospect of success. This is particularly so if, as the judge suggested, the inability of a party to recover its costs in a successful adjudication is relevant to the question of whether the other party's behaviour is oppressive. If a party has commenced an adjudication which, in the opinion of his opponent, he has little chance of winning, then it might be tempting to seek an injunction to stop the whole lot.

Of course, it should be kept in mind that this case was decided on very particular facts. Packman had already gone through the adjudication process but had not received a penny from Mentmore pursuant to the adjudicator's decisions and despite the court order enforcing the decisions. The court was simply not prepared to allow Mentmore to circumvent the adjudication process by issuing new adjudication proceedings.

**Opening the door?**

It remains to be seen whether, in seeking to protect the principle that adjudicators' decisions should be enforced, the court has opened the door to parties seeking to avoid the process altogether. However, although the judgment might be seen as contrary to the principle that a party can adjudicate 'at any time', as a matter of policy the courts are unlikely to intervene except in the most extreme cases. **CL**



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