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# Adjudication Update No.1 of 2022

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# Today's Agenda

- Hybrid contracts: pitfalls when adjudicating
- Adjudication and abuse of process
- Case law update

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# Hybrid Contracts: pitfalls when adjudicating



# Recap: “construction operations” under the Act



- Section 105(1): big *inclusive* list of things that are construction operations
- Section 105(2): *exclusive* list of things that are not construction operations:
  - (2) The following operations are not construction operations within the meaning of this Part—
    - (a) drilling for, or extraction of, oil or natural gas;
    - (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
    - (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—
      - (i) nuclear processing, power generation, or water or effluent treatment, or
      - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
    - (d) manufacture or delivery to site of—
      - (i) building or engineering components or equipment,
      - (ii) materials, plant or machinery, or
      - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;
    - (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.



# Ove Arup & Partners v Coleman Bennett [2019] EWHC 413 (TCC)

- Good example of “construction operations” being interpreted broadly
- This case concerned engineering work that went no further than a broad feasibility study for a transport project
- Held to be within the Act and subject to the Act’s payment and adjudication regime



# Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture

- Ramsay J:
  - A decision covering construction and non-construction operations is unenforceable (unless the objectionable part can be severed)
  - In a hybrid contract, the default payment provisions in the Act apply only to the portion of the contract relating to “construction operations”

# Severfield (UK) v Duro Fleguera UK Ltd [2015] EWHJC 2975 (TCC)

- Severfield successfully adjudicates in relation to a payment application for works on power plants.
- The contract is a hybrid contract
- Adjudicator only has jurisdiction over “*construction operations*”
- TCC refuses to enforce the Adjudicator’s decision on the basis that parts of the claim fall outside the definition of construction operations.

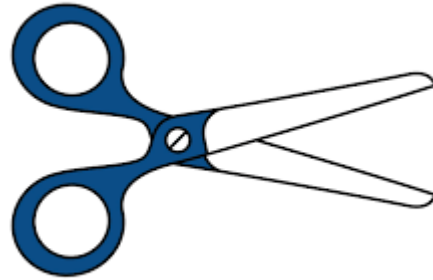




# Severfield (UK) v Duro Fleguera UK Ltd [2015] EWHJC 3352 (TCC)

- Severfield has another go at enforcement:
  - Yes this is a hybrid contract
  - But we have now made a new application, dealing only with construction operations, and we want summary judgment on that claim.
- TCC: not so fast.





- Severance often not possible (see Cleveland Bridge and Severfield)
- So where an adjudicator's jurisdiction is limited to "construction operations" take care to:
  - Split construction operations and non-construction operations in payment applications; and,
  - Be clear in the notice of adjudication that only construction operations are referred; and,
  - If there is doubt about any particular element of the claim, keep it ringfenced so that it can be severed later if necessary
  - Specifically invite the Adjudicator to make decisions in the alternative where there is doubt about scope of jurisdiction

## Parsons Plastics v Purac Limited [2002] EWCA Civ 459

- Court of Appeal considers rights of set-off against an adjudicator's decision
- Here: a clear contractual right of set-off, and an adjudication award that was *not* subject to the Act (i.e. purely contractual procedure)
- Court of Appeal says that the unsuccessful party *can* set off other claims they may have against the sum due on an adjudication award

## MI Electrical Solutions Limited v Elements (Europe) Limited [2018] EWHC 1472 (TCC)

- Last in a series of cases which limit the scope of Parsons Plastics.
- Clauses which purport to allow a set off against an adjudicator's decision are contrary to the policy of the Act and “*entirely unenforceable*”
- Parsons Plastics is good law *only* in relation to adjudicator's decisions not subject to the Act



## Parsons Plastics and hybrid contracts

- What about an adjudicator's decision under a hybrid contract, dealing with construction and non-construction operations?
- Enforceable subject to rights of set-off, or rights of set-off excluded?

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# Adjudication and abuse of process



# Adjudication and abuse of process



- A concept in adjudication?
- Parties have tried to resist enforcement on grounds of an “abuse of process” but it has failed:
  - *Connex South Eastern Ltd v MJ Building Services Group Plc* [2005] EWCA Civ 193
  - *Emcor Drake & Skull Ltd v Costain Construction Ltd* [2004] EWHC 2439 (TCC)
  - *Lanes Group PLC v Galliford Try Infrastructure Ltd* [2011] EWHC 1679 (TCC)

# *G&D Brickwork Contractors Ltd v Marbank Construction Limited* [2021] EWCH 3009 (TCC)

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- G&D - brickwork sub-contractor.
- Marbank - main contractor.
- G&D subcontract to carry out labour only brickwork and associated works at a property on Uxbridge Road in West London.
- The enforcement hearing concerned an adjudication commenced by G&D against Marbank seeking payment of an unpaid sum of £36k.



# G&D v Marbank: Procedural History



- June 2017 – G&D issue Part 8 claim seeking £100k
- November 2017 – should have been Part 7. G&D are struck out. **STRIKE ONE!**
- January 2018 – G&D successfully apply to restore claim but fail to serve amended Particulars of Claim on time in accordance with unless Order. **STRIKE TWO!**
- February 2018 – G&D obtain relief from sanctions, parties agree to give G&D another chance. Claim stayed until October 2018 for ADR.
- December 2018 – proceedings listed for a CMC but then left in unexplained abeyance until August 2019. Further CMC listed for January 2020.
- February 2020 – witness statements exchanged, then claim stayed again for ADR until May 2020. Parties ordered to seek further directions by 21 June 2020 and in default the claim would be struck out.
- July 2020 – G&D fail to seek any further directions from the Court, the claim was struck out. Relief from sanctions application unsuccessful. **STRIKE THREE!**



- June 2021 – G&D commenced four adjudications in respect of four different projects, inc. Uxbridge Road.
- Marbank applied for an injunction to restrain the adjudications – unsuccessful.
- The adjudications went ahead and on the Uxbridge Road adjudication, G&D was awarded £36k.
- Marbank defended the enforcement proceedings on the basis that the proceedings themselves were an abuse of process and should be struck out pursuant to CPR r. 3.4 (2) (b).

# G&D v Marbank: Abuse of process



- CPR r. 3.4 (2)(b): “*The court may strike out a statement of case if it appears to the court...that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings.*”
- *Davies v Carillion* [2018] 1 WLR 1734 – if first action struck out for reason other than abuse, must consider the circs, conduct must be inexcusable.
- *Arbuthnot Latham Bank Limited v Trafalgar Holdings Limited* [1998] 1 WLR 1426 – take into account use of Court’s resources.
- *Cranway v Playtech* [2008] – the stage in proceedings at which the action struck out important.

# *G&D v Marbank*: Judgment



- The questions for the Court were:
  1. Was it an abuse of process for G&D to litigate the same issues raised in the county court proceedings?
  2. If yes, is there any special reason why the Court should not exercise its discretion to strike out the second action?

# G&D v Marbank: Judgment



- Answer to Question 1: YES.
  1. Strike out in June 2020 imposed as a result of a number of defaults by G&D.
  2. The claim had been struck out twice before.
  3. The relief from sanctions application in June 2020 failed.
  4. The *Denton* criteria therefore applied.
  5. G&D's former solicitors' negligence did not matter.

# G&D v Marbank: Judgment



- Answer to Question 2: YES.
- 1. Contrast with *Cranway*, G&D were struck out 3 years after issue of proceedings.
- 2. The Court accepted there would be a windfall to Marbank but:
  - *“G&D should not be able to put itself in a better position than it would have been in if it had sought to bring a second set of proceedings in court simply by resorting to a procedure that would not be open to the majority of litigants.*
  - *If its second bite of the cherry had been by way of litigation it would not have been able to rely on the fact that its claim had already been determined, and I do not see why the fact that it has been able to take advantage of the Scheme under the 1996 Act should put it in a better position than the average litigant. Put another way, I do not see why enforcement proceedings following an adjudication should be subject to more sympathetic treatment than would have been the case in a second action before the court.”*

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# Recent cases





# Cubex (UK) Ltd v Balfour Beatty Group [2021] EWHC 3445 (TCC)

- Cubex is contracted to design and manufacture doors for use in a construction project
- Balfour Beatty resists enforcement of an adjudication award on the basis that the contract is not for construction operations:
  - Design work is included in principle in the Act
  - But only design work “*in relation to construction operations*”
  - And the manufacture and supply of building components is expressly excluded by section 105(2)(d)

# Bilton & Johnson v Three Rivers [2022] EWHC 53 (TCC)

- D resists enforcement on basis of natural justice
- Adjudicator reaches a decision on formation of contract which is not what either party argue for:
  - No breach of natural justice: each party put in submissions on this issue, and the Adjudicator reached a decision “*derived from*” those submissions, although it did not adopt either party’s case in full
- Adjudicator failed to consider an issue on rectification:
  - No breach: “*this complaint proceeds from the unpromising starting point that the Adjudicator’s decision contains a section entitled “Rectification” which spans 21 paragraphs and more than four pages in total*”



# John Graham Construction v Tecnicas Reunidas [2022] EWHC 155 (TCC)

- Adjudication 1: scope of works limited as C argues, meaning that C refuses to complete certain work and leaves site
- Arbitration 1: Adjudication 1 was wrong. C's scope of work is broader. C has to complete the remaining work
- Adjudication 4: what is the true value of a particular payment application?

# John Graham Construction v Tecnicas Reunidas [2022] EWHC 155 (TCC)

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- In Adjudication 4, D claims a contra charge based on the cost of completing the works not done by C
- C says: we were acting in compliance with the decision in Adjudication 1, which was temporarily binding at the time we left site
- D says: no, the true state of affairs is *and always* was as it was found to be in Arbitration 1.

# John Graham Construction v Tecnicas Reunidas [2022] EWHC 155 (TCC)

- Adjudicator finds:
  - *“The First Partial Award, although reversing the Decision in Adjudication no 1, cannot, as a matter of fact, have a retrospective effect on the lawfulness of the subsequent actions of the Parties, because the Parties were obliged to give effect - albeit temporarily - to that Decision. Neither should be penalised for doing so.”*

# John Graham Construction v Tecnicas Reunidas [2022] EWHC 155 (TCC)

- In Court, D says that the effect of the Adjudicator’s decision was to “*undermine*” the award in Arbitration 1.
- Court decides this by looking at what was actually decided in Arbitration 1:
  - It was a dispute as to the terms of a contract, and a decision was made as to C’s scope of work
  - There was no decision on the financial consequences of the decision on scope
  - Decision in Adjudication 1 expressly did not challenge Arbitration 1 on scope: adjudicator decided *what he thought the effect* of that award was

# *BraveJoin Company Limited v Prosperity Moseley Street Limited* [2021] EWHC 3598 (TCC)

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- BraveJoin initially engaged to carry out steelwork and cladding works at site in Moseley Street in Birmingham by company that went into liquidation.
- BraveJoin alleged it was then engaged by PMSL.
- BraveJoin issued invoices to Mr Hay who was working for Prosperity Developments.
- Mr Hay issued payment certs and pay less notices signed “*for and on behalf of PMSL*”.
- BraveJoin referred unpaid invoices to adjudication and was successful.
- At enforcement stage, PMSL alleged no contract between it and Bravejoin and therefore no dispute.



# *BraveJoin Company Limited v Prosperity Moseley Street Limited* [2021] EWHC 3598 (TCC)

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- No dispute – the law:
  - *Collins v Baltic Quay Management Ltd* [2004] EWCA Civ 1757
  - *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC)
  - *Ringway Infrastructure Ltd v Vauxhall Motors Ltd* [2007] EWHC 2421 (TCC)
  - *CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd* [2015] EWHC 667 (TCC)
    - The word “dispute” is to be read literally and should be given no special meaning.
    - A dispute does not arise until it emerges the claim is not admitted. The claim may be an assertion of a right and the parties’ simple compliance with the contractual provisions may give rise to a crystallised dispute.
    - There may be an express rejection of the claim, discussions from which it can be inferred the claim is not admitted or the respondent may remain silent for a period of time.
    - The period of time for which a respondent may remain silent before a dispute is to be inferred depends on the facts and the contract.
    - If claim is well known and obviously controversial, a very short period may suffice.

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*BraveJoin Company Limited v Prosperity Moseley Street Limited* [2021] EWHC 3598 (TCC)

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- Was there a crystallised dispute?
- Answer: YES.
  - Clearly a contract between BraveJoin and PMSL.
  - The invoices referred to PMSL and the payment notices were served on behalf of PMSL.
  - PMSL's solicitors' letter denying liability confirmed there was a crystallised dispute.

# *RHP Merchants and Construction Limited v Treforest Property Company Limited* (unreported) 22 October 2021 (TCC)

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- Treforest engaged RHP in connection with development of 62 residential units in Newport.
- Adjudication 1 – RHP referred its final account. It was ordered to pay Treforest £260k.
- Adjudication 1 decision then enforced by Treforest, RHP refused to pay.
- Adjudication 2 then commenced by RHP referring a breach of contract claim in relation to defects. Treforest ordered to pay RHP £220k. Jurisdiction?
- RHP still not happy – commenced Part 7 proceedings seeking a final determination of the sum due to it.
- Treforest applied for a stay of the Part 7 proceedings and strike out on basis RHP had not yet paid the enforced Adjudication 1 award.

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# *RHP Merchants and Construction Limited v Treforest Property Company Limited* (unreported) 22 October 2021 (TCC)

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- Access to justice v. pay now, argue later
- *Anglo Swiss Holdings Ltd & Ors v Packman Lucas Ltd* [2009] EWHC 3212 (TCC):
  - The Court has the power and discretion to stay any proceedings if justice requires it.
  - In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and pursue proceedings.
  - The power is one that is to be used sparingly and in exceptional circumstances.
  - Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably.

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*RHP Merchants and Construction Limited v  
Treforest Property Company Limited*  
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- Decision: Court ordered that unless RHP pays the difference between Adjudication 1 and Adjudication 2 within 28 days, the Part 7 proceedings would be struck out, and a stay in the meantime.

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**Thank you!  
Questions?**

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