*Ian Pease reviews Jackson J's findings in* Multiplex Constructions *and looks at a recent case highlighting the problems of successive adjudications*

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# A fraught case reaches its final chapter

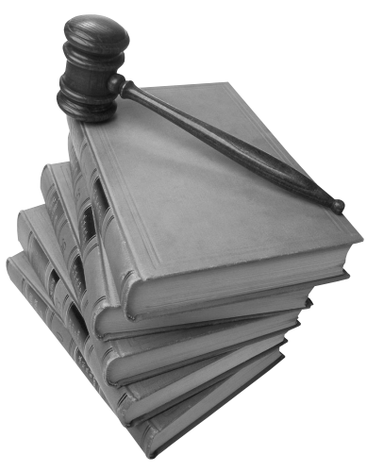
*Jackson J provides lessons for all*

Scroll back a few years and what did the construction industry look like. The best word would be 'fractious'. As an industry, construction ranked very highly on the scale for disputes. When I first qualified one was faced with long waits for trial in the Technology and Construction Court (TCC) simply because of the weight of traffic. That is no longer a problem.

Why the change? Undoubtedly there have been several factors, the advent of ADR and ENE that I wrote about last month has certainly been influential, as have the changes wrought by the CPR (pre-action protocols etc), but without doubt the main change was that which resulted from the Latham Report of 1994, namely the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). That Act is now under review, and in July the Department for Business, Enterprise & Regulatory Reform published for consultation a draft Construction Contracts Bill that was the subject of an article last month by Rupert Choat in issue 216 (22 September 2008, p16).

The supposition that bubbling under the industry's surface is a continuing rich stream of discord is highlighted by the recent TCC case of *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd & anr (No 6)* [2008]. Jackson J gave a weighty judgment with several interesting features, not least his comments on the role of the Court and the tactics of the parties.

Multiplex (M) had retained Cleveland Bridge (CB) as the steelwork sub-contractor for the construction of the Wembley stadium. The original contract comprised the design, fabrication, supply and erection of the steelwork but, as the judge put it, 'matters did not proceed smoothly and each party lost confidence in the other'. This resulted in agreed substantial reductions in the scope of CB's contract in February and July 2004. However, on 2 August 2004 CB wrote, terminating the contract. This termination was subsequently held by the Court to be a repudiatory breach of contract. After that, M employed a replacement sub-contractor to perform the remainder of the original scope of works. The present judgment deals with matters arising from the final account.



## A shot across the bows

Towards the end of his judgment, under the heading 'Lessons to be drawn from this litigation', Jackson J considers the 'normal and sensible' way of resolving major disputes, drawing a distinction between the role of the court in deciding 'questions of principle' and role of the parties to then 'sort out the financial consequences' so that they can 'get back to their real business'. He quoted from his June 2006 judgment:

> Both parties have had a measure of success on the preliminary issues. Neither

*Lusty v Finsbury Securites Ltd* (1991) 58 BLR 66

*Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd & anr (No 6)* [2008] All ER (D) 04 (Oct)

party has won an outright victory. With the assistance of this Court's decision on the ten preliminary issues, it may now be possible for both parties to arrive at an overall settlement of their disputes, either through negotiation or else with the help of a mediator, who is unconnected with this Court.

Clearly that did not happen and one senses from the judgment the judge's irritation with the parties that the case, the matters of principle having been settled in 2006, was back before him to determine quantum.

The judge thought that:

> A resolution broadly along the lines of this judgment could have been arrived at by the parties at fractional cost, if both parties had instructed their advisers to go through the accounts together in a constructive spirit.

*'A resolution broadly along the lines of this judgment could have been arrived at by the parties at fractional cost, if both parties had instructed their advisers to go through the accounts together in a constructive spirit.'*

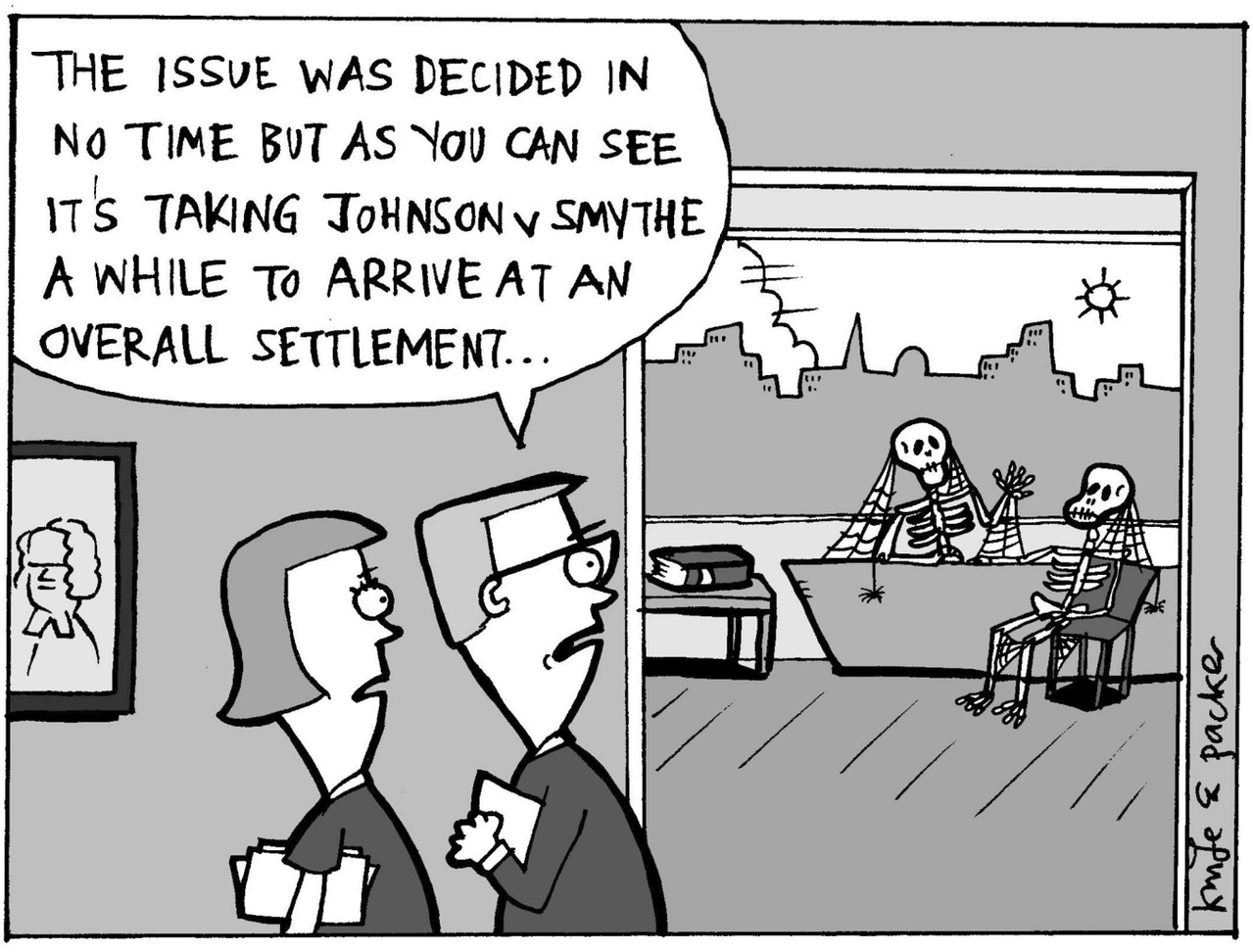
*Jackson J in* Multiplex Constructions

And at what cost:

> Since 5 June 2006 (when issues 1 to 10 were decided) the parties have run up costs of some £14m. These costs are in addition to pre-June 2006 costs of some £8m. That level of expenditure far exceeds the sums which (after stripping out the froth) are seriously in dispute between the parties. Furthermore, costs were only limited to that level by reason of the fact that (a) there was a 'chess clock' agreement to limit the length of the trial to three months, (b) counsel on both sides worked prodigiously hard to compress their oral presentation into that narrow period... The final result of this litigation is such that (when costs are taken into account) neither party has gained any significant financial benefit.

And he concluded with the Sword of Damacles:

> Over the last two years both parties have brushed aside repeated judicial observations on the wisdom of settling this particular litigation. Each party has thrown away golden opportunities to settle this litigation upon favourable terms. Those golden opportunities continued to arise during the run up to trial and even during the first month of trial. In the judgment on costs, which is about to be delivered, I shall consider the apportionment of responsibility as between the parties for the final unhappy outcome.



## When is an expert not an expert?

The other interesting matter that the judgment throws up is the question of expert evidence. CB called evidence from one of its engineers on the proposed erection methodology. As part of that testimony the engineer made various statements of opinion. Objection was made to this testimony on the basis that it was inadmissible expert opinion, for which permission had not been obtained under CPR Part 35, and inadmissible comment, speculation or argument.

Jackson J indicated that, as a starting point, the witness was a factual witness and that he had no experience or knowledge of the requirements for giving expert evidence, and that furthermore he was not independent of CB. However, he was a highly qualified and experienced engineer, who was involved for many months with the stadium and who was fully conversant with the construction methodology being used. The Court was willing to treat him as a factual witness who possessed considerable engineering expertise.

The nub of the question was whether the witness was confined to giving evidence of fact, without including his expert opinion on matters, or, alternatively, whether he could include statements of professional opinion bearing upon facts within his personal knowledge.

After citing *Lusty v Finsbury Securites Ltd* [1991], a case in which an architect suing for his fees gave evidence in that regard, and noting that professions giving opinion evidence in professional negligence cases was common, Jackson J concluded:

> 'As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts who are called pursuant to CPR 35. However, such evidence is usually valuable and it often leads to considerable saving of costs.
>
> Having regard to the guidance of the Court of Appeal and the established practice in TCC cases, I conclude that in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience.'

And finally he concluded in words that we should all, as practitioners, have in the front of our minds:

> Once this Court has decided questions of principle, the parties can save themselves and their shareholders many millions of pounds by instructing their advisers to agree reasonable figures for quantum, if necessary with the assistance of a mediator unconnected with the Court. If one party is not prepared to negotiate, then the other party can protect its position by making a timely and realistic offer under Part 36. The Court's decision on preliminary issues should be used by both parties as a basis for sensible discussion or at least as a basis for sensible assessment. It should not be used as a platform from which the victor on the preliminary issues launches new and ill-thought-out claims in order to transform its case on quantum. Finally, I wish to place firmly on record that what has happened in this case is in no way typical of litigation in the Technology and Construction Court.

# A case of déjà vu

## *Successive adjudications found 'substantially the same'*

The problem of successive adjudications is, in all likelihood, innate. The procedure is rapid and given that a party has not made good its claims the first time around it may feel that it should have a second bite at the cherry. That is the scenario that HHJ Kirkham QC faced in the TCC case of *Birmingham City Council v Paddison Construction* [2008].

*Birmingham City Council v Paddison Construction*
[2008] EWHC 2254 (TCC)
*Quietfield Ltd v Vascroft Construction Ltd*
[2007] BLR 67

In the first adjudication Paddison alleged that BCC was responsible for the delay in completion and sought, amongst other matters, a full extension of time and loss and/or expense. However, the adjudicator decided that he was not prepared to grant any further money relating to the contractor's loss and/or expense claim. Thereafter Paddison commenced a further adjudication again claiming loss and expense, but this time based it upon a successor report from its cost consultants. Crucially, however, the Court found that there was no real difference between the reports, the only distinction was the way in which head office and overhead recovery were calculated, with the back-up and supporting information and documents behind the reports remaining essentially the same for both adjudications.

Relying upon *Quietfield Ltd v Vascroft Construction Ltd* [2007], the Court was able to conclude that the present situation was in line with Dyson LJ's decision in that case, that:

> Where the only difference between disputes arising from the rejection of two successive applications for an extension of time is that the later application makes good shortcomings of the earlier application, an adjudicator will usually have little difficulty in deciding that the two disputes are substantially the same.

The second notice of adjudication was the same, or substantially the same, as the first dispute and as such the second adjudicator had no jurisdiction and had to resign, with any decision reached null and unenforceable. ■