# CONSTRUCTION LAW PERIODICAL

**Editorial Committee's Note**

*The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.*

*The next edition of the Construction Law Periodical is due for release in March 2021. Please contact a member of the editorial team if you would like to submit a case note or article for consideration.*

***John McDonagh SC***
***Deirdre Ní Fhloinn BL***
***Michael Judge BL***

## Broseley London Limited v Prime Asset Management Limited [2020] EWHC 944 [TCC 21 April 2020]

*Adjudication - application for enforcement - application for stay on judgement - principles to be applied.*

This matter concerned an application by the claimant ["BLL"] for summary judgement to enforce an adjudicator's decision for the sum of £485,000 approximately, and an application by the defendant ["PAML"] for a stay of execution on the judgement sum. The claimant's application was not opposed by the defendant. The dispute was entirely concerned with the defendant's application.

The relevant principles relating to applications for stays are usefully set out at paragraphs [21] to [26] of the judgement:

The principle case relating to the issue is *Wimbledon Construction v Vago* [2005] BLR 374 in which HHJ Coulson QC stated the following:

(i) Each case must turn on its own facts;

(ii) Adjudication is designed to be a quick and inexpensive method at arriving at a temporary result in a construction dispute;

(iii) Adjudicator's decisions are intended to be enforced summarily and the claimant should not generally be kept out of its money;

(iv) In an application to stay the execution of a summary judgement arising out of an adjudicator's decision the court must exercise its discretion with (ii) and (iii) firmly in mind;

(v) The probable inability of the claimant to repay the judgement sum (awarded by the adjudicator and enforced by way of summary judgement) at the end of the substantive trial, or arbitration hearing may constitute special circumstances rendering it appropriate to grant a stay;

(vi) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted;

(vii) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgement sum when it fell due, that would not usually justify the grant of a stay if; (a) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or (b) the claimant's financial position is due, either wholly, or in a significant part, to the defendants failure to pay those sums which were awarded by the adjudicator.

In *Grosvenor London Ltd v Aygun Aluminium* [2019] BLR 99 Coulson LJ stated that in addition to the above should be added that if the evidence demonstrates that there is a real risk that any judgement would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, this would also justify the grant of a stay.

The onus is on the defendant to adduce evidence of a very real risk of future non-payment [23], and where the arguments are finely balanced the court should lean in favour of enforcement of the judgement [26]. In addition failure by the defendant to pursue cross-claims or challenges with diligence may itself be a bar to a successful application for a stay. [28]

In this case the Deputy High Court Judge refused to grant a stay for a number of reasons which included that PAML had been extremely slow to show any signs of any real desire to grapple with the amount of the true value of the account with BLL since the adjudicator had made his award. This he viewed as a crucial factor. [35]

As regards the probable inability of BLL to repay the judgement sum at the end of the trial of the underlying issues between the parties, while PAML adduced two

reports from an accountant, which were countered by two statements from one of BLL's directors, the judge pointed out at [59] that the burden of proof was firmly on PAML to make out that ground. He accepted that the Covid-19 emergency measures might well have an impact on whether all of BLL's projects would continue or commence. This made the assessment of BLL's financial position more difficult, but he took the view that if PAML had moved diligently after the adjudicator's decision was handed down, and paid the award, it could have had a result by adjudication of its alleged entitlements before the Covid crisis blew up, and at a time when BLL had been able to repay. [66] to [69]

As regards the allegation that there was a real risk that any future judgement would go unsatisfied by reason of BLL organising its affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, he stated at [72] that this was a serious allegation, and referring to *Gosvenor v Aygun Aluminium* accepted that a high test is to be applied as to whether the evidence put forward reaches the standard necessary for the principle to apply. The judge took the view that PAML had failed to discharge the high onus of proof.

Accordingly judgement was granted to BLL and no stay was placed on it.

**John McDonagh SC**

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**Empyreal Energy Limited v Daylighting Power Ltd; Daylighting Power Ltd v Empyreal Energy Ltd [2020] EWHC 1971 [TCC 22 July 2020]**

*Expert determination - scope of the expert's authority - whether the dispute was within the jurisdiction of the expert conferred by the expert determination clause in the contract.*

Two sets of proceedings were issued arising out of a contract between Empyreal (EEL) as employer, and Daylighting (DPL) as contractor. The contract was for DPL to carry out the design, supply and installation of a solar park in Essex. EEL alleged that DPL's work was defective. Both parties issued proceedings against the other. The basic issue in both sets of proceedings was whether a Mr Sliwinski, acting as an agreed expert determiner, had jurisdiction to determine and order that DPL pay to EEL the sum of £1.7 million approximately in respect of the cost of remedying works which EEL asserted but DPL denied were defective.

In examining the approach of a court to provisions for expert determination Stuart-Smith J referred to two authorities at [8] and [9]. In *Homespace Ltd v Sita South East Ltd* [2008] the law on expert determination was summarised as follows: "*Each case depends on the contract under which the determination is made, both as to what it is the expert has to decide, and as to how far his decision is binding on the parties. In each case it is necessary to examine the determination, in order to see whether it lies within the scope of the expert's authority. If it does not, then it has no effect between the parties*".

In *Barclays Bank Plc v Nylon Capital LLP* [2011] the Court of Appeal in England stated that "The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it. It is a question of construction with no presumption either way".

At [10] the judge accepted that an expert may take into account and determine the factual matters that are necessary for their decision on the point or points referred to them, but it requires that close scrutiny take place to determine what point or points have been referred to the expert. The starting point will be to decide what question has been referred to the expert and then to decide what facts and matters that question requires the expert to consider and determine in order to decide the question. The terms of the agreement between the parties will define and circumscribe the scope of what may be referred to the expert for his decision and may do so in terms that preclude the expert from considering some matters that would otherwise be considered relevant to the question the expert is required to decide.

As regards dispute resolution in this case the contract provided that either party could refer any dispute or difference to adjudication where the 1996 [UK] Act applied. In this case it did not apply, and EEL would not consent to the dispute being dealt with by way of adjudication. There was also provision for mediation and expert determination. In relation to expert determination it provided that where the contract provided for a dispute to be referred to an expert the determination would be binding unless and until agreed by the parties or by final determination of the dispute by a court. The contract provided for expert determination in five separate circumstances.

EEL, as per the terms of the contract, applied to the Chartered Institute of Arbitrators for the appointment of an expert. The application identified three heads of dispute. DPL contested jurisdiction, and subsequently stated that it would not participate in the expert determination. The CIArb appointed Mr Sliwinski, and thereafter DPL submitted jurisdiction submissions, after which it took no further steps in the determination.

Mr Sliwinski decided that there was no clear case that he did not have jurisdiction, and reached his decision which EEL applied to court to enforce.

One of DPL's points of defence in the enforcement application was that the dispute between the parties concerned the cost of carrying out remedial works, not the amount of any reasonable reduction in the contract price. The court was told during the hearing that EEL had paid the contract price, with the result that this was a case about reimbursement rather than reduction of the contract price. Letters written by EEL's solicitors before the expert was appointed had confused reimbursement with the costs of repairing the allegedly defective works, and the application to the CIArb made no mention of the dispute being about a reimbursement of part of the contract price. [58] to [61]

Ultimately the judge held that despite the occasional use in the correspondence of the word reimbursement he considered that the overall effect of the language used by EEL was to advance a claim for the cost of repairs, and not a claim for an adjustment to the contract price in relation to which the notional cost of repairs was supporting evidence. As pointed out by the judge at [63] on an objective reading of the correspondence EEL was asking for reimbursement of the costs of cure, which was not the same thing as seeking reimbursement of part of the contract price.

He therefore concluded at [64] that the dispute that had been referred to the expert, and which he had decided, was a claim for the cost of the proposed remedial works that did not fall within the relevant clause in the contract, which referred to a reasonable reduction in the

contract price or where the contract price had already been paid a reimbursement of a part of the contract price to be paid by the contractor as a debt.
Accordingly the dispute which EEL purported to refer, and which the expert purported to decide, was not one which the contract permitted to be resolved by expert determination. As a result the expert lacked jurisdiction and his determination was null, void and of no effect and was not binding on the parties. EEL's claim to enforce the determination therefore failed.

**John McDonagh SC**

## Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform [2020] IESC 56

*Discovery - Public procurement - Confidential documents*

In this case, the Chief Justice took the opportunity to clarify the law as it relates to discovery in the particular context of public procurement litigation. In this regard, the Chief Justice noted that the application of very broad principles to specific areas of law can give rise to issues of general public importance.

The case underlying the application for discovery which was before the Court arose from a challenge by Word Perfect Translation Services Limited ("**Word Perfect**") to the decision of the Minister for Public Expenditure and Reform (the "**Minister**") to award a contract for the provision of translation services in respect of An Garda Síochána to a rival tenderer. Word Perfect sought discovery of nine categories of documents which it argued was necessary to pursue its application for judicial review.

In considering the requirements for discovery from first principles, the Chief Justice stated that before discovery can be ordered in respect of any category of documents, it is necessary for the requesting party to show, by reference to the proceedings, that the documents sought are necessary. However, in the context of public procurement litigation (§8.2):

> "*it is necessary to have regard to the scope of the issue which properly come before the Court in such cases. While public procurement litigation has some features in common with judicial review proceedings, it does require to be acknowledged that both the standard of review and the scope of the remedies available to the Court are potentially wider. That widened scope of the proceedings has, of course, the potential to also widen the scope of the issues properly arising and thus the category of documents which may potentially be relevant to those issues*." (Emphasis added)

In the context of **confidential information**, the Court stated that Irish discovery law generally provides for a nuanced and flexible approach to cases where confidential information may be relevant and where the disclosure of that information may be necessary to a fair and just resolution of the case.

The Chief Justice stated that, without being exhaustive, the following principles can be identified:

1. The fact that information may be confidential is not, in and of itself, a barrier to its disclosure.

2. The requirement that discovery be proportionate includes a requirement that there needs to be a balance struck between the extent to which ordering discovery of a particular category of document may give rise to the disclosure of confidential information (including especially highly confidential information and information confidential to third parties), on the one hand, and the extent to which it may be reasonable to anticipate that the information concerned may be important to a just and fair resolution of the proceedings, on the other.

3. It may be disproportionate to direct discovery which would involve the disclosure of confidential information where no credible basis has been put forward for suggesting that there is a sustainable basis for that aspect of the claim in respect of which it is said that the confidential information concerned is relevant. In this latter context, in relation to procurement proceedings, the extent to which adequate reasons for the result of the procurement process have been given may be relevant for it may breach the requirement that there be an effective remedy if a party obtains very limited information about why the result wen the way it did and is then told that it cannot have discovery because it has not put forward a credible basis for suggesting that there was anything wrong with the procurement process.

4. It is recognised generally that a judge conducting a substantive hearing of proceedings may well be in a better position to identify whether the disclosure of confidential information is really necessary to enable a fair result of the proceedings to be achieved. On that basis procedures can, and are, put in place to ensure the retention of documentation and the availability of those materials at the hearing should the trial judge consider it necessary.

The Chief Justice reasoned that these principles have particular application in the context of procurement cases because the procurement process almost invariably involves commercially sensitive and confidential information in the shape of tenders submitted by competitors. However, the Court rejected the argument that any different approach is required to discovery in procurement cases.

The Chief Justice further stated that (§8.7) "*additional comfort may be obtained*" if confidential materials are made available under a confidentiality ring, while noting that (§8.13) confidentiality rings have yet to be implemented in the context of public procurement. The Court noted the further possibility of document redaction in appropriate cases.

**The Proposed Course of Action in Word Perfect**

The Chief Justice noted that the Remedies Directive requires that parties wishing to challenge public procurement decisions should have access to a speedy process.

To facilitate this, the Chief Justice mandated immediate discovery of documents which are relevant which (i) do not involve confidentiality or any other issue which might be relied on to suggest that relevant documents do not have to be disclosed; and (ii) discovery of documents which involve confidential information where it is determined at an interlocutory stage that such disclosure is necessary. In the case of (ii), it will be left to the trial judge to determine whether further disclosure may be necessary.

To facilitate this cascaded process, the Chief Justice directed that all documents in respect of which it is appropriate to adopt such an iterated approach should be the subject of an Affidavit sworn contemporaneously with the main

affidavit of discovery. However, this contemporaneously sworn Affidavit should not be handed in. This Affidavit, together with the documents referred to in it, should be available in Court during the hearing of the matter so that there can be immediate disclosure of any materials which the trial judge directs.

**Michael Judge BL**

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## John Doyle Construction (in liquidation) v Erith Contractors Ltd [2020] EWHC 2451[TCC 14 September 2020]

*Adjudication - enforcement application - claimant insolvent - considerations to be taken into account by a court in deciding whether or not to enforce adjudicator's award in its favour.*

This was a claim for enforcement of an adjudicator's decision issued by John Doyle Construction Ltd ["JDC"], a company in liquidation since 2013.
The claim against Erith in the adjudication was for money JDC claimed to be due on its final account for hard landscaping works carried out at the Olympic Park, before the 2012 London Olympic Games.
In the adjudication JDC was awarded the sum of £1.2 million approximately.
It is of note that shortly prior to the decision in this case the UK Supreme Court had in Bresco v Lonsdale reversed the decision of the Court of Appeal and allowed a company in liquidation to bring its dispute to adjudication. In Bresco Lord Briggs at [64] stated that:

"*The reasons why summary enforcement (of an adjudication award) will frequently be unavailable are set out in detail in Bouygues v Dahl Jensen [2000] EWCA Civ 1041, paragraphs 29-35 per Chadwick LJ. As he says, the court is well placed to deal with those difficulties at the summary judgement stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution*".

Fraser J in this case states at [32] and [34] that in deciding whether to grant a company in liquidation summary judgement at all, and if it is decided to grant judgement whether a stay of execution should be granted, one must identify the principles that should be applied by the court when considering an application for summary judgement, taking into account the dicta of Briggs LJ in Bresco.

The first matter to be addressed is whether the adjudicator's decision is a valid one, ie one made within jurisdiction and without material breaches of natural justice. Assuming that any such issues are resolved in favour of the party seeking enforcement, the judge considered that the next issue which arose was in what circumstances will a company in liquidation be entitled to summary judgement on a valid adjudicator's decision in its favour?

At [37] he points out that the issue in the Supreme Court in Bresco was whether a company in liquidation could adjudicate at all rather than whether it could obtain summary judgement on a decision in its favour. Fraser J at [43] quotes at length from the judgement of Briggs LJ. At [67] he (Briggs LJ) stated that in many cases a liquidator will not seek to enforce an adjudicator's decision summarily. In others he may offer appropriate undertakings, such as to ring-fence any enforcement proceeds. Where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgement.

At [52] he returns to the judgement of Briggs LJ at [67] and states that difficulties relating to repayment will be taken into account by the court when considering whether to grant summary judgement and/or a stay. The liquidator may see fit to offer appropriate undertakings, and such offers will be taken into account by the court as they avoid the potential injustice in the sum not being available to be repaid in the event the adjudicator is found to be wrong on final determination of the dispute. If there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim, then the court would not ordinarily grant summary judgement.

Briggs LJ in Bresco reinforced that the above difficulties where a company is in liquidation are to be considered by the court, but only at enforcement stage, and not earlier than that (which is how the Court of Appeal had dealt with them, granting an injunction to prevent the adjudication taking place at all).
At [54] Fraser J usefully summarises the principles to be applied by a court when considering an application for summary judgement on an adjudication decision in favour of a company in liquidation as follows:

1. Whether the dispute in respect of which the adjudicator had issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply an element of it.

2. Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.

3. Whether there are other defences available to the defendant that were not deployed in the adjudication.

4. Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.

5. Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

At [62] he explains the above and states that the circumstances where summary judgement would be available to a company in liquidation which seeks to enforce an adjudicator's award in its favour are as follows:

1. The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract. Where, as here, the dispute referred was the valuation of the referring party's final account, summary judgement would potentially be available. If the dispute referred is a more narrowly defined one then it will not. [This type of adjudication where all the different elements of the overall financial dispute between the parties is unusual/atypical. cf[63]]

2. Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by a court on the summary judgement

application. [At [64] it is suggested that adjudicators ought to resist becoming embroiled in matters outside the construction contract, and potentially outside their expertise. Absent specific agreement from the parties, for the adjudicator to consider and resolve matters outside the construction contract would give rise to jurisdictional issues/problems].

3. There would have to be no real risk that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim.

In *JDC v Erith* the main issue concerned number 3 above. At [80] Fraser J states that he considers the primary concern, when a court comes to consider whether there is a real risk that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim, to be recovery of the sum paid to satisfy the adjudicator's decision. A secondary concern is the costs that would be expended in doing so.
At [85] he states that as near as possible the safeguards proffered by a liquidator must seek to place the paying party in a similar position to if the company was solvent.

The starting point in the instant case was that no undertakings at all were offered by the liquidator. No security was offered by him in any respect. The security was proffered by a firm with which the liquidator had agreed to assign the company's claim against Erith, that firm stating in evidence that its primary business was to purchase legal claims from insolvent companies and commence proceedings itself in respect of those claims. [cf 18]
Ultimately the judge took the view that the security proffered by the said firm could not be equated to a safeguard that would place Erith in a similar position to the one which it would be in if JDC was solvent. [101] As regards Erith's costs, security by way of an ATE insurance policy was proffered but again the judge considered the cover available under the policy was insufficient. [113]

His conclusions on the application for summary judgement on the facts of the case were that there was a real risk that the summary enforcement of the adjudication decision would deprive Erith of its right to have recourse to the company's claim as security for its cross-claim. Accordingly summary judgement was refused. [117]

**John McDonagh SC**

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## Paddy Burke (Builders) Ltd. (in liquidation and in receivership) v Tullvaraga Management Company Limited & Ors [2020] IEHC 170

The owners' management company ('OMC') of a residential development obtained an order from the Circuit Order requiring the receivers of the original developer to carry out remedial works to address fire safety deficiencies in the development.

McDonald J. held that the original lender, and the receivers, were not bound by the Management Agreement which provided for completion of the common areas prior to transfer.
The building agreement remained enforceable but could not take priority over the lender's security. The OMC was an unsecured creditor.

Where a borrower entered into an enforceable agreement before the grant of a mortgage, if the lender was made aware of it, the lender and a receiver subsequently appointed in respect of the lender's interest could be bound by that agreement.

The receiver appointed in respect of the developer's interest in a multi-unit residential development in Co. Clare entered into a contract for sale of a number of blocks of apartments, together with common areas, which formed part of the development. The lands on which the development was constructed had been mortgaged to Anglo Irish Bank prior to its construction.

Paddy Burke Builders Ltd. ('the Developer') had entered into an agreement for transfer of the freehold of the estate subject to the leases to be granted in respect of the individual units, and with the benefit of a lease in respect of the car park. By a further agreement, the Developer had agreed to transfer the common areas of the estate to the OMC, subject so an obligation on the Developer to maintain the common areas in a proper state of repair until the completion date. The Developer (via the receivers) contracted in 2019 for sale of the property over which the receiver had been appointed, including unsold residential units and commercial units, subject to the two agreements between the Developer and the OMC.
Circuit Court proceedings were initiated by the Developer in order to require the OMC to take a transfer of the common areas. The OMC counterclaimed seeking various reliefs, including an order that the Developer should complete the common areas of the Development. Following commencement of the proceedings, notices were served by Clare County Council which required the carrying out of significant fire safety remedial works.

McDonald J referred to the decision of Haughton J. in *Grehan v Maynooth Business Campus Owners Management Company* [2019] IEHC 829 in which the Court had held that the receivers appointed in respect of the developer's interest in a commercial development were bound by a management agreement, and thereby required to rectify defects in the development prior to transfer of common areas to the management company. The receiver and lender argued that the relief sought by the OMC was equivalent to a mandatory injunction; McDonald J. accepted that the effect of the Circuit Court order was mandatory, and on that basis that the usual criteria as to the grant of an injunction were to be applied, necessitating consideration of the strength of the OMC's case. In this regard, the Court found as follows:

1. The effect of s 104 of the Land and Conveyancing Law Reform Act 2009 was that a mortgagee exercising its power of sale has power to convey property free from all estates, interests and rights in respect of which the mortgage has priority;

2. The management company remained entitled to enforce the two management agreements by specific performance, against the Developer but not against the lender and receiver;

3. The 2004 mortgage of the property to the lender took priority over the management agreements that imposed obligations with regard to completion of the development prior to transfer of the common areas;

4. The orders made in favour of the management company pursuant to the Multi-Unit Developments Act 2011 did not confer any priority in favour of the OMC over secured creditors, and that the OMC, in respect of the management company obligations taken on by the Developer with regard to completion of the development, was an unsecured creditor;

5. Where the receivers had not adopted the management agreements, they could not thereafter be bound by them, and accordingly were under no obligation to carry out remedial works not to discharge the cost of those works from the proceeds of sales of units.

McDonald J. stated that he had *"every sympathy for the position in which the management company finds itself"* but that there was no basis upon which to distinguish the dicta of Baker J. in the decision of the High Court in *Lee Towers Management Company Ltd. v Lance Investments Ltd. (In Liquidation)* [2018] IEHC 444, to the effect that an order made under the 2011 Act did not displace the order of priority of the assets of an insolvent company. It should be noted that subsequent to the *Paddy Burke Builders* decision, the Court of Appeal overturned the decision of Haughton J. in *Grehan v Maynooth Business Services Campus* [2020] IECA 213. Costello J., delivering the judgment of the Court, observed that the right of the management company to have remedial works carried out is a right *in personam* which could not take priority over the interest of a secured creditor.

**Deirdre Ní Fhloinn BL**

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## Jose Monteriro da Silva et al v. Rosas Construtores S.A. et al [2020] IECA 301

*Refusal to issue a European Enforcement Order*

This case came before the Court of Appeal on the basis that the Defendant appealed the High Court's order in relation to costs and the Plaintiffs cross-appealed the refusal to issue a European Enforcement Order. This case note is limited to a consideration of the Plaintiffs' cross-appeal insofar as it relates to Article 3(1)(c) of Regulation (EC) 805/2004 (the "**Regulation**").

The Plaintiffs were construction workers of Portuguese nationality who came to Ireland in or around 2007/2008 to carry out construction works on the N7 in Nenagh to Limerick Dual Carriageway. The Defendant were their employers who formed a partnership "RAC Eire Partnership" for the purposes of the N7 project. The Plaintiffs claimed underpayment of wages and unlawful deduction from their wages.

The Regulation created a European Enforcement Order ("**EEO**") for uncontested claims throughout the European Union. It establishes a simplified form of enforcement orders in respect of uncontested claims.

Article 3(1) of the Regulation states:

> "… A claim shall be regarded as uncontested if:
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> a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or
>
> b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or
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> c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or
>
> d) the debtor has expressly agreed to it in an authentic instrument." (emphasis added)

In respect of the concept of an uncontested claim, the Court relied on Case C-511/14 *Pebros Servizi Srl. v. Aston Martin Lagonda Limited*, where the CJEU stated:-

> *"37. In that regard, it must be stated that Regulation No. 805/2004 does not define the concept of 'uncontested claim' by means of a reference to the laws of the Member States. On the contrary, it is apparent from a reading of Article 3 of that regulation in the light of recital 5 of the latter, that that concept is an autonomous concept of EU law. The reference to the laws of the Member States in Article 3(1)(b) and (c) of that regulation does not relate to the constituent elements of that concept, but concern the specific elements of its application.*
>
> *38. Recital 5 of that regulation states that the concept of 'uncontested claims' should cover all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained, inter alia, a court decision against that debtor.*
>
> *39. As is apparent from the order for reference, Aston Martin, in its capacity as duly informed debtor who is given an opportunity to participate in the court proceedings, failed to take action throughout those proceedings by not participating in them at any moment. For that reason, a judgment was delivered in default with respect to it. It follows that that company's situation is covered by Article 3(1)(b) of Regulation No. 805/2004, in accordance with which a claim is to be regarded as uncontested if 'the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings'."*

Accordingly, the Court concluded that (§14):

> "*It is thus clear that an uncontested claim is an autonomous concept of EU law. A debtor's silence may*

> *potentially be used against him as a form of admission. In the case of Pebros, the defendant failed to participate at all in the proceedings and was adjudged therefore, under Article 3(1)(b), not to have contested the claim*."

However, the Court further stated that (§15):

> "*The situation under Article 3(1)(c) is somewhat different. It applies where a defendant has initially contested the claim but then he is deemed, by his behaviour, tacitly to have admitted the claim*."

The Court relied on Advocate General Bot in *Pebros* and stated that a Defendant could tacitly admit the claim pursuant to Article 3(1)(c) by not appearing at a Court hearing or by not being represented at a Court hearing regarding the claim after having initially objected to it.

The Court then went on to consider whether the Plaintiffs' claim against the Defendants could be regarded as uncontested within the meaning of the Regulation.

The Court noted that while the Defendants had delivered full Defences in these proceedings, the Defendants had instructed four firms of solicitors each of whom came off record, citing *inter alia* a failure to obtain instructions. During the proceedings, no defence case was put to the Plaintiffs or their witnesses on behalf of the Defendants. Their evidence was not challenged. Cross-examination of witnesses was limited to points of clarification of the evidence and the Defendants called no witnesses.

The Defendants emphasised that at no point did they consent to judgment or withdraw their defences or indicate that they were not contesting the orders sought by the Plaintiffs.

In determining whether the Defendants contested the claim, the Plaintiffs submitted that the Court must engage in a qualitative assessment of the Defendant's role and determine whether the role, in truth, amounted to contesting the claim. The Plaintiffs maintained that the participation of the Defendants in the trial could not be interpreted as a *bona fide* contesting of the claim.

The Court noted their sympathy for the Plaintiffs but that they did not agree that a Court ought to, or even could, engage in the qualitative assessment of the participation of the defendants in the trial in order to determine whether the Plaintiffs are entitled to an EEO pursuant to Article 3(1)(c).

By virtue of the fact that the order will not be reviewed in the recipient's Member State, the Court held that (§24) "***the safeguards afforded to defendants must be strictly construed to ensure, inter alia, that the claim is in fact an uncontested claim***."

The Court held that the correct approach to the construction of Article 3(1)(c) involves a two-stage test (§24):

1. the Defendant must not have appeared or been represented at a hearing of the case; and
2. If the first limb of the test is satisfied, can the nonappearance or non-representation amount to a "*tacit admission*" of the claim?

The Court concluded that (§24) this does not permit a qualitative assessment of the role played once the Defendant appears or is represented at a hearing: "[*p*]*articipation in a trial, however slight it may be or for whatever unmeritorious motives, cannot verify the absence of a dispute.*"

**Michael Judge BL**

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## RG Securities (No 2) Ltd v Allianz Global and Speciality CE and R Maskell Ltd [2020] EWHC 1646 (TCC)

*Limitation – Deliberate concealment – Defective premises – Cladding defective – Defective Premises Act 1972, s 1(1) – Limitation Act 1980, s 32. Whether deliberate concealment re-set the limitation clock to zero on discovery if limitation had already expired before the concealment.*

**The Facts**

The claimant was the freeholder of St Francis Tower, Ipswich ('the Property'), the tallest residential block in Suffolk and comprising 16 storeys with 116 flats and a cafe´ at ground floor level. It has a concrete frame construction built in the 1960s. The Claimant acquired the Property in April 2015 from Central House Investments Ltd (now known as Maskell Loughton), which is a subsidiary company of the third named Defendant R Maskell Ltd ('Maskell')

Between about 2006 and 2009, the Property was subject to substantial refurbishment works, which were carried out by Maskell. As part of the Refurbishment Works the Property was over-clad with a Trespa cladding system, largely using Polyisocyanurate insulation underneath, and small amounts of Aluminium Composite Material('ACM') cladding, and all the windows were replaced. The Claimant contended there were defects in the Property relating to the cladding, to internal fire compartmentation and to the windows, and to safety measures which should have been taken. It was subsequently discovered that the Refurbishment Works did not have Building Regulations approval.

**The Summary**

The substantive claim concerned post-Grenfell Tower cladding flammability issues. The Claimant's case was that the Refurbishment Works were not done in a workmanlike or professional manner or with proper materials, with the consequence that the Property was not fit for habitation in breach of s 1(1) of the Defective Premises Act 1972. It was pleaded that the cladding system used at the Property is more flammable even than that used on Grenfell Tower, and that no reasonably competent developer would have used such cladding on a building such as the Property. The claim was for the cost of remedial works necessary to ensure that the Property was fit for habitation, which were estimated to cost £3,589,373.70, of which the bulk related to the cladding system.

The application by the third Defendant ('Maskell') was for summary judgment on its Defence against the Claimant on the basis that the claim against Maskell was statute-barred, alternatively seeking permission to bring a counterclaim against the claimant together with a wholly owned subsidiary ('Maskell Loughton'). defendant on the whole of a claim or on a particular issue if—

(a) it considers that—
(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) … and
(b) there is no other compelling reason why the case or issue should be disposed of at a trial.'

Maskell contended that the six-year limitation period must already have

expired by the time of the sale of the Property to the claimant such that any concealment on or around the sale could not assist the claimant as limitation had already expired. The claimant contended that it was not informed that the works did not have Building Regulation approval, that it was led to believe such approval had been obtained, that Maskell deliberately concealed the lack of approval, and that, accordingly, the Claimant was entitled to rely on s 32 of the Limitation Act 1980, such that time did not begin to run for limitation purposes until the claimant discovered the concealment in May 2018.

**The law:**

Section 32 of the 1980 Act is part of Pt II and deals, inter alia, with concealment. It provides:

**Postponement of limitation period in case of fraud, concealment or mistake**

(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act,

either—

(a) the action is based upon the fraud of the defendant; or
(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the Defendant ; or
(c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent. Accordingly, the effect of this latter provision is that if there has been any deliberate concealment by Maskell of any fact relevant to the Claimant's cause of action, then s 32(1)(b) of the 1980 Act postpones the time period in terms of limitation. The six-year period relied upon by Maskell, working back from the date of issue of the claim form, originates in s 9 of the 1980 Act.

**Judgment**

(1) The limitation clock was reset to zero on concealment even if the defendant had already acquired a limitation defence before the concealment took place. The House of Lords in *Sheldon v RHM Outhwaite (Underwriting Agencies)Ltd* [1995] 2 All ER 558 applied. Accordingly, insofar as Maskell might have deliberately concealed from the claimant facts relevant to its cause of action, time did not begin to run for limitation purposes until the claimant discovered such concealment by reason of s 32(1)(b) of the Limitation Act 1980 and the date on which the Refurbishment Works were completed was irrelevant.

(2) Maskell's application for summary judgment against the claimant was dismissed. On the documents it appeared that the fact the Property did not have Building Regulation approval for the Refurbishment Works as completed was not disclosed to the claimant, and arguably was deliberately concealed by Maskell. The claimant's case on concealment had a realistic prospect of success.

(3) Maskell had advanced a counterclaim against the claimant with its defence, such that permission of the court was not required. However, Maskell Loughton was not a party to the proceedings and no additional claim under Pt 20 had been made by Maskell against Maskell Loughton under CPR 20.7. Practice Direction 20 set out steps that ought to be followed if the court was to be asked for permission to make an additional claim, including that it had to be supported by evidence. No such evidence had been provided. If Maskell wished to join Maskell Loughton as a party, then the requirements of PD 20had to be complied with. The applications would therefore be dismissed.

**Reflection**

This judgment is a useful reminder of the effect of s 32 of the Limitation Act 1980 in cases where there is deliberate concealment of a relevant fact which occurs sometime after the date of accrual of the cause of action. The applicant argued that the effect of a deliberate concealment was simply to pause time for the duration of the concealment so that if the concealment occurred after the initial limitation period had expired, it did not revive a time-barred claim. The respondent argued that following a deliberate concealment the six-year period started afresh, irrespective of the limitation period at the time of the concealment. The decision itself was relatively simple with the judge feeling compelled to follow House of Lords authority to the effect that a claimant had six years after a deliberate concealment within which to bring a claim, irrespective of whether that claim was already time-barred at the date of concealment.

**Barra McCabe BL**