Case No: HT-2024-000208
[2024] EWHC 2084 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Technology and Construction Court
Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

BEFORE:

MRS JUSTICE JEFFORD

BETWEEN:

BECK INTERIORS LTD	**CLAIMANT**
- and -	
EROS LTD	**DEFENDANT**

Legal Representation

Andrew Singer KC and Mischa Balen (instructed by Howard Kennedy LLP) for the Claimant

Sean Wilken KC and Peter Brogden (instructed by Shoosmiths LLP) for the Defendant

Judgment

Judgment date: 28 June 2024
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

Number of folios in transcript 123
Number of words in transcript 8,845

Mrs Justice Jefford:

The injunction

1. This is an application by Beck Interiors Ltd for an injunction in terms that:

    1) The Defendant in an intended action, that is Eros Limited, be restrained from issuing any notice of adjudication against the Claimant unless the Defendant first obtains the permission of a judge authorised to sit in the Technology and Construction Court, and
    2) That the Defendant must forthwith withdraw the notices of adjudications dated 17 May 2024, 21 May 2024, 28 May 2024 and 30 May 2024, initiated against the Claimant.

2. The prospect of an injunction was first raised by letter to the Court, with the application and supporting witness statement, on 21 June. An urgent hearing was sought with a time estimate of seven hours, that is approximately 1½ days. It has become apparent on the hearing of this application that the reasoning behind that lengthy time estimate was a desire to examine on this application the merits of the claims made in adjudication by Eros and which the injunction seeks to bring to an end. The matter having been referred to the judge in charge, this hearing was listed with a reasonable time estimate of three hours which has nonetheless been slightly exceeded in argument and further time to give judgment has been added.

3. As yet, no proceedings have been issued and the application must, by definition therefore, be for an interim injunction rather than a final injunction. Nonetheless, in this case that distinction is effectively meaningless. If granted, the injunction would bring four extant adjudications to an end, and would prohibit the commencement of any further adjudications by Eros without the permission of the Court.

Factual background

4. By a contract dated 27 August 2020, Eros engaged Beck as a design and build fit out contractor for a development now known as The Residence, Mandarin Oriental in Hanover Square. The contract as made on a JCT Design and Build Contract, 2016 Edition with amendments. The works included the fit out of a Mandarin Oriental brand hotel with 50 rooms, a retail space, and 79 residential apartments. There were two subsequent agreements to vary the contract. The contract sum was approximately £40.2 million.

5. It goes without saying that the contract contained provision for adjudication, and there are or have been multiple adjudications between the parties. The adjudications and the progress of the adjudications is addressed extensively in the statements of Mr Pawlowski of Howard Kennedy, Beck's solicitors, and Ian Reid of Shoosmiths, Eros' solicitors. I will address the content of those statements in summary only.

Adjudication no. 1

6. Turning to the adjudications, the first adjudication was commenced by Beck. It was commenced on 8 March 2024 and sought extensions of time arising out of events in a period up to July 2022. That date related to the terms of a deed of variation, the detail of which is not something that has been gone into or that I need go into.

7. Eros says that the Referral was accompanied by a 225 page expert report on delay, which it had not previously seen, and over 3,000 pages of appendices. There is a potential dispute of fact about this. Mr Pawlowski says that the report was issued to Gardiner & Theobald ("G&T"), the Employer's Agent, in December 2023. It had been preceded by meetings with G&T and Eros' delay expert. After it was issued there was no progress in terms of further responses, a promised note from Eros and further meetings. In other words, he says that there was nothing new about it and Eros had created the situation in which it had not been discussed further.

8. Eros complains that Beck acted unreasonably in terms of the timetable for the adjudication. Eros asked for four weeks to respond, Beck offered two weeks. The parties compromised on three weeks. When Eros then asked for an additional three days, Beck resisted.

9. As I have indicated, the statements of both Mr Pawlowski and Mr Reid set out a more detailed account of the various extensions of time sought and agreed or ordered by the adjudicator. I do not recite them. The short point is that there was the usual toing and froing on the timetable, a phrase which I prefer to the "cut and thrust" description in Mr Reid's statement. In any event, Beck agreed to extend the time for the adjudicator's decision, the date for which was then 5 July 2024. In the course of this hearing, I was told that the adjudicator had in fact given his decision today and that, in that decision, he finds that Beck is entitled to an extension of time on section 2, the hotel, to 23 July 2023.

Adjudication no. 2

10. This was again an adjudication commenced by Beck on 18 March 2024 seeking a decision on contractual responsibility for the smoke extract ventilation system in the basement. Beck's position was that the Employer's Agent's instruction to fit or retro-fit this system was a Change, a Relevant Event and a Relevant Matter under the contract. There was a clear dispute about this but Eros had agreed to pay 50% of the full value claimed.

11. Eros contends that Beck again acted unreasonably, refusing to agree any amendments to the timetable to allow for the Easter period. In his letter of 20 March 2024, Mr Pawlowski said that Beck was not acting tactically in commencing adjudication no. while adjudication no. 1 was still on foot, and that there was no question of any ambush. He asserted that this was a 28 day adjudication, that is, not one which sensibly called for an extension to the default period, but agreed to extend time for the decision by 14 days. In response to Eros' point that they were already dealing with adjudication number 1, he said:

> "It is plain that any construction team in any law firm or any person who sits on the RICS panel will have more than one adjudication in play at any one time."

Eros has pointed to this statement, which reflects the statutory regime and common practice, as indicative of Beck's view as to multiple adjudications proceeding at one time.

12. The adjudicator's decision was given on 2 May. The adjudicator decided that Beck was not responsible for these works - that is they did not fall within Beck's scope of works - and were a Change and Relevant Event.

13. Beck contends that Eros has not complied with that adjudicator's decision. It was not a decision pursuant to which any monies were ordered to be paid. However, Beck contends that the necessary consequence is that further monies ought to have been certified and paid and they have not been.

14. Mr Singer KC made two submissions in this respect. Firstly, he pointed out that G&T had, in the latest payment notice no. 47, certified nothing for these works. That went back on the previous agreement to pay 50% of the value which had previously been certified. Mr Singer submitted that it was plain that Eros had interfered with G&T's certification because the spreadsheet with the payment notice included the comment that they had certified nil "in line with" Shoosmiths' letter dated 8 May 2024. That letter is the letter of claim on this issue, which is now the subject matter of Part 8 proceedings.

15. As the adjudicator's decision is binding, I accept that the Employer's Agent ought to certify the value of the works, but the Employer's Agent should also act independently in certifying. It might be inferred that G&T have wrongly ignored the decision of the adjudicator and taken the argument set out in the letter of claim as a reason to give a nil value, but that is far from saying that Eros has acted wrongfully by instructing the Employer's Agent not to implement the decision. There may transpire to be something in that allegation but it is not an inference that can safely be drawn from the comment that the certification is in line with Shoosmiths' letter.

16. It would also of course have been open to Beck to commence an adjudication seeking payment, and/or to raise this issue in one of the further adjudications in respect of a valuation which I will come to, and it will no doubt do so in some adjudication.

17. Mr Singer's further submission was that whatever G&T certified, Eros was obliged to pay the further 50% because that was what was agreed. There is no evidence of such an agreement, it could easily have been the basis for a claim in the adjudication, and it was not.

18. Eros has, in fact, now commenced Part 8 proceedings. The Claim Form was issued on 19 June 2024. Eros seeks declarations that Beck's scope of work includes the smoke extraction works and what might be regarded as consequential declarations as to whether the instruction is a Change, Relevant Event or Relevant Matter.

19. The claim goes further and seeks declarations as to a duty to coordinate and a duty to warn, which as I understand it, relate to the contention that these works should have formed part of the works of the contractors engaged to provide the shell. Mr Pawlowski, in his statement on this application, says that these proceedings ought to be Part 7 proceedings, and that is a matter which will no doubt be raised as and when service is acknowledged in respect of the Part 8 proceedings. However, again, it is not a matter which is before me today or to which I have any regard.

20. Following those two adjudications, or at least the commencement of those two adjudications, by letter dated 3 May 2024, Beck identified three further disputes which it was contemplating referring to adjudication.

21. Those three disputes related to the effect of the deed of variation dated 1 July 2022, to which I have already referred; valuation number 45 which was in a negative amount; and Beck's obligations to maintain shell and core plant and systems after handover but before practical completion. The letter concluded:

> "If your client does not respond in a positive manner by Tuesday 7 May [2024] and agrees to meet with BECK within the next 10 days, then BECK will have to consider its options with regard to issuing appropriate proceedings."

22. At this point, I observe that there is a live dispute between Beck and Eros as to what Beck is entitled to be paid. Eros points out that the contract sum was £40.2 million; that to date Eros has paid £73.2 million; and that, in its latest payment application, Beck has valued its works at £102.9 million.

23. As at today's date, Beck has not in fact commenced any further adjudications, and indeed the proposed adjudication in respect of valuation no. 45 would appear to have been overtaken by events. However, Eros did thereafter commence four adjudications which I will now turn to.

24. Before I do, I emphasise that anything I say about the nature of the claims and issues in the adjudications is derived from the parties' submissions on this application, the witness statements of Mr Pawlowski and Mr Reid, and the correspondence or other documents which I have been able to read in the time available or have been directed to in the hearing. It would be wrong in principle and in fact to consider anything I say as a decision on any aspect of the claims or issues in the adjudications or, indeed, relevant to any future issues as to enforcement.

Adjudication no. 3

25. This adjudication was commenced by Eros by notice dated 17 May. Its Referral was served on 24 May. In this adjudication, Eros claims £3.8 million. The claim is in respect of alleged defects in Beck's reporting and forecasting and is for what are called pre-opening costs. The nature of the claim is that Eros incurred additional costs because of the difference between the anticipated opening date of the hotel and the actual opening date. In particular, they started to recruit and pay staff, reaching a full complement, but in circumstances where the hotel had not opened, contrary to the forecasts being offered by Beck. The claim is put on the basis of breach of obligations in respect of forecasting completion dates. It also encompasses a claim in deceit in respect of the dates that were forecast.

26. Beck submits that this is a weak claim and is, in reality, a claim for unliquidated damages in respect of a breach for which liquidated damages are the exclusive remedy. It takes particular issue with the claim in deceit. This characterisation of Eros' claim is obviously disputed, and on the face of it, the strength or weakness of Eros' claim is a matter for the adjudicator.

27. On 28 May 2024, Beck wrote to the adjudicator disputing jurisdiction. In very short summary, the arguments were:

1) No dispute had crystallised. A letter of claim was only issued on 3 May 2024. Beck's solicitors replied pointing out deficiencies in the claim. There was no further response to that letter. Accordingly, no dispute had crystallised.
2) The claim was based on establishing that Beck had not achieved sectional completion dates and was therefore the same as the claim in adjudication no. 1.
3) The claim was an abuse of process and manifestly unfair and any decisions in Eros' favour would necessarily be reached in breach of natural justice.

28. On this last point, it was said that Eros could not claim liquidated damages and unliquidated damages at the same time, that practical completion could not be achieved until the smoke extract system was fully functioning, and that it had been established that that was not Beck's responsibility. It was also said that Beck was one of a number of companies being subjected to financial abuse and commercial bullying and that the adjudication was being used as a vehicle to put unfair commercial pressure on them.

29. On 3 June, the adjudicator Mr Raynor gave a reasoned, albeit not binding, decision on each of the issues raised and rejected the jurisdictional challenge.

30. In that letter of 28 May, Beck also made representations about the timetable. Eros says that it has taken a reasonable approach in respect of the timetable and agreed to the timetable proposed by the adjudicator, and his later request for an extension of time for his decision, the date for which is now 2 July.

31. Mr Pawlowski sets out in his witness statement the progress of the adjudication, including correspondence with Eros and the adjudicator, in which Eros objected to Beck submitting a Rejoinder and having further time to do so. The adjudicator mentioned some limited matters he thought it would be useful for him to be addressed on and the Rejoinder was duly served. I am told that a Surrejoinder is due today and thereafter the decision of the adjudicator. Mr Singer submits that that process will have to start all over again because of the decision that has now been reached in adjudication no. 1.

Adjudication no. 4

32. This adjudication was commenced by Eros by notice on 21 May 2024. The Referral was served on 29 May. In this adjudication, Eros sought a determination of the true value of interim certificate no. 47, although Beck has contended that the notice defines the dispute as a claim for payment of the negative sum of £5.8 million certified by G&T, whilst the Referral frames the dispute as a true value dispute. Beck contends, therefore, that there is an inconsistency, relevant to jurisdiction, between the two.

33. By letter dated 30 May, Beck challenged the jurisdiction of the adjudicator. In the conclusion of that letter, Beck said this:

> "1. All the purported disputes claimed by Eros are sham claims and the numerous adjudications commenced by Eros are an abuse of process in an attempt to put adverse financial pressure on BECK;
> 2. Eros's claims have no legitimacy, and it is attempting to make an unfair financial gain by making conflicting and/or contrary claims

against the other trade contractors and professional consultants engaged on this project; and

3. It will be an abuse of process and manifestly unfair and a breach of the rules of natural justice if BECK is not allowed a fair and reasonable period of time to respond to the Referral.

For all of the above reasons, we invite you to resign. As noted above, should you not resign, Beck's continued participation in the reference is entirely without prejudice to its position that you lack jurisdiction."

34. On 5 June 2024, the adjudicator, Mr Eyre, gave a reasoned, non-binding decision on jurisdiction. He rejected the jurisdictional challenge. Then on 6 June he gave directions. These included an extended decision date which Eros had proposed. Eros again says it has taken a reasonable approach to timetable, immediately agreeing to the three weeks sought by Beck for the Response. On 17 June Beck asked for further time, extending that date to 24 June. Eros objected. Following various correspondence, Mr Eyre in an email of 20 June 2024 said that if Beck was held to serving the Response the following day, he would have to consider any breach of natural justice argument and whether he should resign. Eros then agreed to the extension sought.

Adjudication no. 5

35. Again, this was an adjudication commenced by Eros by notice dated 28 May 2024, with its Referral served on 4 June 2024. The claim is for payment of £8.6 million by way of liquidated damages. There is an obvious relationship to adjudication no. 1 and also adjudication no. 2 and Beck's position is that it is entitled to yet further relevant extensions of time.

36. On 4 June, Beck wrote to the adjudicator in respect of timetable. So far as I can see, there was no challenge as such to jurisdiction, but the adjudicator was invited to resign if Eros was not reasonable about the timetable. There was initially disagreement about the time for the Response. The adjudicator gave directions. Beck then asked for further time, relying in part on the demands of the other adjudications. The adjudicator was away ill at the time. On his return, there were further exchanges about the timetable. In short, Beck proposed a 70 day adjudication and Eros proposed a 42 day adjudication.

37. Eros again says that it has taken a reasonable approach. In an email on 21 June, Eros offered two options: (i) that the adjudication proceed in accordance with the timetable already directed or (ii) that Beck was allowed until 3 July for the Response as Beck wanted and Eros was given 29 days, the same period, for the Reply, with the decision date extended to 15 August 2024. Eros also sought to impose a condition that any submissions that did not meet their due date would be disregarded. The position in relation to adjudication no. 5 and the date for the adjudicator's decision has not yet been resolved.

Adjudication no. 6

38. Eros gave Notice of Intention to Refer on 30 May and served its Referral on 6 June. Eros claims approximately £15.5 million in additional financing costs which it claims to have incurred because of delay in selling apartments. That delay is said to be the consequence of defects in the apartments caused by breaches of Beck's obligations.

By letter dated 7 June, Beck challenged the jurisdiction of the adjudicator on grounds that a dispute had not crystallised and on the same abuse grounds that had been raised in the other adjudications.

39. The adjudicator, Mr Riches, gave a reasoned, non-binding response on 11 June 2024 rejecting the challenge. In terms of the progress of the adjudication, the adjudicator considered that the period proposed by Eros for the Response was too short and he thought it should be closer to the four weeks proposed by Beck. Eros agreed to the timetable proposed by the adjudicator.

40. On the substance of this adjudication, Beck has drawn attention to an article in The Times newspaper which reports that all of the apartments have now been sold. That is disputed as a matter of fact by Eros, who rely on witness statements that have been served in this or other adjudications.

The context of the application

41. I would note that each of the Referral Notices informed the adjudicator of the ongoing adjudications between the parties, as did the letters from Howard Kennedy challenging jurisdiction. It is not therefore suggested, and could not be suggested, that the adjudicators were not each aware of the extent to which other adjudications were being commenced and pursued by Eros. Further, it was apparent to Beck from 11 June at least that all of the Eros adjudications were proceeding and that none of the adjudicators had seen fit to resign.

42. As I have mentioned, two weeks after the Referral Notice in adjudication no. 6, Eros commenced the Part 8 proceedings. These were issued on 19 June but appear to have been served the following day.

43. Just before that on 18 June, Shoosmiths wrote to Howard Kennedy setting out a further prospective claim. That claim related to the lost opportunity to engage in a further project in the same geographical area. A claim of £36.9 million was intimated, representing the estimated lost opportunity or lost profit. In the concluding paragraphs of that letter, Shoosmiths said this:

> "20. This letter is as detailed as it reasonably needs to be to allow you to understand the claim made against you client and decide whether you accept, reject it or require further information. For the avoidance of doubt, this letter is not intended to serve as a Letter of Claim under the Pre-Action Protocol.
>
> 21. We invite you to confirm on an open basis, by no later than 5pm on 3 July 2024 whether your client accepts this claim, rejects it, or requires further information. If you have questions about the claim, or require further information, please set out these requests clearly and succinctly with the same timeframe so that this matter may be progressed expeditiously.
>
> 22. Please be advised that if the claim is disputed, our client reserves the right to commence an adjudication to recover the losses it has incurred by reason of your client's breaches of contract. If we do not hear from you, we will assume the claim is disputed and will proceed accordingly."

44. On 21 June Beck then made this application. No notice was given to Eros of the intention to make the application. The application was uploaded to CE file at 4.18pm on Friday 21 June so that it was not processed until the Monday morning. As Mr Wilken KC points out in his written submissions, Beck was aware that Eros, a company incorporated in Jersey, had English solicitors, namely Shoosmiths, who are acting in all the adjudications, who might well have been authorised to accept service, as in fact they were. In any event, the application was emailed to Shoosmiths at 5.09pm on the Friday and Shoosmiths responded on behalf of Eros on Saturday 22 June 2024.

45. Amongst other things, Eros unconditionally confirmed that it would not commence any further proceedings in Court or adjudication until all four adjudications which it had commenced were concluded. That undertaking has been offered again today to the Court. Mr Singer relies on that speedy response to argue that Eros must have been aware that their conduct was likely to be the subject of challenge or complaint and that that is the only reason why they might have been ready with such a prompt response.

The statutory regime and the authorities

46. Section 108 of the Housing Grants Construction and Regeneration Act 1996 provides at subsection (1) that:

> "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section."

47. Subsection (2)(a) provides that the contract shall include provision to enable a party:

> "To give notice at any time of his intention to refer a dispute to adjudication."

The words "at any time£ are central to the argument on this application.

48. It is not in dispute that the Court has jurisdiction to grant an injunction preventing a party from pursuing an adjudication, whether that is one that has or has not yet been commenced, but it is also a jurisdiction that will rarely be exercised. That is apparent from at least the following three authorities.

49. In *Dorchester Hotel Limited v Vivid Interiors Limited* [2009] EWHC 70 (TCC) at [17], Coulson J said this:

> "It will only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication. It is important that, wherever possible, the adjudication process is allowed to operate free from the intervention of the Court."

50. In *Michael J Lonsdale Electrical Ltd v Bresco Electrical Services Ltd (in liquidation)* [2018] EWHC 2043 (TCC) at [14], Fraser J said:

> "What these cases make clear is that although the Court has the necessary jurisdiction to grant an injunction in respect of an ongoing adjudication, it will only do so very rarely and in very clear cut cases."

51. Lastly, in *Marbank Construction Ltd v G&D Brickwork Contractors Ltd* [2021] EWHC 1985 (TCC) at [12], O'Farrell J said:

> "…it is only in very rare cases that the Court will interfere in the adjudication process by way of injunctive relief…"

52. A simple example where the Court might exercise that jurisdiction is where it is plain that the adjudicator would lack jurisdiction so that there could be no purpose in pursuing the adjudication to an unenforceable decision or award.

53. The authorities which have been cited to me allow for the possibility that an injunction may be granted, however, in broader circumstances and in particular where it is unreasonable and oppressive to pursue the adjudication.

54. In *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC), it was sought to restrain the adjudication on the grounds that the appointment was a nullity because the adjudicator was appointed under a provision that did not exist. That is illustrative of my simple example and an injunction was granted on that basis.

55. Alternative grounds advanced included that the adjudication was oppressive. The judge, Edwards-Stuart J, dealt with this aspect, as he said, shortly, because he had already restrained the adjudication on the primary ground. At [68[, he referred first to what he had said in *Mentmore Towers v Packham Lucas Ltd* [2010] EWHC 457 (TCC). He then continued

> "The issue here, therefore, is whether this referral to adjudication has been brought unreasonably and oppressively. I would emphasise that these two requirements are disjunctive. A referral to adjudication may be unreasonable (for example, if deliberately delayed until shortly before Christmas) without necessarily being oppressive. Alternatively, it may prove to be oppressive, perhaps because unknown to the referring party, the relevant personnel within the responding party have just been posted abroad - without having been unreasonably started. Both elements must be present and, in my judgment, to a fairly high degree.
>
> 69 …In my view, the starting point must be the statutory right to refer a dispute to adjudication "at any time" pursuant to section 108 of the Housing Grants Construction and Regeneration Act 1996. In this context, the authorities support the following propositions.
>
> (i) The fact that a referral to adjudication is brought in parallel with existing litigation restraining the same issue is not in itself a ground for restraining the referral…
> (ii) The mischief at which the 1996 Act is aimed is the delays in achieving finality in arbitration or litigation…
> (iii) The right to refer a dispute to adjudication at any time confers a commercial advantage on the referring party and this must be taken to have been known by Parliament when the 1996 Act was passed: see

Camden London Borough Council v Makers UK Ltd [2009] EWHC 605 (TCC) at paragraph 32. One aspect of this advantage is the fact that the responding party will in most cases incur irrecoverable costs in defending the adjudication, and this can operate as a bargaining lever in favour of the referring party.

(iv) A party should not be prevented from pursuing its right to refer a dispute to adjudication, save in the most exceptional circumstances, see *Makers* at paragraph 35."

56. Edwards-Stuart J then dealt with the facts of the case and would have refused to grant the injunction sought on this alternative ground. At [71], he added:

> "In saying this I do not underestimate the difficulties in which Twintec and its experts have been placed by VFL's decision to refer this dispute to adjudication at this particular juncture. Undoubtedly, if the referral were to proceed it would put Twintec and its advisers under great pressure, but in my judgment that pressure is not of itself sufficient to amount to an exceptional circumstance so as to justify the court in restraining VFL from further pursuit of the referral…"

57. Another example of the Court's approach where it was argued that it was unreasonable and oppressive to pursue the adjudication is to be found in the decision of O'Farrell J in *Jacobs UK Ltd v Skanska Construction UK Ltd* [2017] EWHC 2395 (TCC). In that case, Skanska commenced an adjudication and then withdrew the notice. It then commenced a further adjudication in respect of the same dispute, and Jacobs sought to restrain it from pursuing that second adjudication.

58. At [32] O'Farrell J observed:

> "The court's power under section 37 may be exercised… (b) where one party to an action has behaved, or threatens to behave in a manner which is unconscionable. The court's jurisdiction extends to a power to grant an injunction restraining a party from commencing or continuing an adjudication that is unreasonable and oppressive, although the fact that a claim is being pursued by way of adjudication rather than litigation may affect the court's view as to whether or not it amounts to unreasonable and oppressive behaviour…"

59. Then at [35] – [36] the judge said:

> "35. The court has power to grant an injunction to restrain the second adjudication if it is established that it is unreasonable and oppressive. Such power will be exercised where the adjudicator does not have jurisdiction (such as where the dispute has already been decided in an earlier adjudication), where the referring party has failed to comply with the adjudication agreement (such as failures to pay awards or costs from earlier adjudications), or where the further adjudication is vexatious (such as serial adjudications in respect of the same claim).
> 36. …The court will not intervene unless the further reference is both unreasonable and oppressive. In this case, the substance of the claims remains

the same and therefore, Jacobs will be entitled to rely in large part on its prepared response. Although there is new material, including new quantum expert evidence, it was anticipated that there might be new arguments raised by Skanska following Jacobs' response; hence the indication that Jacobs would seek the right to submit a rejoinder. The inconvenience and additional costs suffered by Jacobs as a result of the second adjudication are not so severe or exceptional so as to warrant intervention by the courts by way of injunctive relief."

60. On the facts of that case, therefore, although the judge considered the withdrawal from the first adjudication to be unreasonable, she did not consider the conduct unreasonable and oppressive in commencing the second adjudication so as to justify the grant of an injunction. Although the facts of that case are materially different from the present, the approach itself provides useful guidance.

61. Mr Wilken KC also makes the point that the second element of the injunction sought, that is, that Eros in effect discontinues the extant adjudications, is a mandatory injunction because it requires Eros not to refrain from doing something but to do something. He therefore submits, referring to the notes in the White Book at 25.1.11 and Volume 2, section 15:15 - 24, and the authorities referred to in those passages, that the test is whether the applicant will suffer irremediable prejudice if the injunction is not granted, and, further, that I need to be satisfied to a high level that this injunction ought to be granted on an interim basis and that the right to this injunction would be established at trial.

62. It is difficult to apply those concepts to the present case because the contention is not that Eros has no right to adjudicate at all, for example because of lack of jurisdiction under a binding contractual provision, but rather that the manner in which it is adjudicating is oppressive and unreasonable. The effect of the injunction would be to restrain Eros from proceeding with the adjudications already on foot, and that is in the nature as I have already indicated of a prohibitory injunction. So far as I can see, that is how the applications have been treated in the cases cited in relation to adjudication and Mr Wilken was in agreement that it was the substance of the injunction that was relevant not the form.

Beck's argument

63. Beck's argument in the present case, in respect of the four adjudications already commenced, is, in essence and against that legal background, as follows. Firstly, it is submitted that all of the claims are weak claims, and, secondly, that Beck cannot reasonably defend itself or fairly represent its position in these four adjudications all at once. The fact that they are weak claims is relied on as bolstering the argument that it is unreasonable and oppressive for Beck to have to fight on four fronts at once. These arguments, or at least those as to procedural fairness, have already been raised in the adjudications, not only in the jurisdictional challenges but also in the debates about progress and timetable, to the extent that one adjudicator considered that if a reasonable extension of time was not agreed, he might have to consider resignation. In effect, having failed to persuade the adjudicators that they should not proceed, Beck is now trying to succeed on the same arguments before the Court.

64. Like the adjudicators, I do not accept Beck's arguments. There is an inevitable burden in having to act in four adjudications at the same time. That is the product of the right

to commence an adjudication at any time. The commencement of the adjudications was spread over a short period but Eros was largely content to agree to the timetables proposed by the adjudicators or requested by Beck. Where that was not the case, there was the commonplace exchange of proposals, culminating in directions from the adjudicator. That was the normal to-ing and fro-ing, or, to adopt the phrase that I do not like, cut and thrust, of exchange of proposals as to directions in an adjudication.

65. I have not seen anything that I could regard as unconscionable, unreasonable or oppressive in Eros' approach in the individual adjudications. Beyond that, I make no judgment on either party's conduct, but I observe that even if one made an unreasonable proposal or raised an unreasonable objection to an extension of time, that would certainly not be a reason for the Court to halt the adjudication. It would be a matter for the adjudicator to deal with within the adjudication.

66. There is a real risk that if the Court were to halt an adjudication because a party was alleged to be behaving unreasonably within the adjudication, that would open the door to the Court policing adjudications. That was indeed what the Court was asked to do in the *Dorchester Hotels* case. In that case, Coulson J was asked to make a declaration that an adjudication was being conducted in breach of natural justice. He held that he had jurisdiction to do so but that it was a jurisdiction that should be exercised very sparingly. Coulson J was critical of the commencement of an adjudication just before Christmas, with 37 lever arch files of material, some of it new. Nonetheless, he did not grant the declaration sought. In reaching his decision, he took account of the adjudicator's view that he could deal with the adjudication fairly. That is analogous to the position in the present adjudications.

67. Coulson J also said that he could not conclude at this stage that the timetable would inevitably give rise to a breach of natural justice. That is similarly analogous to the position in the present case.

68. Further, the judge said that he could not determine whether the Claimant was not in a position fairly to respond to the new material, and finally at [33], he said this:

> "The final reason why I have concluded that I should not grant the declaration sought this morning is that my refusal at this stage does not leave the Claimant without a remedy. Assume that this adjudication proceeds and leads to a result which the Claimant does not like, which result the Claimant ascribes to specific breaches of natural justice that occurred during the adjudication process. The Claimant will be entitled to rely on such breaches, if they can be made out, to resist enforcement, subject of course to the usual rules and as to the demonstration of prejudice and the like. On that occasion, the Judge will be in a much better position to see whether or not any breaches of the rules of natural justice have actually taken place and if so, whether they have caused real prejudice to the Claimant. That is an exercise which, because of the pre-emptive nature of this application, I am unable to take today."

69. Again, that is analogous to the position before me, and I have made it plain that nothing in this decision pre-empts the taking of any defence of breach of natural justice if there are decisions in favour of Eros and if there are enforcement proceedings.

70. I observe briefly that in terms of volume of material, Mr Brogden submitted that the volume of material in *Dorchester Hotels* was far greater than in the present case. That is undoubtedly a point well made, and the number of pages has been properly counted, but there are arguably added complications in the present case from the fact that there are four adjudications, so a simple comparison of volume of material may hold less weight. In any case, all such matters are fact specific. However, as I have said, Coulson J's last point holds good in the present case and there are other clear analogies to be drawn. As he made clear and others have, the door to policing ongoing adjudications is one that should be opened sparingly, and I would say only in exceptional circumstances, and these are far from being such circumstances.

Further discussion

71. Given the submissions that have been made to me, I say something about the adjudications themselves, although it seems to me that other than in the way I have already indicated, that is, as bolstering the case on what is unreasonable and oppressive, the merits of the adjudications themselves are plainly matters for the adjudicators and not for the Court, and it would again be an exceptional case in which the Court would take into account the weakness of a claim brought in adjudication when considering whether to restrain that adjudication from proceeding.

72. Firstly, adjudication no. 4 in respect of interim certificate no. 47 is one in relation to which Beck must, by definition, already know its case. Mr Singer submitted that there were differences because a negative sum has now been certified, but Beck must know its own case on valuation, and indeed indicated that it might commence its own adjudication on the negative valuation in interim certificate no.

73. Secondly, Beck says it has short answers in principle to adjudications nos. 3 and 6 which are claims for unliquidated damages, in that Eros' exclusive remedy is in liquidated damages.

74. Thirdly, in respect of adjudication no. 5, there is clearly a relationship to adjudication no. 1, but there was nothing that required Eros to wait for the outcome of an extension of time claim before pursuing its claims for liquidated damages and the extension of time given in adjudication no. 1 can now be taken into account in the later adjudication as appropriate.

75. In short, Beck knows what its defences are in these adjudications and the adjudicators conducting them have determined timetables which they, at least, consider fair to Beck in putting forward those cases. At the risk of repeating myself, if at the end of the day Beck considers that there has nonetheless been a breach of natural justice, that is a matter that can be raised in resisting enforcement.

76. I also take account of the fact, as Mr Wilken has submitted, that there is a distinction between adjudication and litigation, in that in adjudication only one dispute can be referred at one time. Despite that, it is well established that the Court will treat say, a final account claim that might comprise a valuation claim, a variations claim, an extension of time claim, and a loss and expense claim, as a single dispute. Firstly, that illustrates that the scope of what can be referred to adjudication at one time may be vast. If the upshot is that the responding party cannot fairly respond, there may be a defence to enforcement on the grounds of breach of natural justice, but there would have to be something quite exceptional for the court to interfere with the adjudication

at an earlier stage - something that would lead to the conclusion that there could never be an enforceable decision. That is not the case here.

77. Secondly, that observation as to the difference between adjudication and litigation supports Eros' contention that there is nothing unreasonable or oppressive in the commencement of four adjudications in short order. There are four adjudications on four disputes and not ones that Eros considered could be wrapped up in one adjudication in a manner akin to a final account dispute. Indeed, there seems to me to be at least some merit in Mr Wilken's submission that had they sought to commence one adjudication in respect of all four disputes, Beck would have taken the more than one dispute point, if I can call it that, as a jurisdictional objection.

78. A further point is this. As I have mentioned, Mr Wilken submits that the test that Beck must meet is that they will suffer irremediable prejudice if the injunction is not granted and Mr Singer adopted the same test. That submission is made on the basis that the injunction sought in part is a mandatory one. It is equally capable of being regarded as a prohibitory injunction, and that is how applications have been regarded and addressed in previous cases. But irrespective of whether irremediable prejudice is the relevant test, the position is that decisions in adjudication are temporarily binding. If they are in Eros' favour, Beck has a remedy in Court proceedings, or, if there is merit in its jurisdictional or breach of natural justice arguments, in defence of enforcement proceedings. That militates against the possibility of irremediable prejudice.

79. The ability to raise breach of natural justice arguments in defence to enforcement is a point I have emphasised in the course of this judgment and Beck's only answer to that point appears to be that its current financial position means both that it would be unable to pay any award in Eros' favour and that it would not be able to challenge the decisions by further proceedings in Court. But neither of those is a reason to halt the adjudications.

80. Having said that, and for the avoidance of doubt and at the risk of repeating myself, I would add the following. There is a substantial element of the pot and the kettle both name calling in this application, not so much, in fairness, in counsel's submissions but in the witness statements and the correspondence exhibited to them. Both parties at various points have complained vigorously about the other's conduct. I only have to address these issues so far as they are material to the application for an injunction. I make no more general comments or findings. In particular, if, in due course, there are arguments on enforcement, these are arguments for then not now.

81. Lastly, I have dealt thus far with the limb of the application which seeks to injunct the four extant adjudications from proceeding. The other limb, which is first in the draft Order on the application, is one that seeks to injunct Eros from commencing any further adjudications without the permission of the Court. I have not been referred to any authority in which such a sweeping injunction has been granted. If an injunction were granted restraining a current adjudication because of a lack of jurisdiction, it might well be obvious that no further adjudication could be commenced, and if a party sought to do so, an injunction restraining further referrals might be appropriate. There are no such circumstances here. As Eros has submitted, to restrain them generally from commencing further adjudications, in circumstances such those in the present case, would be an extraordinary interference with the statutory right to adjudicate. Since the order sought is one that would prohibit the commencement of any further adjudication without the permission of the court, it would also involve the court

policing the commencement of adjudications and create a new range of satellite litigation in relation to the granting of permission.

82. I do not have to decide whether that is an injunction that could not ever be granted. I can envisage circumstances akin to declaring someone a vexatious litigant where it might be appropriate for the Court to intervene, in effect to support the statutory regime and its intent rather than to interfere with it, but it is not an injunction that should be granted in this case.

83. Accordingly, the application is refused.

(proceedings continue)

Indemnity costs

84. So far as the basis on which costs should be assessed is concerned, I have some sympathy with Mr Brogden's submission. There are some undoubtedly unsatisfactory aspects of this application which he has relied upon and I have alluded to in judgment. Nonetheless, I am in agreement with Mr Singer on this point.

85. The real crux of this case is not whether the application was issued ex parte without notice and ought to have been advertised prior to that happening, nor is it that the proposed undertaking in respect of further adjudications was a complete answer to the application.

86. The application was unusual and one which invited the Court to exercise a jurisdiction which it rarely does, but nonetheless it was properly arguable on the basis that four adjudications being pursued at one time, creating particular pressure on Beck, was oppressive and unreasonable. The application was, in the event, heard on notice with both parties represented. There are, I agree, unusual aspects to this application, but not such as take it outside the regime for assessment on a standard basis, so I will deal with assessment of costs on the standard and not the indemnity basis.

(proceedings continue)

Summary assessment

87. I am asked to summarily assess the costs which I have already said I will do on a standard basis, the point of which is that the burden is on the party seeking its costs to show that those costs were reasonably incurred. The total costs bill put forward by the respondent to the application, Eros, is £115,436.50. That has to be seen in the overall context that this application was issued late last Friday afternoon and emailed to Eros' solicitors at just after 5 o'clock on the Friday. I accept from Mr Brogden that that timing is likely, in itself, to have caused some increase in costs. As I put it a moment ago, all hands had to be on the pumps, and although leading counsel is involved in the extant adjudications, he was not available at that short notice, and Mr Wilken has had to step in at short notice to act as leading counsel. There can be no complaint or no suggestion that instructing leading counsel was not reasonable. Both parties have had leading counsel on their teams and understandably so for an application of this seriousness.

88. However, and bearing in mind that the hourly rates for Shoosmiths are £442.50 for a grade A partner, £243.75 for a grade C associate at one level and £228.75 at another,

£161.25 for the trainee, and £243 for the costs lawyer who will have drawn up the statement of costs, I have taken, for the purposes of forming a view about this costs bill, an aggregate hourly rate of £500. That might be thought to be generous. It is certainly generous in terms of the solicitors but it takes account of the potentially higher rates for counsel, particularly leading counsel. Taking that broad brush figure and dividing it into the total costs bill indicate that 230 hours of work have been done on this case in the course of just less than a week, which seems to me quite extraordinary, even for an application of this seriousness.

89. The witness statement of Mr Pawlowski which had to be considered and the responsive statement of Mr Reid were properly, and I have already praised them for this, statements which set out the factual sequence of events in relation to the adjudications and surrounding matters rather than seeking to argue the case. However, the effect of that was that what was involved was putting the documents into chronological order, which I would reasonably assume they were already, given that they related to adjudication proceedings ongoing, and then reducing those to a narrative, cross-referenced to the bundle which is an administrative task that can be carried out, and presumably was carried out, by the trainee or the lowest grade of associate.

90. That amounted to £35,000 of solicitors' costs. The remaining £70,000 is made up in brief fees for two counsel, whose work would have included advising on this matter, digesting the witness statements, advising on the witness statements, and then drawing up the skeleton argument that reflected that. How that could all amount, on my rough calculation, to 230 hours of work in the course of a single week, I fail to see. Mr Brogden is clearly right that this was an important matter for his clients, it needed to be hard fought, but that does not to my mind justify quite extraordinarily high number of hours and this extraordinarily high level of costs.

91. I do recognise that there will have been some uplift because of the manner in which Eros was "bumped" with this application, and I am going to make a generous allowance for that in assessing the costs, but I am going to take a broad brush approach and assess them at £70,000.
