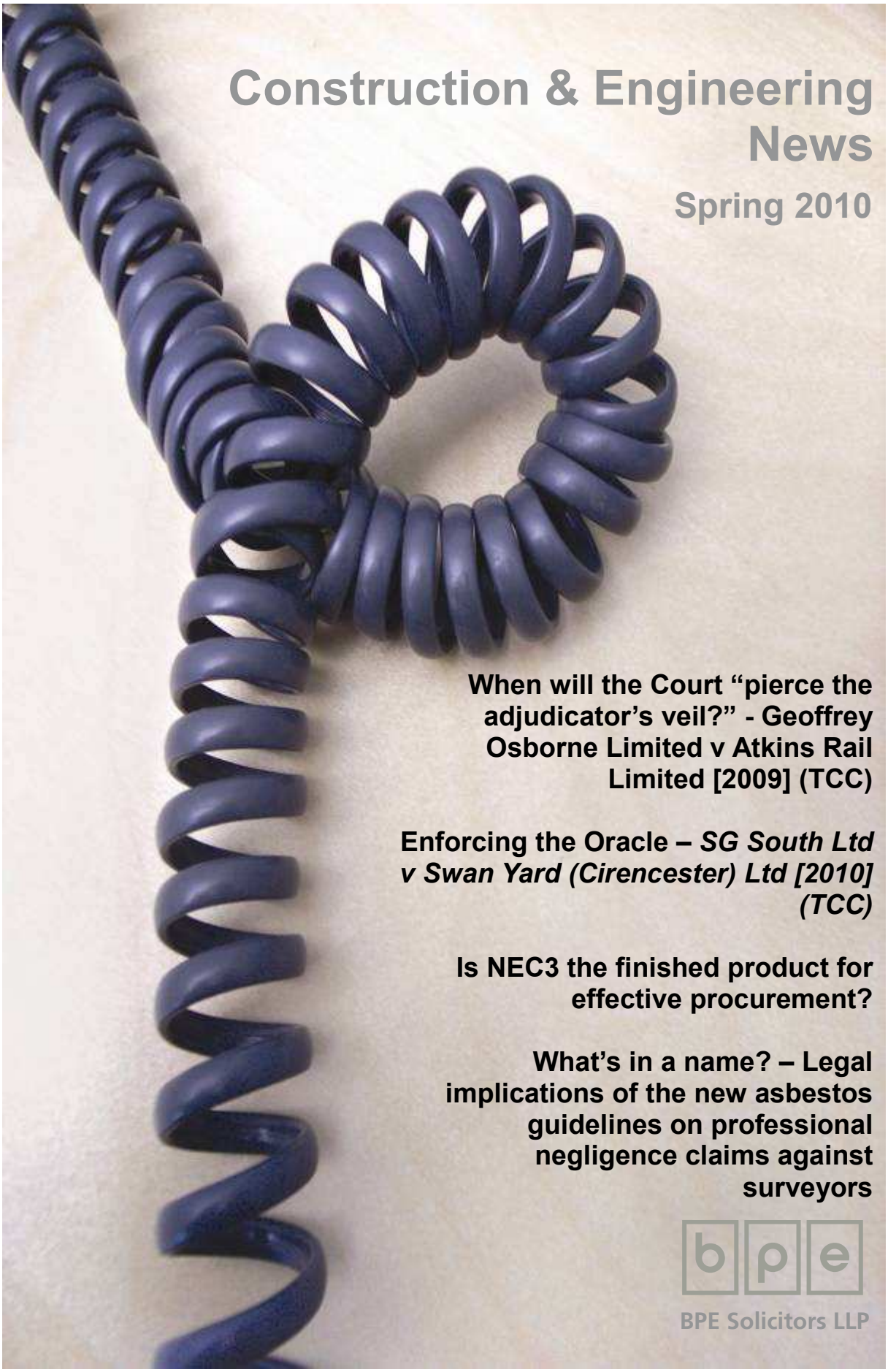

# Construction & Engineering News

## Spring 2010

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BPE Solicitors LLP

In our Spring newsletter we comment upon several adjudication enforcement cases to have come out of the TCC, as well as providing an overview of how the NEC3 seems to be shaping up in the marketplace five years on. An update on the changes to asbestos guidance for developers is also available.

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**When will the Court "pierce the adjudicator's veil?" - Geoffrey Osborne Limited v Atkins Rail Limited [2009] (TCC)**

by Jon Close

It is a well established principle that an adjudicator's decision will be enforced by the Courts provided that the adjudicator has answered the correct question, even if that decision contained obvious errors or was wrong in fact and/or law. There are inevitably exceptions to the rule which could, to misquote a popular corporate phrase, pierce the adjudicator's veil.

The case of *Geoffrey Osborne Limited* ("Osborne") *v Atkins Rail Limited* ("Atkins") clarifies when the Court will look behind an adjudicator's decision to finally determine items in dispute rather than simply enforce it.

***The facts***

Atkins was the main contractor for certain safety rail upgrade work in the Basingstoke area. Osborne was employed as its subcontractor.

Predictably, Osborne issued a notice to adjudicate when it was not issued with an interim certificate for a large part of its subcontract works. The company asked the adjudicator to value the ground investigation and signalling works and to determine the payment to which Osborne was entitled as a result.

***The adjudication decision***

The adjudicator decided that Osborne was owed a sum of £504,000 in respect of these two items but had overlooked the fact that Atkins had included a sum of £912,000 for the same items in a previous interim certificate. This error resulted in Osborne being overpaid by £400,000.

Atkins invited the adjudicator to correct his decision but he refused to do so. Upon enforcement of the decision by Osborne, Atkins sought declarations from the Court that the adjudicator had "*no jurisdiction to make the decision that he did and/or that the decision was plainly wrong and should be set aside and/or not enforced".*

***The TCC application to overturn or set aside the decision***

The starting point here was the case of *Jarvis Facilities Limited v Alstom Signalling Limited*. There are times when it is more appropriate for the Court to finally determine matters rather than enforce the adjudication decision and then for the parties to re-visit the dispute. This is often the case in serial adjudications or proceedings between the same parties.

The Construction Act does not however give a timeframe by when the Court should choose one action over the other.

In coming to his decision, the judge asked himself the following questions:

1) In the light of his assessments as to the value of the two claims, was the adjudicator entitled to order such sums either by law or by means of the scope of dispute referred to him?

The answer was that he was not – the adjudicator had ordered the difference between the sum claimed and the gross valuation of the works without taking into account the value of sums already certified and paid. This was clearly required in the subcontract.

2) Did the adjudicator's decision amount to a decision that he was not asked to make (i.e. outside his jurisdiction) or was it merely a wrong answer to a question that he was asked to decide (i.e. not outside jurisdiction)?

Having considered a finely balanced argument, the judge found that the adjudicator did make his decision within jurisdiction. He could not interpret the wording of the Notice to Adjudicate as not giving the adjudicator the power to award such sums as he saw fit.

3) If the first question was decided in Atkins' favour, was it entitled to declaratory relief on its Part 8 application?

The outcome was somewhat of a hybrid judgment:

- Atkins was entitled to a declaration to the effect that the adjudicator was wrong to order payment without taking into account sums paid as at the date of the Notice to Adjudicate;
- Osborne's application for summary judgment was granted insofar as it related to the adjudicator's award in respect of costs of £44,453.25 and the adjudicator's fees; but
- On all other sums payable, the judge left those matters open to be dealt with at trial. He did however add that he would have decided them had he been given all relevant material to do so.

In summary, this case is important in clarifying when a Court will determine disputes rather than take the normal course of enforcing decisions; namely when:

- there is no substantial dispute as to fact. In this case, both parties admitted that the adjudicator had made an error;
- the challenge relates to the validity of the decision itself and not the adjudicator's Jurisdiction; and
- the Court has all necessary information in front of it to finally decide the items in dispute.

***Practical tips***

For the enforcing party, the position remains the same as before. Unless you and your advisers can identify merit in any resisting defence based on an alleged excess of adjudicator jurisdiction, breach of natural justice or alleged financial impercuniosity which may amount to grounds for setting aside the award, then apply for summary judgment using the TCC abridged process and seek enforcement of the award.

If you are the defending party, take the initiative and issue a Part 8 application for declarations that the enforcing party is not entitled to payment. Only do so if the substance of the adjudicator's decision is plainly wrong and neither party disputes this fact. Make sure that the basis of arguing that the decision is plainly wrong can be proved in the material in front of the Court. Provide the Court with a full copy of the material originally given to the adjudicator.

Both parties should bear in mind that the Court may be prepared to finally determine isolated areas of the dispute provided it is just and expedient to do so.

**Enforcing the Oracle – *SG South Ltd v Swan Yard (Cirencester) Ltd [2010] (TCC)****

by Jon Close and David Holmes

It's impossible to enforce an adjudicator's decision where there is no contract in writing, right? Wrong apparently, according to the TCC who handed down judgment leading to the award to SG South of £70,450.14 plus VAT based on an unsigned JCT Management Contract.

The crucial point is that Swan Yard never reserved its position on the adjudicator's jurisdiction. To the contrary, it based its submissions in the adjudication on the assumption that the terms of the JCT contract applied. More specifically, Swan Yard expressly waived any jurisdictional challenge in a letter dated 28 August 2009 to SG South.

The bottom line is that if you do not expressly reserve your position, you are highly unlikely to be able to complain if it all goes wrong at a later date. A party may not go back on its concession if it then goes on to exchange written submissions evidencing a contract in writing. Section 107(6) of the Construction Act can be argued very effectively in such circumstances.

Several other reminders result from this judgment:

- If arguments fail in adjudication, raising the same arguments again at enforcement stage will not work if the adjudicator has had necessary jurisdiction to come to a decision.

- An argument based on mathematical errors in the decision itself will only be successful on the basis set out in *George Osborne v Atkins Rail* discussed above.

- Commencing proceedings in another TCC (in this case, Bristol) to determine a final account is inappropriate where there has already been an adjudicator's decision, which is temporarily binding and which has not been honoured. The fact that there are ongoing proceedings to deal with the underlying issues will not change that fact.

The enforcing party should deal with multiple enforcements against the same defaulting party in the same application. It seems that this applies whether or not the underlying contracts and issues raised are different. Otherwise, the enforcing party will be penalised in terms of costs recoverable.

**[BPE Solicitors LLP acted for the successful enforcing party in this action as well as its sister action, SG South Ltd v (1) King's Head (Cirencester) Ltd (2) Cornhall Arcade Ltd [2009] (TCC) covered in our December 2009 edition. Read more at:*

**http://www.bpe.co.uk/pages/4638/No_change_in_judicial_stance_on_enforcement_of_adjudication_awards.htm**

**Is NEC3 the finished product for effective procurement?**

by Jon Close

Five years on, the following areas still seem to be causing some confusion:

- The proper formation of the contract itself and how to use the various secondary options to achieve the desired risk parameters of the team; and
- The concept of partnering – does anyone know what it means?

It is, of course, all too easy to criticise a particular contract for its failings. Contracts are not meant to be, and cannot be, of the "one size fits" variety. The benefits of NEC3 are clear for all to see and have been covered many times over.

Let's not forget however that NEC3 was born in a period of relative economic stability, so has its operation really been tested to destruction? There is still a lack of judicial opinion to judge NEC3 by its own principles. It may be that strong project management has avoided any of the key pinch points from ever coming into the public eye. It could be, however, that the early warning mechanism is highly effective in avoiding disputes.

There are, in reality, positives and negatives as with any contract. The consequences of exploiting certain ambiguities in this form could be magnified using NEC3, which is a trap for the unwary.

*Flexibility vs clarity – they are not mutually exclusive*

One of the core features of the NEC3 is, of course, its wide range of secondary options and the ability to incorporate 'z clauses' to aid the interface between various disciplines on site.

Inexperience or simply a lack of care may conceivably lead to there being no enforceable contract concluded at all, or at least not in the way parties intended. In terms of adjudication, there may not be a contract sufficiently evidenced in writing to enable an adjudication to take place (a situation which will continue to prevail if the amendments to the Construction Act are ever brought into force).

Problems tend to arise from one or a number of the following issues being overlooked:

- A failure to execute the contract properly, which may have consequences for enforcement as well as insurance cover;
- Vagueness in defining the scope of services to be provided;
- Project specific employer's risks being ignored or not stated in the Contract Data. This causes the Contractor to complain as it bears the risk of any not so stated;
- The fact that there is simply an obligation to record risk events in the Risk Register; not necessarily to do anything about them. Decision making is not mandatory under core condition 16.3;and
- A lack of proper programming or a failure to adequately set out sectional completion information. Sometimes, parties forget to include secondary option X5, which must be included within the contract if section completion is required.

The practical advice is to get the Contract Data firmed up as soon as it is accepted at tender stage. Why leave it to chance when you are otherwise dedicating so much administrative resource to making the conditions of the contract work?

**What's in a name? – Legal implications of the new asbestos guidelines on professional negligence claims against surveyors**

by Adam Hiscox

The revised Health and Safety Executive guidance for asbestos surveys (HSG264) came into force at the end of January 2010, replacing the previous MDHS100. Whilst the name has changed, what else is new? More importantly, what do the changes mean in reality?

Given the increased emphasis on the role of the 'Duty Holder' (i.e. employer) in the new regulations, who will ultimately approve the surveyor's asbestos survey, it will no longer be quite so easy to blame the surveyor if things are not in order.

Conversely, the surveyor will now find it more difficult to produce a less thought out survey and blame it on time or cost constraints. Surveyors who tender on a 'pile them high, sell them cheap' basis will quickly find that they do not get as many orders. The employer cannot now afford to accept such surveys even less than before for the following reasons.

**Planning**

The Duty Holder must now check the competency of the prospective surveyor in terms of:-

- Training – for example the surveyor's procedures for health and safety training; and
- Resource – the surveyor must be allocating sufficient time and staff to the job.

Whilst the above will have implications on the cost of the survey, the Duty Holder must get involved and take an interest in the survey right from the outset. He will now not be able to treat the commissioning of the survey as a 'tick box exercise' and then complain to the surveyor. Moreover, the Duty Holder must make sure the report will be fit for purpose, which is quite a shift in the burden of proof if the results of a survey were ever to be tested.

**Caveats**

Although there is a renewed emphasis on the obligations of the Duty Holder, the surveyor is also under an important new restriction. The surveyor will need to agree any caveats in writing and expressly confirm to the Duty Holder which areas are not to be assessed.

The Duty Holder should not accept any restrictions on the areas to be assessed or any other caveats if this fetters his duty to manage asbestos. Otherwise, it does so at its own risk.

**Final Checks**

If the parties still do not understand what the final survey should contain, there is now an added fail-safe to the procedure. The Duty Holder is now obliged to check for, amongst other things, any obvious errors and that the report is fit for purpose in terms of the areas assessed and the samples taken.

The increased obligations on the Duty Holder means that surveyors are less likely to escape liability for poor performance. These processes and the emphasis on the pro-activeness of both parties limits any contractual limitations.

So are disputes over shoddy asbestos surveys now a thing of the past? In theory, there should at least be less of them. It is important to realise that the Duty Holder's failures under the regulations, whether it be a failure to hire a competent surveyor or to check the surveyor's report, does not automatically preclude actions against negligent surveyors. It will however help to clarify what is expected of each party in terms of the required thoroughness and due diligence of the employer.

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