# CORONAVIRUS, ADJUDICATION AND INJUNCTIONS

## By James Frampton

**Coronavirus, or Covid-19, has impacted and continues to impact all parts of our lives. The focus in the construction industry has rightly been on the safety of workers still attending sites. No doubt the future will see litigation on whether the coronavirus gives rise to extensions of time, force majeure, frustration or other legal rights or remedies. At present, the main impact on construction litigation has been the procedural impact of the Coronavirus.**

By the middle of April 2020, within 1 month of the start of lockdown, there were already 15 High Court judgments referring to Coronavirus. These included judgments on procedural issues, such as the refusal of an application to adjourn a 5-week trial in a £250 million claim in the Insolvency and Companies List of the Business and Property due to start in June 2020. The TCC has since published a template remote hearing order and hearings by Zoom, Skype or similar video conferencing software have quickly become the norm.

In litigation and arbitration, it has, therefore, been all change. What about the impact of the Coronavirus on adjudication?

### *Millchris Developments Ltd v Waters*

The question of adjudication and Coronavirus was always likely to arise given the short-timescales in adjudication and the complications and delays caused by remote working and the furloughing of employees at many contractors during the lockdown. The surprise is how quickly it did so.

On 2 April 2020, Jefford J heard an application by Millchris Developments ("MD"), a building contractor, for an interim injunction to prohibit a home owner ("W") for whom it had carried out building works in 2017 from continuing with an adjudication.

It is a sign of the difficulties of remote working, that the transcript of the judgment only became available two months later on 1 June 2020.

### The Facts

MD had carried out building works to W's property. The works commenced in December 2017, albeit the contract, in the form of the JCT Homeowner Contract, was only executed on 2 March 2018. The contract contained a provision for adjudication and required a decision to be made within 21 days.

It appears that the works were completed in 2019 and there was a final account meeting on 19 August 2019.

In November 2019, MD ceased trading (although it remains an active company on Companies House) as a result of its poor financial state.

After MD has finished the works, W had engaged a second surveyor who advised her that she had been substantially overcharged.

On 23 March 2020, W commenced a true value adjudication contending that she had overpaid MD by £45,000 and that there were defects in its works. That evening the Government announced the "lockdown" measures.

An adjudicator was appointed who initially proposed a timetable for submissions to be completed by 3 April 2020. This timetable was rather condensed but was necessary in order to meet the 21 day timescale in the contract (as opposed to the standard 28 days under the Scheme).

On 26 March 2020, MD wrote to the adjudicator stating that it would not be able to comply with this timetable and also suggesting that the case was not suitable for adjudication given its nature and complexity. MD concluded by stating that W should withdraw the adjudication as it would inevitably lead to a breach of natural justice.

The adjudicator rightly ignored the suggestion that a £45,000 final account claim was not suitable for adjudication. However, on timetable, he recognised the difficulties caused by the Coronavirus and proposed a 2 week extension.

W agreed to this extension. However, MD was still dissatisfied and applied to the court for an interim injunction to stop the adjudication until the Coronavirus crisis, and the lockdown measures imposed by the Government as a result, were over.

### Injunction: Principles and Argument

The principles applied by the court on an interim injunction are well established. Following *American Cyanamid*[1], the questions to be asked are:

1. Is there is a serious issue to be tried?
2. Would damages be an adequate remedy?
3. Where does the balance of convenience lie?

1 [1975] AC 396

The adjudication specific guidance from *Lonsdale v Bresco*[2] in applying this three stage test is that the court will only grant an injunction in respect of an ongoing adjudication "*very rarely and in very clear cut cases*". (The Court of Appeal, in affirming the first instance decision which is of wider significance for insolvency and adjudication, did not comment on this part of the judgment. The appeal to the Supreme Court in *Bresco* was heard in April 2020, with the judgment expected later this year.)

On the first limb, MD's argument was that there was a serious issue to be tried because the adjudication, if pursued, would be in breach of the principles of natural justice and thus unenforceable.

## Decision

Unsurprisingly, Jefford J made short shrift of this argument in declining to grant an injunction on the first stage of the test.

As a matter of principle, the court did not completely shut the door on the argument that an adjudication could be injuncted on grounds of an unavoidable breach of natural justice. However, it made it clear that such an argument would only succeed in exceptional circumstances, the example given by Jefford J being where an adjudicator indicated that he would only consider submissions from one party.

On the facts, Jefford J rightfully does not appear to have had much sympathy for MD's explanations as to why it could not participate. Plainly, allowances need to be made for remote working, but it should have been possible for MD to obtain documents and provide submissions in the adjudication. As the Court noted, MD had been able to prepare for the injunction hearing.

## Analysis

Overall, the clear indication from the court is that natural justice challenges based on the Coronavirus to ongoing adjudications or adjudicator's decisions are very unlikely to succeed.

This decision is unsurprising and to be welcomed. In fact, far from being discouraged or unfair, adjudication is eminently suited to resolving disputes during the current remote working environment:

1. Adjudication is typically conducted on paper without live evidence.
2. Procedural issues are typically dealt with by email rather than hearings.
3. Adjudicators and the parties can adopt a flexible and bespoke timetable or approach.
4. Any adjudicator's decision is interim.

Points 1 to 3 mean that in many adjudications, minimal if any changes are required because of the Coronavirus to the typical procedure and approach, save for the likely absence of hardcopy bundles.

Point 4 means that even if a party feels aggrieved by a decision, it still has the opportunity to contest the adjudicator's decision in court or arbitration once we have returned to normal. The possible prejudice faced by a party having a remote electronic trial in court because of the lockdown is arguably greater than the prejudice to a party in an adjudication. The latter retains the ability to bring new proceedings once the Coronavirus and lockdown measures have ended (or at least ceased having such a significant impact on our lives), the former does not.

Overall, adjudication can and should continue to play a vital role in allowing those in the construction industry to resolve disputes and secure cashflow, particularly important during this difficult period. So long as parties and adjudicators are flexible and reasonable in making allowances for the unique working environment, and any particular difficulties it may pose, there is no reason why adjudication should be restrained.

## Site Visit

However, one aspect of the court's reasoning could merit criticism. The court's response to MD's argument that it could not be present at the site visit was to the state that:

(a) Parties do not have an absolute right to be present at a site visit, so an adjudicator could conduct it alone.

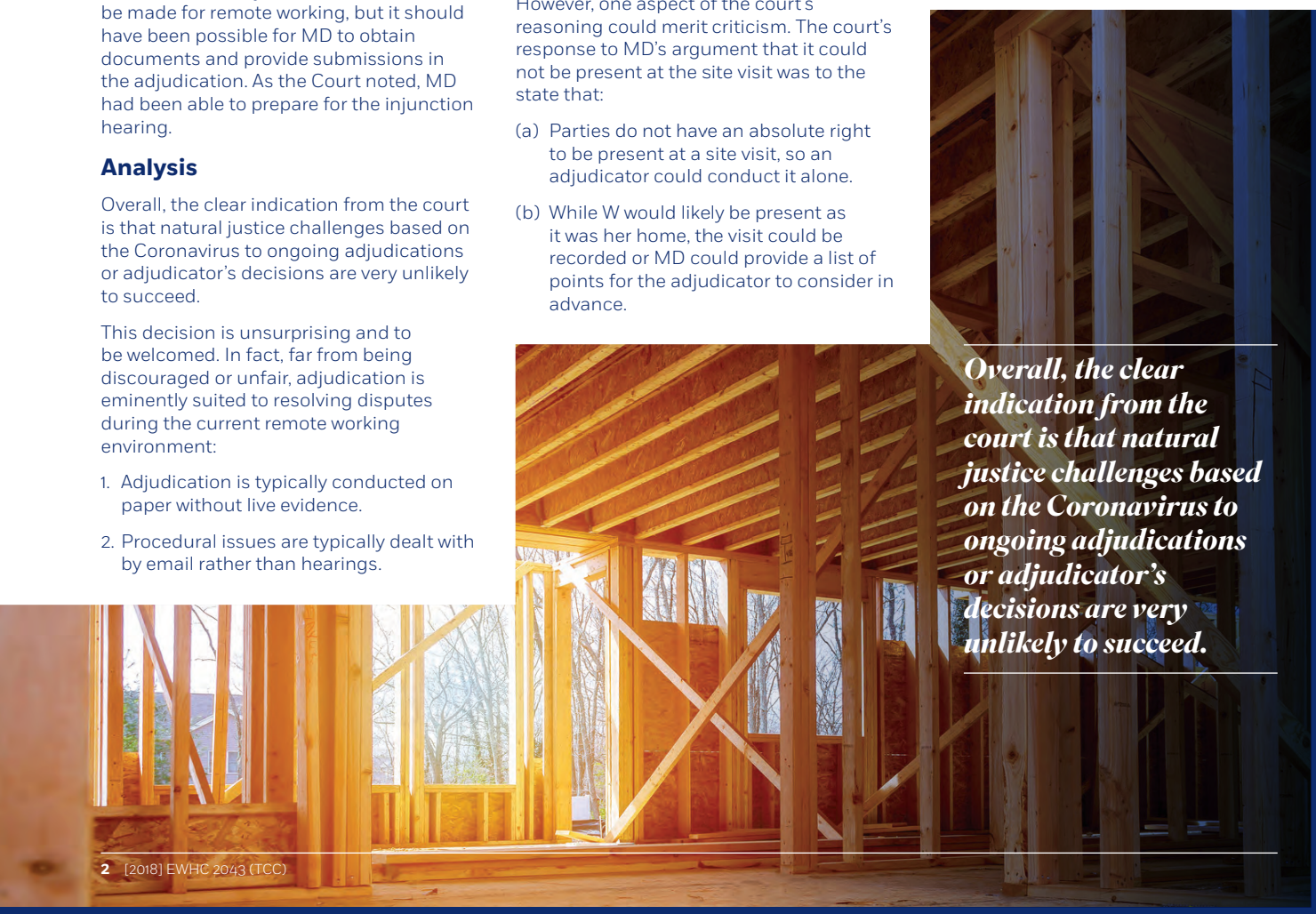
(b) While W would likely be present as it was her home, the visit could be recorded or MD could provide a list of points for the adjudicator to consider in advance.

This reasoning is open for question.

First, as a matter of public and personal safety, a site visit during the height of the lockdown period in April 2020 arguably should have been discouraged, particularly a visit to someone's home in a claim only valued at £45,000.

Second, the risk of unfairness, even if unintended, from an adjudicator and one party being alone together, particularly at the location relevant to the substantive dispute, is significant. While not giving rise to an unavoidable breach of natural justice, this situation should be avoided, particularly where the absence of one party is enforced.

In other cases, where the site is not to one of the parties' home, site visits no doubt can and should proceed where necessary. The best solutions for such visits, to avoid the risk of unfairness or challenges on that ground, would be for the adjudicator to attend alone and show both parties his or her visit by a live video on Zoom, Skype or similar, or for a non-party representative to provide a video tour under the direction of the adjudicator. If sensible and fair measures cannot be adopted, then it is important to remember that the timing of an adjudication is a matter for the Referring Party. If a claim is brought where a site visit or meeting to examine witnesses is not possible or reasonable, despite a visit or oral evidence being essential to the determination of the claim, then fairness might dictate that the claim should fail for want of proof.



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2 [2018] EWHC 2043 (TCC)

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