Hewitsons Construction

LEGAL UPDATE

Absolute Client Focus

January 2019

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STOP PRESS: Construction (Retention Deposit Schemes) Bill second reading moved to January 2019

The Construction (Retention Deposit Schemes) Bill will receive its second reading on 25 January 2019. This is the fourth delay (it was initially postponed from 27 April 2018 to 15 June 2018, then to 26 October 2018 and then to 23 November 2018). Growing pressure on Parliamentary time seems increasingly likely to prevent the Bill's progress into legislation which was a concern expressed by Professor Rudi Klein Chief Executive, SEC Group at the recent Society for Construction Law event held in Cambridge which we attended.

STOP PRESS: Cladding ban regulations in full force as of 21 December 2018

The Building (Amendment) Regulations 2018 (SI 2018/1230) were laid before Parliament on 29 November 2018 and came into force on 21 December 2018. The Regulations ban the use of combustible materials in the external walls of high-rise residential buildings and apply to:

All new residential buildings above 18 metres in height.
New dormitories in boarding schools, student accommodation, registered care homes and hospitals above 18 metres.

The ban also applies where building work is a "material change of use" bringing an existing building within one of these categories.

A further jab to the "smash and grab" adjudication?

Tim Richards
Partner

S&T (UK) Limited v Grove Developments Limited [2018] EWCA Civ 2448

Background:

In our edition of the HTML last April we reported on the decision in the Technology and Construction Court, which signified the ability for employers to bring separate (counter) adjudications to decide the true value of an amount due where there is either no Payment/Pay Less Notice, which in turn signified a potential reduction in the amount of "smash and grab" adjudications.

The matter was heard on appeal in November and the original decision of the TCC was upheld in respect of each of the three issues raised by way of S&T's appeal. Dealing now with these three issues:

Court Judgment:

Pay Less Notices:

The Court ratified Coulson J's (as he then was) reasoning. In doing so it confirmed that the test to be applied to the proper construction of such notices under the Construction Act 1996 (as amended) is how a reasonable recipient would have understood the notice. Thus, if a reasonable recipient of a notice (which only complied because it referred back to documents previously sent but were not re-attached) would have understood what was in actual fact being referred to, the notice would be deemed to be valid Pay Less Notice.

"True value" adjudications:

The Court of Appeal upheld the first instance judgment, considering the six reasons why Grove was entitled to bring a separate adjudication to determine the correct value of their interim application, even if it was being argued there was no valid Pay Less Notice. The six reasons provided were:

1. Courts and adjudicators have the power to open up, review and revise sums shown as due in interim applications in any case where the interim application determines what is payable
2. Under section 108(1) of the Construction Act (as amended) and paragraph 20 of the Scheme (as amended) there is no limit on the nature of disputes which either party may refer to adjudication.
3. A distinction is made between a dispute about the sum which must be paid ("notified sum") and the true valuation of the work done. These raise different disputes.
4. The "sum due" (clause 4.7) is different from the "sum stated as due" (clause 4.9). Section 4 of the contract in its entirety is designed to achieve payment of the true sum which is due under clause 4.7.
5. The idea that an employer has the right to adjudicate over the true value of an interim payment is fair because the contractor in the same way has the right to adjudicate when seeking payment of a higher sum than that notified.
6. There is no real justification for treating interim and final applications for payment differently.

Timing:

Coulson J had emphasised that a true value adjudication could not be commenced until payment by the employer had first been made of any "smash and grab" adjudication award. The Court of Appeal confirmed this as the correct approach by construing the Act so that the mandatory payment provisions in s.111 should be seen as having priority over the statutory right to adjudicate, as per s.108. In essence, an employer MUST pay first and adjudicate after.

Liquidated Damages (LDs):

The Court of Appeal agreed with Coulson J regarding the notices required by the contract for the deduction of LDs namely that there has first to be a notice warning about the intention to deduct LDs and then a second notice confirming that the deduction has been made, however no particular period of time must elapse between receipt of the two.

Comments:

This case confirms that any employer is entitled to seek adjudication for a true value of a claim, even if no Payment or Pay Less Notices have been served and in turn dilutes the concept of "smash and grab" adjudications because it signifies that any over payments can be returned to the employer in a subsequent adjudication.

That being said, the employer can only exercise such a right after it has made the required payment under the adjudication which fundamentally prevents it from being used as an instrument to withhold an adjudication award and reinforces the cash flow intention of the Construction Act.

Collude, get sued (and you may even be held personally liable)

Mohammed Husnain Ali
Trainee Solicitor

Palmer Birch (A Partnership) v (1) Michael Lloyd (2) Christopher Lloyd [2018] EWHC 2316 (TCC):

Background:

The claimant (a construction business specialising in house refurbishment) claimed the unpaid value of work carried out under a contract with a limited company (H). The second defendant (D2) was H's director. The first defendant (D1) was its sole funder.

The claimant and H had entered into a JCT Standard Building Contract with Quantities (2011) for the renovation of a property that was, essentially, D1's English residence. H had a leasehold interest in the property; the freehold was owned by a company (S), which was beneficially owned by D1. D1 arranged for loans by S to H to meet the renovation costs. H did not trade, had no independent financial resources, and had been incorporated largely for tax reasons, enabling D1, who lived abroad, to recoup VAT on the contract costs. H went into liquidation before completion of the works.

Claimant's case:

The claimant claimed under three economic torts:

- Inducing breach of contract
- Unlawful interference
- Unlawful means conspiracy

The claimant essentially argued that the defendants had colluded to bring about H's insolvency and procure repudiatory breach of contract, so as to avoid having to pay the claimant for work done. It asserted that D1 significantly influenced H's finances and used H as a conduit for his funding when it had been clear, from H's incorporation, that it had insufficient means to repay S.

Defendant's case:

The defendants' case was that the claimant had contracted with H, knowing that it was a new company dependent on third party funding, and was seeking to pierce the corporate veil. They maintained that H's legal personality, together with the absence of any obligation on D1 or S to fund the contract to completion, meant that there had been mere non-actionable prevention, not inducement. They relied on a defence of justification and maintained that no loss had been caused to the claimant, because H had lacked the means to pay in any case.

Court Judgment:

- **Inducing breach of contract:** This allegation succeeded against D1. There was a fine line between acts of inducement and acts of mere prevention (where a defendant's conduct prevented a third party from performing the contract, but without any inducement or

procurement). Here, D1 had incurred no tortious liability in respect of his failure to fund the contract, as he was not legally obliged to feed the coffers of a limited company to enable it to meet its contractual obligations. D1 had, however, crossed the line from prevention to inducement when he procured H's repudiatory breach of contract by deciding to bring about H's liquidation i.e. by diverting his funds elsewhere and in doing so abused H's separate corporate personality.

- **Unlawful interference:** This allegation failed and the court identified the components of the tort. This was a tort of intention i.e. an intention to cause loss by the use of unlawful means. As there was nothing 'unlawful' about D1 ceasing to fund H, it could not be said that he had committed the tort.
- **Unlawful means conspiracy:** This allegation succeeded against both defendants because of their collusion to bring about the repudiatory breach of contract. The evidence clearly supported an inference that the defendants had reached an agreement to facilitate H's liquidation to escape the contract and avoid the claimant's claims. This amounted to **requisite intention to injure**. D2 had been prepared to play his part in implementing D1's intention that H be left to flounder without funding and could not hide behind the company in denying personal liability as he had played a huge part in the conspiracy.

The justification defence was not available to the defendants facing allegations of unlawful means conspiracy and the "no loss" defence failed. D1 enjoyed no "equal or superior right" to the claimants and had been motivated purely by commercial self-interest.

Comments:

This case emphasises that directors who abandon their duties in such a way will generally be personally liable in tort and cannot rely and hide behind the company as a separate legal personality especially if this too has been abused.

Essential Intention: The need to scrutinise your T's & C's in Letters of Intent

Campbell Wilson
Senior Solicitor

Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd (2018).

Background:

AMEC was a specialist sub-contractor on two large construction projects: the Wellcome Centre and the Castlepoint car park. AMEC engaged Arcadis to carry out design work on both projects. The parties had planned to enter into a "Protocol Agreement" that would govern all of Arcadis' works. Before the Protocol Agreement had been finalised, Arcadis got to work on the Castlepoint car park under a letter of instruction that referred to the ongoing negotiations.

Unfortunately, the Protocol Agreement was never finalised and the works were defective. AMEC pursued Arcadis for the defects. Arcadis brought a claim for a declaration that its liability was limited to £610,515.

Coulson J's first instance decision

Coulson J found that, absent a finalised Protocol Agreement, Arcadis had carried out the works under a "simple contract". The letter of instruction was, in effect, a *letter of intent* pending the agreement of a formal contract, which would contain detailed terms. In the judge's view, Arcadis had performed the works with the comfort that, if the Protocol Agreement was never completed, the correspondence would, at least, afford a contractual right for payment. While the parties had exchanged three sets of T&Cs that all limited Arcadis' liability, *no final agreement had been reached* and there was no limitation provision on which Arcadis could rely. As a result, Arcadis faced a potential loss of £40 million.

The Court of Appeal

Gloster LJ, reversed Coulson J's decision for the following reasons:

- The judge had failed to distinguish between (i) the interim contract under which Arcadis had carried out work and (ii) the intended Protocol Agreement, the terms of which would supersede the interim contract. Contrary to the judge's decision, the parties did not need to reach agreement on the T&Cs of the Protocol Agreement for them to have a binding agreement on the T&Cs of the interim contract.

- AMEC's letter of instruction was a request to start work on all of the terms set out in it. Arcadis had accepted AMEC's request, and formed a contract, by correspondence and/or conduct. In the absence of any express rejection of the terms or a counter offer, Arcadis had accepted all the terms of the letter of instruction. Coulson J was wrong to find that Arcadis had to mention specific parts of the terms to accept them. The judge had also placed too much emphasis on the absence of the word "accept" from Arcadis' letters.

- The letter of instruction referred to "the terms and conditions we are currently working under with yourselves". Gloster LJ rejected the judge's view that the words "working under" meant "under negotiation". Instead, Gloster LJ found that the words incorporated the T&Cs Arcadis was already "working under" on the Wellcome Centre. Those terms included a limitation of liability.

- It was not material that different T&Cs had subsequently been exchanged by the parties because those T&Cs were exchanged in the course of negotiations for the Protocol Agreement. The later T&Cs did not supersede the T&Cs incorporated to the distinct and finalised interim contract.

- Citing Goff J in *British Steel v Cleveland Bridge*, Gloster LJ described Coulson J's conclusion as an "extraordinary result". It would be extraordinary for Arcadis to have assumed an unlimited liability under the letter of instruction when it never would have assumed such liability if the Protocol Agreement had been finalised as the parties intended.

Comments:

This decision highlights the need for parties to ensure due diligence and caution when drafting or responding to such Letters of Intent, and to scrutinise terms and conditions with great care. Even if the parties in negotiations expect a detailed agreement to be reached in the near future, there is a risk that work undertaken under these letters will be on the basis of the terms enclosed in them and NOT the intended final agreement. As such it is of paramount importance to ensure such terms and conditions are entirely acceptable.

Risky business or Real Risk of Dissipation?

Campbell Wilson
Senior Solicitor

Gosvenor London Ltd v Aygun Aluminium UK LTD [2018] EWCA Civ 2695

Background:

The appellant company appealed against a stay of execution of a judgment based on an adjudicator's decision.

The appellant had carried out cladding works on a large building project for the respondent. Delays occurred and a dispute arose over the sums due to the appellant. The respondent asserted that the appellant's invoices were exaggerated. An adjudicator found that the respondent should pay over £553,000 to the appellant. The appellant sought to enforce its award, but the respondent raised allegations of fraud and asserted that the appellant had stolen work records, intimidated the respondent's staff and would do all it could to avoid having to repay the adjudication sum. It also relied on discrepancies in the appellant's company accounts as showing a real risk of dissipation. The judge concluded that the fraud allegations could have been made during the adjudication, and he therefore awarded the appellant summary judgment.

He did, though, stay execution of the judgment because he found that there was a disparity in the value of the work done and the appellant's invoices, the appellant was not financially viable, and there was a likelihood of dissipation if the sum was paid to the appellant. He concluded that if there was a real risk that any judgment would be unsatisfied because the appellant would organise its financial affairs in order to dissipate the adjudication sum, that would justify the grant of a stay.

Court Judgment:

The Appeal was dismissed due to the following:

Correct principles when determining an application to stay a judgment based on an adjudicator's decision:

If the court concluded that there was a real risk of dissipation, it could grant the stay regardless of what happened in the adjudication. The court had to consider all the relevant evidence, regardless of whether it was or could have been raised in the adjudication. However, if part of the evidence relevant to dissipation had been rejected by the adjudicator, the adjudicator's rejection might be a material consideration in the exercise of the court's discretion, but it would not necessarily be decisive. The same had to apply to evidence not even raised in the adjudication, even if it could have been.

There was a difference between, first, an issue that could have been decided in the adjudication and was raised for the first time in enforcement and, second, an application for a stay of execution on the ground that there was a real risk of dissipation, with the latter requiring a more nuanced approach.

Accordingly, the judge had been correct to say that if the evidence demonstrated a real risk that any judgment would go unsatisfied by reason of dissipation, that would justify the grant of a stay.

Had the judge applied the principles correctly?

The judge was right to draw an analogy between a stay on the basis of dissipation and the grant of a freezing order. He had concluded that the respondent had raised material from which a real risk of dissipation could be inferred. The principal reason for the judge's conclusion was the evidence about the appellant's accounts, the belated changes to them, and the untrue explanation given for the radically altered figures. His exercise of discretion could not be said to have been unreasonable or unenforceable.

Comments:

This case emphasises that it is for the judge in each case to assess the extent to which there is material overlap between the evidence that could have been deployed in the adjudication, and the evidence deployed in support of the stay, and to determine the consequences of that overlap.

Moreover, the judgment confirms that judges are entitled to grant a stay of proceedings where there is a real risk that assets will be dissipated before the substantive elements of the dispute are to be determined. That being said, the evidence required to stay enforcement of adjudication under principle (g) is a high hurdle to pass, being equivalent to that of granting a freezing injunction and one which requires solid evidence of a real risk of dissipation.

A friend in need, is a friend... in greed! The perils of providing free advice

Sardeep Gill
Solicitor

(1) Peter Burgess (2) Lynn Burgess v Basia Lejonvarn [2018] EWHC 3166 (TCC)

Background

This case concerned an architect who agreed to assist her friends with their landscaping venture on a gratuitous basis whereby she secured a contractor to carry out earthworks and hard landscaping, providing a budget of £130,000. Following a disagreement over the budget, the parties fell out and the architect left the project. The owners claimed that much of the work done during her involvement was defective, alleging negligent design and project management and negligent advice on the architect's part. They claimed the difference between the £360,000 they eventually incurred on the project and the budget of £150,000 plus VAT they said they would have agreed with a landscaper had they been properly advised.

The court had determined, as preliminary issues, that there had been no contract between the parties and that the architect, as a professional providing gratuitous services, was liable for what she had done but not for what she had failed to do. It remained to be decided what services the architect had actually provided and whether she had acted negligently.

Court judgment:

The Court held, on the facts of the case, that the architect was not liable for any defects in the work conducted. The Court conducted thorough analysis of the issues and concluded the following:

- **Services provided** - Drawings the architect had made had not been produced negligently. The architect had inspected the works sufficiently to review and advise regarding the contractors' applications for payment but she had not been inspecting the structural work and groundworks for non-compliance. The architect could not have been expected to inspect those works. She had not failed to properly assess and advise the owners regarding applications for payments made by the contractor.

- **Breaches of duty** – The Burgesses' claim for negligent design and project management lacked credibility. They had been unable to identify any drawings by the architect which had caused any defective construction or any advice given negligently. In the absence of a contract, the architect had not been under any duty to offer advice or warnings and, until the parties fell out over the budget, there had been no advice or warnings which should have been given and were not given. The architect was not in breach of any of the alleged duties of care.

- **Loss and damage** - Even had the owners established a breach of duty by the architect, their global damages claim had many weaknesses, seeming to transpire out of sheer greed. It included many items which the architect could not, on any view, have been liable for. The owners could and should have attempted to identify what actual losses were suffered as a result of the alleged breaches. The global claim was unsupported by the evidence and the owners were in no position to know whether the project would have been completed within the architect's budget. Further, the architect could not be responsible for any defective works carried out after she left the project. The total sum had been spent for reasons which had no relation to any alleged breaches and was not a foreseeable consequence of any breach.

Comments:

The conclusion one can draw from this case is that even when you are merely providing free professional advice to friends albeit of a speculative nature, it is still very important to define exactly the scope of what you are (or are not) doing.

Even in the absence of a contract, a tortious duty of care can still be established if you offer advice knowing the recipient will rely on it and, as such, when providing advice, you ought expressly to exclude liability for your work.

Diffident display of finding an Adjudicator's decision concerning defects to be defective

Colin Jones
Partner

Synergy Gas Services Ltd v Northern Gas Heating Ltd [2018] EWHC 3060 (TCC)

Background:

The claimant and defendant had entered into a sub-contract, clause 14.4 of which stated that if the defendant decided any works done by the claimant were defective, it had to notify the claimant of the defects and specify details. If the claimant failed to make good the defects, the defendant could rectify them itself and recover the costs from the claimant.

A dispute arose over the defendant's alleged failure to pay invoices, and the claimant referred the dispute to adjudication. The defendant's response alleged a breach of clause 14.4, namely the claimant's failure to rectify defects, and claimed a set-off. The claimant denied that allegation and submitted detailed schedules responding to each alleged defect and noting that it had not been given the opportunity to make them good.

The adjudicator's decision:

The adjudicator considered that the interpretation of clause 14.4 was in issue, and found that a notification of defects was a precondition to setting off. As the defendant had not notified the claimant of the alleged defects, it could not claim a set-off. The adjudicator ordered the defendant to pay the claimant over £74,000.

The defendant sent a cheque for around £45,700, so the claimant brought the instant application to enforce the decision in respect of the remaining amount of the adjudicator's award. The defendant submitted that the decision breached natural justice as the claimant had not argued that clause 14.4 was a precondition to set-off, and the adjudicator had not raised it with the parties, so the defendant had not been given the opportunity to address it.

Court judgment:

The Application to enforce the adjudicator's award was granted on the basis that where a breach of natural justice is argued, it is rare for courts to interfere with an adjudicator's decision unless a different question was decided or the adjudication proceedings warrant such intervention.

Here, the adjudicator was of the view that he ought to interpret clause 14.4 and establish whether there was sufficient material to conclude that the parties had considered it an issue and whether they had profusely referred to it in the written material put before him.

The claimant's submissions to the adjudicator had not expressly pleaded that a clause 14.4 notice was a precondition to set-off but it had simply denied the allegation that, in breach of that clause, it had failed to rectify defects.

However, the schedules were full of references to the defendant's failure to give the claimant any opportunity to inspect or rectify alleged defects. That imported the allegation that it had been a requirement that the claimant be given that opportunity. Therefore, the adjudicator's decision was

covered by the arguments raised, and there was no obvious unfairness and no breach of natural justice.

Comments:

This case illustrates the high threshold to overcome when proving an adjudicator's decision to be in breach of natural justice. It also suggests an overall reluctance by courts to find adjudicator's decisions to be incorrect when considering claims for defects and rectification costs, especially when refuting items which ought to have been bought forward during the adjudication itself.

Construction Law Breakfast Seminars

This Spring the team will be hosting a series of Construction Law Breakfast Seminars which will be taking place within Cambridge, Milton Keynes and Northampton.

The dates of these seminars will be hosted on our website in the coming week.

If you wish to register your interest in attending one of our seminar series then please contact our events team by clicking here.