Hewitsons' Construction LEGAL UPDATE

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The death of smash and grab adjudications?

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Grove Developments Ltd v S&T (UK) Ltd (2018) Technology & Construction Court (TCC)

This hot off the press case has been hailed as potentially being the end for smash and grab adjudications. What is it about?

The Claimant employer (Grove Developments Limited) engaged S&T (UK) Limited to design and build a hotel at Heathrow Terminal 4. The contract was based on the JCT Design and Build Contract 2011. The parties had been involved in three previous adjudications, the latest of which decided the Pay Less Notice (PLN) sent by Grove was invalid because the basis of the calculation required by the provisions of the Construction Act was set out in a separate document.

The matter came to the TCC for enforcement of the third adjudication. The TCC was asked whether Grove's PLN complied with the requirements of the contract. The PLN incorporated by reference a detailed calculation sent five days earlier than the PLN. S&T argued that this invalidated the notice.

The TCC held that the PLN was valid as the Court had no doubt that the detailed calculation sent 5 days earlier would allow a reasonable recipient to understand precisely how the valuation was calculated and there was no uncertainty surrounding the document referred to. Having reached this decision the Court held that the third adjudication had been wrongly

decided and could therefore no longer be enforced.

The TCC also considered whether Grove could commence a separate and fourth adjudication seeking a decision as to the "true" value of the interim application 22, the subject of the PLN argued over in adjudication number 3. The TCC found in favour of Grove, allowing them to adjudicate the "true" value including for the following reasons:

there is no limitation of the nature, scope and extent of the dispute which either side can refer to an adjudicaton

the dispute Grove would wish to raise is a different dispute, as the "sum stated to be due" is different to "the sum due"

in the interest of equality and fairness, there is no justification for such radically different treatment of the employer and contractor

Comment:

This case is hugely significant in that it ruled that the previous cases of *ISG v Seevic* and *Galliford Try v Estura* were wrongly decided. Those cases have for several years been authority for an employer's deemed agreement to an amount claimed where they fail to serve a PLN either in time or correctly. The Grove case overturns this by stating that there is no basis in fact for this deemed agreement and nothing in the Construction Act, Scheme for Construction Contracts or indeed the JCT Contract to indicate such deemed agreement.

The Hon Mr Justice Coulson in his last case sitting in the TCC said that that the deemed agreement stemming from these previous decisions:

"*is not only unjustified, but it is also an unnecessary complication*".

The industry suggestion is that this decision may well pave the way for a reduction in the amount of "smash and grab" adjudications as employers are now able to bring separate (counter) adjudications to decide the true value of an amount due. Watch this space!

Excluded operations and common sense

Colin Jones
Partner

Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd (2018) Technology & Construction Court (TCC)

The defendant was engaged by the claimant, an SPV created specifically for this project, to build an Energy Generating Plant. Progress on the project was slow, and the claimant sought a declaration in adjudication number 1, that the defendant was not allowed an extension of time. The defendant notified the adjudicator that it was reserving its position as to whether or not the adjudicator had jurisdiction to make an award. Despite this reservation the adjudicator went on to find in favour of the claimant and held that the defendant was not entitled to an extension of time.

The claimant then terminated the contract and issued an interim account requiring the defendant to repay around

£8 million paid to the defendant by the claimant for preparatory non-site work and an additional £3 million for other claims. The defendant disputed the account and the dispute was referred to adjudication number 2 where the defendant was ordered to pay £9.8 million.

The defendant failed to pay the adjudicator's award number 2 and therefore enforcement action was issued in the TCC by the claimant.

Issue no 1 – excluded operations?

The first issue for the court to decide on hearing the enforcement action was whether the dispute related to or arose out of excluded operations, as defined in the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "**Construction Act"**). The court held that the preparation of bonds and a business plan were preparatory works falling within the scope of the Construction Act. The fact that these were not physical works on the site was not relevant. Although the contract covered non-construction operations, the key point was that the dispute itself did not concern operations excluded under the Construction Act and there was therefore no valid objection to the adjudicator's jurisdiction.

This decision confirms previous case law that the broader contract is ignored when determining whether aspects of a specific dispute are excluded activities.

Issue no 2 – reservation – one more for lawyers

The contractor's second argument was that it had reserved the right to challenge the jurisdiction of the adjudicator to make an award. However, the court held that in terms of the contractor's reservation of position, this related to the timeframe for the adjudication (commonly known as ambush) which was resolved in the first adjudication. There was no general reservation made by the contractor which related to adjudication number 2. This illustrates that a party wishing to reserve its position generally must do so in a clear and open way.

The decision and further comment:

The Court ruled that as the claimant employer was an SPV there was a real risk that the contractor could effectively overpay the claimant the sums awarded by the adjudicator and then the SPV be wound up leaving the defendant contractor without recourse to any reimbursement. Even if it was not wound up, it could still take many years to resolve all outstanding arguments and it was decided some form of stay of payment was necessary in terms of fairness and justice.

The Court ordered the contractor to pay £4.5 million, with a further £1 million to be paid into court. A general suspension of payment (known as a *stay*) was ordered in respect of the remaining sums.

So it is good news that the Courts are recognising the very real difficulty in obtaining back windfall adjudication decisions from adjudication winners with questionable assets.

What third floor?

Tim Richards
Partner

Lloyds Bank v McBains Cooper Consulting Ltd (2018) EWCA Civ 452Court of Appeal

Miracles Signs & Wonders Ltd entered into a building contract for £2,556,937 in August 2007 after Lloyds Bank agreed to lend it £2,625,000. Lloyds engaged the defendant McBains as progress monitor (otherwise known as a monitoring surveyor), to report on the progress of the building contract and recommend interim payments to be made under the facility letter with Miracles.

In Progress Report 4 McBains raised the possibility of a third floor being built. This was not within the scope of the building contract upon which the loan was provided. McBains recommended a payment of £10,000 in respect of works to the third floor in Progress Report 10 and further payments in Progress Report 11.

A claim was brought by Lloyds against McBains in the Technology and Construction Court. Lloyds contended that it was McBains' duty to take reasonable care to ensure that Lloyds did not fund works outside the facility and in recommending payment this was a breach of the retainer. The Court agreed.

The judge awarded £622,159.93 to Lloyds, reduced by one third for the bank's own contributory negligence. It was held that McBains was liable for all sums paid out in respect of the third floor works, as well as all sums paid pursuant to progress reports 14 onwards. This was on the basis that had Lloyds been alerted to the third floor claims earlier, it would not have continued making the payments as it would have realised there was not enough money to fund the whole project.

McBains appealed. On appeal it was held that McBains was negligent in failing to inform Lloyds that it was paying for work outside the scope of the loan facility. The Court of Appeal therefore found that McBains was liable for the sums paid in respect of the third floor works.

However, the Court of Appeal also held that the payment of sums by Lloyds under Progress Report 14 and onwards was a result of Lloyds own fault in continuing to fund an uneconomic project and that McBains should not be held liable for this.

The appeal Court therefore found there was significant irresponsibility on the part of Lloyds which was not considered in full by the TCC. It held that McBains, as monitoring surveyor, was entitled to expect Lloyds to comply with basic banking principles, which it had not. As a result the Court of Appeal reversed the apportionment so that Lloyds were held two thirds responsible for the losses and McBains one third.

Comment:

This is an interesting case where on appeal only the bank were not allowed to escape responsibility for their own mismanagement contributing to the losses. Compare this with the case of *Riva Properties Ltd & Others v Foster + Partners (2017) TCC* covered by me in our

last Issue (January 2018) where in that case the true impact of the economic crisis on the Riva project were also fully acknowledged by the Court despite the finding of breach of contract against Fosters.

Note to claimants to fully consider what the true cause(s) of the losses suffered is/are and to see that this are properly apportioned when bringing a claim.

Don't get your fingers burnt:

Sardeep Gill
Solicitor

Clapham v Peacock (T/A Allflames) (2018) Technology & Construction Court

In 2009 a contractor, Peacock (t/a Allflames), was employed to install a wood burning stove and chimney in a thatched cottage. The cottage's owner confirmed with the contractor before work began that the contractor was fully registered by HETAS (a not for profit organisation that approves biomass and solid fuel heating appliances, fuels and services, including the registration of competent installers and servicing businesses). The contractor later provided a HETAS certificate of building regulation compliance.

Some three years later the claimants, who were living in the cottage with their young baby, lit a fire in the stove which caused the thatch to catch light, destroying the roof and first floor and naturally requiring the claimants to find alternative accommodation. It transpired that the chimney should have been built 0.5m higher to have avoided this problem. A dispute arose as to whether the contractor had warned the cottage owner of this when undertaking the work.

The Court ruled that the contractor had breached his duty of care by failing to comply with the building regulations in force at the time of the work and that this was the cause of the fire to the cottage. When the contractor first undertook his HETAS training the recommended flue height was 0.6m and, whilst he remembered an increase to 1.3m, he was not aware of, or did not remember, the increase to the current recommended 1.8m.

In terms of damages, the claims for insured losses of lost contents, alternative accommodation and professional fees had been resolved by the claimants' insurers. The court allowed additional uninsured losses of the policy excess, food and petrol, additional parking and travel, replacement food and clothes, a lost holiday and mobile phone costs as it ruled these were modest and reasonably attributable to the fire. Losses for distress and inconvenience for each claimant were allowed.

Comment:

This case is an important reminder that construction professionals must keep up to date with their professional competencies in order to provide their services with reasonable skill and care. Whilst the contractor was not responsible for the design, he was liable to warn the client of design defects which should be within the competence of a contractor in these circumstances. It also highlights the importance of contractors holding professional indemnity

insurance, even where they have no apparent liability for design.

An implied responsibility for planning?

Charlotte Glasse
Trainee Solicitor

Jean François Clin v Walter Lilly & Co Ltd (2018) Court of Appeal

Mr Clin was the owner of two adjoining Victorian houses in Kensington, London and engaged the contractor Walter Lilly to demolish and reconstruct the buildings into one single dwelling. A dispute arose after the Royal Borough of Kensington and Chelsea Council sent a letter stating the proposed works would require conservation area consent as they amounted to "substantial demolition". Walter Lilly then suspended work on the site for over a year until permission was granted for a revised proposal and claimed an extension of time for this period.

The matter came before the Court of Appeal for determination of preliminary matters. The Court was asked to consider:

Whether the judge at first instance was correct in implying a term into the building contract making the Employer responsible for obtaining any required consents;

What the scope of this term, if implied, should be; and

What impact the term may have on the allocation of risk under the building contract.

The contract was silent in terms of who was responsible for obtaining the planning permissions and consents, although both parties agreed an implied term was needed to give business efficacy to the contract. The Court of Appeal upheld the original decision that this responsibility lay with the Employer: a reasonable person wishing to develop his land should know whether he would require planning permission and as the individual procuring the works he is best placed to know what he wants the works to consist of.

After clarifying that there was indeed an implied term, the Court of Appeal then confirmed that this was not an absolute obligation on the Employer to obtain consents, since this was ultimately at the discretion of the Local Authority. However the Employer is under a duty to use "all due diligence" to obtain consents and the Court identified a number of steps that would illustrate compliance. These include making a timely application, providing the Local Authority with sufficient information when required and co-operating throughout the process.

The Court of Appeal was clear in saying the terms of the contract as it was drafted adequately addressed the risk associated with the new implied term and that the implied term must therefore be read together with all existing terms of the contract that provide for obligations, responsibility and risk.

Comment:

Responsibility to seek planning permission has therefore been confirmed as that of the

Employer unless of course there is an express term in the contract to the contrary. This case is therefore a timely reminder of the need for the allocation of risk to be considered carefully when drafting a building contract.

Expansion of the Construction Team

We are please to announce the appointment of a new senior solicitor CAMPBELL WILSON. Campbell joined our Milton Keynes office on Monday 9 April 2018 primarily working alongside Partner and Head of Construction, Tim Richards.

Campbell is a 10 year PQE dual qualified lawyer and comes to us with an excellent range of construction experience. We welcome Campbell to the team and look forward to working with him.

General news:

- Are you GDPR ready? The EU General Data Protection Regulation (GDPR) is due to come into force on 25 May 2018.

- The Construction Industry Council has updated its Building Information Modelling (BIM) Protocol. The second edition Protocol reflects the changes and updates to standards and practices since the first edition Protocol was published in 2013 and include alignment with PAS 1192-2 and provisions to reflect PAS 1192-5. This means the new Protocol will apply to information, not just models, and include additional provisions related to security.

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