



Legal Update  
November 2015

## Legal developments in construction law

### 1. Court demolishes employer's challenges to adjudicator's award

Seventeen years after the Construction Act went live, the ground rules of adjudication are still being tested. In *Wycombe v Topevent* the employer challenged enforcement of an adjudicator's decision, claiming that there was more than one dispute and that there were breaches of natural justice, because the adjudicator did not have a site visit or meeting and did not decide the dispute on the basis of the parties' submissions. In dismissing the challenges, Mr Justice Coulson restated some key principles of adjudication

He decided that a demolition contractor's claim for the costs of an allegedly wrongful termination and its overall claim for all outstanding sums were not separate disputes. There was a clear and obvious link between them. Even if they were separate disputes, under the applicable TecSA rules the parties could agree to include further matters in the adjudication and the employer had acquiesced in, and not objected to, the adjudicator dealing with both claims.

The adjudicator did not have to have a site visit or meeting. Organisation of an adjudication, the procedure and the steps required before the decision is issued, are all matters uniquely for the adjudicator. It is up to them to decide what they need in order to reach their decision.

The judge also ruled that the adjudicator's valuation decision had been based on both parties' submissions. More widely, the judge said that an adjudicator has to do their best with the material provided and has considerable latitude to reach their own conclusions based on that material. In his view, that latitude is inevitably even wider, now that the original Construction Act requirement of a written contract has gone. An adjudicator's conclusion about the nature and terms of the contract could affect their approach to valuation issues. What an adjudicator cannot do, however, and certainly not without warning the

parties in advance of the decision, is to make good deficiencies in the claiming party's case or to plug what they see as a gap in that case, by having regard to something they have been told to ignore.

[Wycombe Demolition Ltd v Topevent Ltd \[2015\] EWHC 2692](#)

### 2. Challenging jurisdiction but paying the adjudicator – not waiving but...?

A defendant in adjudication proceedings challenged the adjudicator's jurisdiction and fully reserved its rights. It also paid the adjudicator's fees, without any covering letter or explanation, but did that payment sink its challenges to jurisdiction?

The adjudicator's terms had not been expressly accepted by the parties but the court ruled that they had been accepted by the defendant, by conduct. Under those terms the adjudicator's fees were payable by the parties, jointly and severally, even if the adjudicator's decision was found to be unenforceable because of a lack of jurisdiction. In the judge's view, both the defendant's reservation of its rights and the relevant clause of the adjudicator's terms permitted the defendant to challenge jurisdiction on enforcement, regardless of the payment of the adjudicator's fees. Even if the judge was wrong on that, in the absence of proper evidence about the basis upon which the fees were paid by the defendant, the judge was not persuaded that the circumstances were sufficiently clear cut in the case to conclude that the defendant had lost the ability to challenge jurisdiction. This was a fact specific issue in this particular case, and should not be seen as authority or encouragement to parties not to follow previous authorities that did not apply in this case.

The defendant did, however, fail in its jurisdictional challenges. In the judge's view, the case was an example of a party "scrabbling around" trying to find reasons not to comply with an adjudicator's decision.

[Science and Technology Facilities Council v MW High Tech Projects UK Ltd \[2015\] EWHC 2889](#)

### 3. Supreme Court takes another look at penalty clauses – 100 years on

The Supreme Court has, for the first time since the House of Lords' ruling in 1915, reviewed the law on penalty clauses. In a 110 page judgment, it has decided to keep the rule, but not to extend it. The real question when a contractual provision is challenged as a penalty is, according to the Supreme Court, whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal, and to describe it as deterrent does not add anything.

The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67

### 4. New housing bill starts government's million homes crusade

The new Housing and Planning Bill has been introduced into Parliament. The government says it is to start a "national crusade to get one million homes built by 2020".

Measures in the Bill include:

- a new legal duty on councils to guarantee the provision of 200,000 Starter Homes on all reasonably sized new development sites, to be offered to first-time buyers at a 20% discount on market prices;
- targeted powers for the government to ensure that all councils get Local Plans in place by 2017;
- automatic planning permission in principle on brownfield sites; and
- a new duty on councils to help allocate land to enable 20,000 custom and self-built homes a year to be built by 2020.

<https://www.gov.uk/government/news/historic-housing-and-planning-bill-will-transform-generation-rent-into-generation-buy>

### 5. New development rights to convert offices into homes

The government has announced new measures to enable conversion of offices into homes. The temporary development rights that permitted this conversion, without the need for a planning application, will now be made permanent. In addition:

- those who already have permission will have three years to complete the change of use;
- the rights will allow the demolition of office buildings and new building for residential use; and
- new permitted development rights will enable the change of use of light industrial buildings and laundrettes to new homes.

<https://www.gov.uk/government/news/thousands-more-homes-to-be-developed-in-planning-shake-up>

### 6. Government puts steel rules into procurement process

The government has issued Procurement Policy Action Note 16/15, of 30 October 2015, on the procurement of steel in major projects. It applies, with immediate effect, to all central government departments, their executive agencies and non departmental public bodies and to any infrastructure, construction or other major procurement project with a significant steel component, where the overall project requirement has a capital value of £10 million or more.

Key actions in the Note include requiring contracting authorities to ensure that Tier 1 contractors include, in their tenders, supply chain plans setting out, where known, how, and from which supplier, steel will be sourced, and to include a contract condition to ensure that the Tier 1 contractor and its subcontractors openly advertise any remaining supply chain opportunities for the provision of steel (i.e. where no contractual arrangements have been agreed by the date of the main contract award).

Contract awards should be on the basis of the most economically advantageous tender, which can be assessed on a cost-effective basis that explicitly includes environmental and/or social criteria, where

these are linked to the contract's subject matter, and are transparent and non discriminatory.

Environmental criteria could include the carbon footprint of construction materials and social criteria could include taking into account the benefits of employment and supply chain activity, including protecting the health and safety of staff, social integration of disadvantaged workers, or skills training needed to perform the contract, such as the hiring of apprentices.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/473545/PPN\\_16-15\\_Procuring\\_steel\\_in\\_major\\_projects.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473545/PPN_16-15_Procuring_steel_in_major_projects.pdf)

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