



Legal developments in construction law

1. Adjudication v insolvency rules; and the winner is...?

A respondent to an adjudication claim by a party in liquidation, and with its own cross-claim, said that, because of the automatic operation of insolvency set-off under the Insolvency Rules, all claims and cross-claims under the contract then ceased to exist, and were replaced by a single claim to the balance (by whichever party turned out to have the larger claim). The Court of Appeal disagreed, but continued an injunction stopping the adjudication because, it said, since there could be no enforcement, it would be futile. Was it right?

The Supreme Court confirmed that the existence of a cross-claim operating by way of insolvency set-off does not mean that the underlying disputes about the company's claim under the construction contract and, if disputed, the cross-claim, disappear and are consequently incapable of adjudication.

It ruled, however, that it is no answer to the utility (rather than futility) of construction adjudication, in the context of insolvency set-off, to say that the adjudicator's decision is unlikely to be summarily enforceable. The reasons why summary enforcement will frequently be unavailable are set out in **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2001] 1 All ER (Comm) 1041 at paras 29-35. The court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution. There is in those circumstances no need for an injunction,

still less a need to prevent the adjudication from running its speedy course, as a potentially useful means of ADR in its own right. Summary enforcement will not be inappropriate in every case and the proper answer to the issues about enforcement is that they can be dealt with at the enforcement stage, if there is one.

The Supreme Court also noted that adjudication is costs neutral and that it is inherent in the adjudication procedure that a party may be put to expense in having an incorrect decision put right in later litigation (or arbitration), at least part of which will usually be irrecoverable even if the litigation succeeds. That cannot of itself be a reason for preventing, by injunction, the statutory right to adjudication.

[Bresco Electrical Services Ltd v Michael J Lonsdale \(Electrical\) Ltd](#) [2020] UKSC 25

2. Court says 25-year PFI contract is paradigm example of relational contract with implied good faith duty

In a dispute under a 25 year PFI contract for a waste treatment plant the court had, once again, to consider whether a duty of good faith was to be implied. After reviewing the case law, including the characteristics of a relational contract identified in *Bates v. Post Office (No. 3)*, it noted a number of factors in favour of the contract in question being a relational contract. It was long term, the parties plainly intended a long-term relationship, it required a close collaborative working relationship

in which the parties must have intended their respective roles to be performed with integrity and with fidelity to their bargain and their shared environmental objectives. And while the relationship was essentially commercial, the parties intended that they should each repose trust and confidence in the other. The contract required a high degree of communication and co-operation, significant investment by both parties and involved exclusivity between them and the court concluded that the contract was "...a paradigm example of a relational contract in which the law implies a duty of good faith." It contained an entire agreement clause but that did not exclude the implied duty. Entire agreement clauses do not usually preclude the implication of terms because the implication of a term is elucidating what the written contract means.

The court also considered the content of such a duty, concluding from case law that:

- whether a party has not acted in good faith is an objective test;
- dishonest conduct will be a breach of the duty, but dishonesty is not of itself a necessary ingredient of an allegation of breach. The question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people;
- what is required in any individual case depends on the contractual and factual context.

The court also had to decide whether there was an implied term that a contract right of termination had to be exercised in a reasonable time. In doing so, it rejected the argument that there is an immutable rule of law that all rights of termination must be exercised within a reasonable time after such right first arises. In this case, whether the contractual right of termination had to be exercised promptly was to be tested on the usual principles as to implication of terms, and there was no such term.

[Essex County Council v UBB Waste \(Essex\) Ltd \[2020\] EWHC 1581](#)

3. Challenges to adjudication enforcement: no jurisdiction or breach of natural justice, but what about the "correction principle"?

Enforcement of an adjudicator's decision can be resisted if the adjudicator had no jurisdiction or there has been a material breach of the rules on natural justice. But is there a third way, the "correction principle"? A contractor argued that enforcing an adjudicator's decision would be inconsistent with, and undermine, the 'correction' principle in the case law, that interim payments can be corrected in the next interim payment cycle. It claimed that the correction in question occurred long before the adjudication was commenced and that the earlier payment entitlement therefore ceased to exist and was replaced by the sum then due pursuant to s111 of the Construction Act.

The court confirmed that there is something established by case law, which could, for the purposes of the case, be referred to as, the "correction principle" and which meant that, if an interim application was subject to a party's failure to issue the required notices, so that the sum applied for became due, any correction to reflect the work's true value was permissible on later applications. The amount due on the original application, however, as a result of the failure, was still the amount due and applying the correction principle could not result in the amount not being due at all. The fact that the application in question was interim, and could be corrected later, did not assist the contractor on enforcement.

The contractor claimed that enforcement in the circumstances of the case would undermine the correction principle but the court disagreed. The contractor's analysis ignored a Construction Act contract party's ability to adjudicate "at any time" and implicitly meant that a party making subsequent interim payment applications removed the possibility of any possible disputes on earlier payment applications remaining as disputes. The court said that disputes on earlier applications did not cease to exist because a subsequent application was made on an interim basis. Nor did some sort of estoppel operate because a contractor makes another interim application in the cycle. The notified sum under the relevant application did not become incapable of adjudication simply because the payment cycle moved on to the next, and subsequent, interim applications.

[J & B Hopkins Ltd v Trant Engineering Ltd \[2020\] EWHC 1305](#)

4. Government brings in new measures to encourage building

The government has brought in new measures to encourage building, in particular, in the Business and Planning Act which:

- introduces a new, fast track application process for the temporary variation of planning conditions relating to construction site working hours;
- provides for extension of the commencement period for certain unimplemented planning permissions and listed building consents, enabling development to commence following delays caused by Covid-19;
- gives a planning inspector the ability to use more than one procedure (written representations, a hearing or a local inquiry) to determine planning appeals, so as to enable the Planning Inspectorate to deal with cases quickly and efficiently during the coronavirus pandemic. The change will, however, provide ongoing efficiencies to the work of the Planning Inspectorate.

See: <https://www.gov.uk/government/news/new-plans-to-get-britain-building-in-coronavirus-recovery>

<https://www.legislation.gov.uk/ukpga/2020/16/contents/enacted>

<https://www.gov.uk/government/publications/construction-working-hours-draft-guidance/draft-guidance-construction-site-hours-deemed-consent>

<https://www.gov.uk/government/publications/extension-of-certain-planning-permissions-draft-guidance>

5. Domestic reverse charge VAT for construction services postponed to March 2021

The introduction of the domestic reverse charge for construction services has been postponed by HMRC from 1 October 2020 to 1 March 2021, because of the impact of the coronavirus pandemic on the construction sector. The reverse charge requires the UK customer receiving supplies of construction services to account for the VAT due on the supplies on their VAT return, rather than the UK supplier.

The original April 2019 legislation is also to be amended, to make it a requirement that, for businesses to be excluded from the reverse charge because they are end users or intermediary suppliers, they must inform their sub-contractors in writing that they are end users or intermediary suppliers. This amendment is designed to make sure both parties are clear as to whether the supply is excluded from the reverse charge

See: <https://www.gov.uk/government/publications/revenue-and-customs-brief-7-2020-domestic-reverse-charge-vat-for-construction-services-delay-in-implementation/revenue-and-customs-brief-7-2020-domestic-reverse-charge-vat-for-construction-services-delay-in-implementation>

6. PPN 04/20 & 05/20, PFI 1 & 2 and responsible contractual behaviour

The government has issued Procurement Policy Notes 04/20 & 05/20, setting out, respectively, information and guidance for public bodies on payment of their suppliers to ensure service continuity during the COVID-19 outbreak, and guidance on the updated Outsourcing Playbook and associated guidance notes.

It has also published updated PF1/PF2 guidance and updated guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by COVID-19. The latter considers three specific issues further: payment, extensions of time and the avoidance and resolution of disputes.

See: <https://www.gov.uk/government/publications/procurement-policy-note-0420-recovery-and-transition-from-covid-19>

<https://www.gov.uk/government/publications/procurement-policy-note-0520-the-outsourcing-playbook-v20>

<https://www.gov.uk/government/publications/supporting-vital-service-provision-in-pfipf2-contracts-during-the-covid-19-emergency>

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896798/

[Update - Covid-19 and Responsible Contractual Behaviour - 30 June final for web .pdf](#)

7. Information Protocol to support BS EN ISO 19650-2 the delivery phase of assets

BS EN ISO 19650-2:2018 requires an Information Protocol to be produced and included in appointments. The UK BIM Framework, in association with the Construction Industry Council, has published an Information Protocol Template, which develops the requirements of the CIC BIM Protocol (Second Edition 2018) and provides an example of what could be included in an Information Protocol to be used when conforming to BS EN ISO 19650-2:2018 for projects and their appointments to which English law applies.

It is not prescriptive but is said to provide a useful starting point for an Information Protocol and to be, to the authors' knowledge, currently the only template or standard form Information Protocol that is designed to be used when conforming to BS EN ISO 19650-2:2018.

See: <https://ukbimframework.org/wp-content/uploads/2020/06/Information-Protocol-to-support-BS-EN-ISO19650-2.pdf>

8. CLC Site Operating Procedures Guidance Version 5

The Construction Leadership Council has issued version 5 of its Site Operating Procedures guidance, updated to reflect the latest government guidance following the easing of lockdown measures in England from 4 July. The 'one metre plus' social distancing guidelines require workers to stay two metres apart, or one metre with risk mitigation where two metres is not viable, and the CLC says that it is expected that sites will maintain the social distancing measures in place.

Other changes in version 5 are minimal and include:

- updates to the 'When to Travel to Work' section;
- latest peak times for public transport;
- entry systems to be regularly cleaned rather than between each use;
- drivers to have access to welfare facilities;
- canteens that have been closed or offered a restricted service may now re-open.

See: <https://www.constructionleadershipcouncil.co.uk/news/clc-site-operating-procedures-guidance-v5/>

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