



Legal developments in construction law

1. Adjudicator's failure to consider substantial part of defence dooms enforcement

An employer's adjudication notice, seeking a true value adjudication of parts of a contractor's interim application, excluded a number of matters from the scope of the adjudication. The adjudicator considered that the employer was entitled to limit the scope of his jurisdiction but, in finding that the adjudicator was acting in breach of the rules of natural justice, in failing to consider and deal with matters relied on by the contractor in its defence, the court set out the applicable legal principles, in summary:

- a referring party can define the dispute by its notice of adjudication and, in doing so, confine the dispute to specific parts of a wider dispute, such as valuation of particular work elements forming part of an interim application;
- a responding party cannot, without consent, widen the adjudication's scope by adding further disputes under the contract but it can start separate adjudication proceedings in respect of other disputes;
- a responding party can raise any defences it considers properly arguable but, in doing so, it is not widening the scope of the adjudication; it is engaging with, and responding to, the issues within the scope of the adjudication;
- where the referring party seeks a declaration as to valuation of specific elements of the works, the responding party cannot seek a declaration as to valuation of other elements;
- where, however, the referring party seeks payment in respect of specific elements of the works, the responding party can rely on all available defences, including valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed;
- it is for the adjudicator to decide whether any defences amount to a valid defence in law and on the facts;
- if the adjudicator asks the relevant question, the decision will be enforced. It is irrelevant whether the answer is right or wrong;
- if the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence in law and on the facts, that may be a breach of the rules of natural justice;
- not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases;
- if there is a material breach of natural justice, the decision will not be enforced.

Global Switch Estates 1 Ltd v Sudlows Ltd [2020] EWHC 3314

2. Suspending work for non-payment = repudiation?

Repudiation of a contract is a dangerous area. Accepting what you think is a repudiation, but is not, can have serious consequences. In a payment dispute a contractor suspended work, but was that a repudiation, which the employer accepted, or had the employer itself repudiated by a mistaken acceptance? Just how does a court identify a repudiation?

In deciding the issue, the court had to revisit these principles.

- there is no right at common law to suspend performance for non-payment of an interim payment, even if the employer was in breach of contract in not paying;
- a wrongful suspension of performance does not, in itself, necessarily amount to a repudiatory breach of the building contract;
- a contractor's absolute refusal to carry out the work, or abandoning the work before it is substantially completed, without any lawful excuse, is a repudiation, but all the circumstances must show that the character of the refusal or abandonment is repudiatory; and
- although there may be a repudiation where a party intends to fulfil a contract but is determined to do so only in a manner substantially inconsistent with their obligations and in no other way, such conduct is not necessarily and of itself repudiatory and it is often necessary to pay proper regard to the impact of the party's conduct on the other party.

The court also noted analysis of the issue in **Mayhaven Healthcare v Bothma** where the judge said that whether a wrongful suspension by a contractor under a construction contract is a repudiatory breach of contract depends on the breach and the facts and circumstances of the case. Such conduct would not necessarily amount to an absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse, and the arbitrator involved was entitled to take into account a willingness by the party wrongfully suspending work to return to site and complete the work, even if only on the basis of an erroneous demand to be paid what it erroneously believed was due. Subsequent correspondence may be relevant to considering whether conduct should be viewed as an absolute refusal or a repudiatory act but it would

normally only be relevant if prior to communication by the innocent party of its purported acceptance of the repudiatory conduct.

In this case the court ruled that the contractor had not repudiated the contract, when it was making plain its willingness to meet and seek to resolve the issues which divided the parties with a view to completing the project, but the employer, in mistakenly alleging and accepting repudiation as terminating the contract, had itself repudiated. The contractor had accepted the repudiation and was consequently entitled to the balance of the value of the works carried out and 17.5% for overheads and profit on the remaining work.

[Optimus Build Ltd v Southall & Anor \[2020\] EWHC 3389](#)

3. Substance, form and intent – what every Housing Grants Act interim application needs

A subcontract contained a payment schedule which included a table setting out the relevant dates for each payment cycle. The schedule also stated that all applications were to be valued up to specified valuation dates, that any applications received late would not be considered and would be administered with the following month's payments, and "must" be submitted electronically to a specified email address. An application, headed "valuation" and specifying that it was valuation number 6, was emailed to addresses other than the specified address and it valued the works up to a date not set out in the payment schedule. Was it a valid application?

The court ruled that it was not. The case law on the interim payments regime under the Housing Grants Act says that the document relied upon as an interim application must be, in substance, form and intent, an interim application, stating the sum considered due at the relevant due date and free from ambiguity. If there are to be potentially serious consequences flowing from it being an interim application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

In the court's judgment, one could not infer that the recipient of the application knew, or ought reasonably to have known, what to do and when. The application was late, it did not value the works to a specified date, it was not sent to the specified email address and consequently did not comply

with the subcontract requirements. It was not clear or unambiguous so that the parties could know what to do about it, or when.

[RGB Plastering Ltd v TAWÉ Drylining and Plastering Ltd \[2020\] EWHC 3028](#)

4. CLC final checklist and resources for post Brexit

The Construction Leadership Council has issued a final one page checklist that summarises the key changes facing UK construction businesses at the end of the transition period with the EU. It includes quick-reference information and links to all the CLC EU Exit Business Readiness publications, as well as additional information from GOV.UK including specific links to BEIS and HMRC. Topics covered include people, goods and materials, standards and alignment, contracts, procurement, data and tax implications.

See: https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/12/EU-Exit-Business-Readiness_Final-Checklist.pdf

5. Government launches new Construction Playbook

The government has launched the Construction Playbook, which outlines what the government expects from public sector works, the role the construction sector will play in the UK's recovery from the coronavirus pandemic and in green initiatives to bring greenhouse gas emissions down to net zero by 2050. Other measures include:

- long term plans for key programmes;
- focusing on project outcomes;
- standardising designs and parts, as well as embedding digital technologies including the UK BIM Framework;
- more investment in training and apprenticeships;
- emphasis on safety.

The Playbook also says that standard construction contracts with appropriate options should be selected, except where the project or programme justifies a bespoke approach, and that standard contracts should be chosen from the NEC 3 or NEC 4, JCT 2016 and PPC2000/TAC-1 and FAC-1 sets of forms.

See: <https://www.gov.uk/government/news/new-playbook-launched-to-step-up-construction-sector-productivity-and-innovation>

and

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941536/The_Construction_Playbook.pdf

6. Select Committee recommends improvements to draft Building Safety Bill

The Housing, Communities and Local Government Select Committee report on the draft Building Safety Bill welcomes the draft Bill but recommends a number of improvements, including:

- a guarantee that leaseholders will not have to pay for fixing historical defects, such as unsafe cladding, alternative proposals for financing remediation work and exploring ways of making building companies pay for fixing problems they created;
- the inclusion of buildings where vulnerable people live, rather than limiting the new regime, as currently proposed, to "higher-risk buildings", i.e. any building over 18 metres or six storeys;
- removal of the ability of dutyholders (those ultimately accountable for building safety during design and construction) to choose who inspects their building work, from all building work, not only that on higher-risk buildings;
- where there is more than one owner of an occupied building, giving multiple "accountable persons" responsible for building safety, a general duty to co-operate with each other;
- publication of the competence framework for building safety managers with the final Bill, which should enable a system of accreditation and registration for them;
- product testing results to be made publicly available and a system for third-party certification established.

See: <https://committees.parliament.uk/committee/17/housing-communities-and-local-government-committee/news/132826/building-safety-bill-aims-welcome-but-more-detail-needed/>

and

<https://houseofcommons.shorthandstories.com/draft-building-safety-bill-scrutiny/>

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