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Legal developments in construction law

1. Adjudicator resigns - no fee payable? Or did his terms and conditions make a difference?

An adjudicator resigned because he considered that one of the parties in the adjudication was not a party to and/or identified in the contract on which the adjudication had been referred and he therefore had no jurisdiction. He sent in his fee note for time spent in the failed adjudication but, as he had not produced an enforceable adjudication award, was he entitled to a fee?

In ***PC Harrington Contractors Ltd v Systech International Ltd*** the Court of Appeal ruled that an adjudicator was not entitled to their fees for producing unenforceable decisions but this adjudicator's terms and conditions, drafted in the light of that judgment, and to which the parties did not object, provided that if the adjudication ceased "*for any reason whatsoever prior to a Decision being reached*" a fee invoice would be raised immediately and would be due for payment seven days after the date of the invoice.

The terms also provided that, save for any act of bad faith by the adjudicator, he would also be entitled to payment of his fees and expenses if the decision was not delivered and/or proved unenforceable. Did this make a difference?

The court said it would have been wiser for the adjudicator not only to inquire as to the parties' position as to who were the contracting parties, but also to inquire whether both parties accepted that he had jurisdiction. He did not do that and the route he took was outside paragraph 13 of the Scheme, which entitles the adjudicator to investigate matters "*necessary to determine the dispute*", which necessarily involved the question, what is the dispute? When he resigned, there was no dispute as to the identity of the contracting parties or as to his jurisdiction and his reasoning in deciding to resign on the basis that he had no jurisdiction, when that was not an issue the parties had referred to him, was wrong.

The court noted the suggestion in ***Harrington*** that the problem faced by an adjudicator in recovering fees where an award was unenforceable could be avoided by suitable terms in their contract of engagement. Resignation under the Scheme, by an adjudicator acting with diligence and honesty, is not a situation within the expression "*bad faith*" and the court ruled that, on the true construction of the terms and conditions, the adjudicator was entitled to be paid for the work done, and the Unfair Contract Terms Act did not apply.

Davies & Davies Associates Ltd v Steve Ward Services (UK) Ltd [2021] EWHC 1337

2. Claimant awarded £2,000 damages handed £500,000 interim costs bill

A main contractor sued its consulting engineers for the cost of demolishing and rebuilding two blocks of terraced houses that, it alleged, had been caused by negligent design. It claimed £3.7million but failed to show causation and was awarded just £2,000 as damages, to cover the assessed cost of partial remedial work made necessary by the negligent design. Because the engineers had, under Part 36 of the Civil Procedure Rules (CPR), made two offers to settle, far in excess of the £2,000 damages award, the engineers were entitled to their costs from 21 days after the first offer, but on what basis should these be assessed, the usual standard basis, or the more generous indemnity basis? And in exercising its discretion in deciding, how should the court approach the issue? It also had to consider who should pay the costs prior to that date, and on which basis.

Under the CPR and case law, a defendant that beats (i.e. is liable for less than) their own Part 36 offer, is not automatically entitled to indemnity costs, but they can ask for indemnity costs if they can show that, in all the circumstances of the case, the claimants' refusal to accept the offer was so unreasonable as to be "*out of the norm*". This is the "*critical requirement*". And if the claimants' refusal comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made.

Costs orders for indemnity costs are not entirely routine, and depend on unusual facts. The court said that, in this "wholly unusual" case, the claimants had advanced a plainly untruthful case on a major and central point in the litigation. The claim was exaggerated and wholly opportunistic, unjustified and extremely thin, at least so far as the quantum case was concerned, which was entirely far-fetched, and wholly irreconcilable with the contemporaneous documents. The claim for the full cost of demolition ignored inconvenient facts, which was wholly unreasonable, and considerably out of the norm.

The court noted that an unreasonable refusal of mediation can justify a departure from the ordinary costs consequences. The engineers had refused mediation but the refusal came at a time when the claimants were advancing, and continued to advance, a factually untruthful case.

This case plainly sat outside the norm and the justice of the case demanded not only that the claimants did not recover their own costs, but also that the court reflected its disapproval of the claimants pleading "facts" so directly contrary to the true situation. The court consequently made no order for costs at all, in either party's favour, up to the date of service of the untrue factual information, but ordered that the engineers should recover all their costs of the proceedings from that date onwards on the indemnity basis, despite the £2,000 award of damages, because, from that date, the claimants were conducting the litigation on a wholly false factual basis, something that must have been known to the directors of both the claimant companies.

The court ordered the claimants to make a payment to the engineers, on account of costs, pending detailed assessment, of £500,000.

Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs) [2021] EWHC 1414

3. Court warns on expert independence

In ***Beattie Passive Norse Ltd v Canham Consulting Ltd (No. 2 Costs)*** Mr Justice Fraser, the judge in charge of the Technology and Construction Court, noted that there are cases where the conduct of experts is such that would, of itself, justify indemnity costs, and sounded a note of caution in terms of experts' compliance with their duties, noting "*a worrying trend generally*", which seems to be developing, in terms of failures by experts in litigation complying with their duties.

He pointed out that Practice Direction 35 makes the position very clear:

"*2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.*

2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate."

The expert's overriding duty is to the court and this overrides any duty to their client. This has since been reinforced by a number of court decisions. Mr Justice Fraser referred to similar observations he made in ***Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*** and to the very recent

case of ***Dana UK Axle Ltd v Freudenberg FST Gmbh*** [2021] EWHC 1413 where Joanna Smith J had excluded, during the trial itself, all the defendant's technical expert evidence due to "*the full and startling extent of the Experts' breaches of CPR 35*".

Mr Justice Fraser also said that parties to litigation who rely on expert evidence that fails to comply with the rules should not be encouraged by his finding that, in this case, the approach of the claimants' expert was not sufficient, alone and of itself, to justify an award of indemnity costs.

Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs) [2021] EWHC 1414

See also Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 at paragraph 237.

4. Government targets 1 August 2021 for planning gateway one

The government is introducing new requirements into the planning system in response to recommendations in Dame Judith Hackett's report. "*Planning gateway one*" has two key elements:

- to require the developer to submit a fire statement setting out fire safety considerations specific to the development with a relevant application for planning permission for development which involves one or more relevant buildings, and
- to establish the HSE as a statutory consultee for relevant planning applications.

(In due course, the government expects the HSE's role to be fulfilled by the Building Safety Regulator established under the Building Safety Bill.)

"Relevant buildings", as currently defined, contain two or more dwellings (which includes flats) or educational accommodation (residential accommodation for students at boarding school or in later stages of education) and meet the height condition (18m or more in height, or 7 or more storeys, whichever is reached first).

Subject to parliamentary scrutiny, the government proposes to bring the changes into effect, through secondary legislation, from 1 August 2021.

See: https://www.gov.uk/guidance/building-safety-planning-gateway-one

5. New national design code goes on test

A new national design code, the National Model Design Code (NMDC), which aims to ensure future developments are beautiful and fit in with local character, is being tested by shortlisted councils in 14 areas in England in a six month programme.

The code gives local planning authorities a toolkit of design principles to consider for new developments, such as street character, building type and façade as well as environmental, heritage and wellbeing factors.

See: https://www.gov.uk/government/news/councils-given-funding-boost-to-develop-new-local-design-guide-for-housing-development

6. Procurement Policy Note 03/21: The Sourcing and Consultancy Playbooks

The government has published Action Note PPN 03/21, which applies to apply to all central government departments, their executive agencies and non departmental public bodies ('In-scope Organisations') and says those organisations should take action to apply the principles, rules and guidelines set out in the Sourcing Playbook and the Consultancy Playbook.

The Sourcing Playbook, which supersedes the Outsourcing Playbook, outlines the government's expectations as to how contracting authorities and suppliers should engage with each other. The Consultancy Playbook is being published with the Sourcing Playbook to provide specific guidance on sourcing consultancy services.

PPN 03/21 states that the Playbooks and associated guidance are considered good practice and the wider public sector should consider taking them into account.

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986856/Procurement_Policy_Note_03_21-_The_Sourcing_and_Consultancy_Playbooks.pdf

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.

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