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Legal developments in construction law

1. Court rejects attempt to send enforcement of £22million adjudication award to arbitration

A joint venture resisted enforcement of an adjudication award of £22million, plus interest, on the ground that the claimant's enforcement claim in court was a dispute that should be referred to arbitration under the contract arbitration clause and section 9 of the Arbitration Act 1996.

The court noted that that the joint venture's failure to pay the sum awarded by the adjudicator, however indisputable the claimant's claim, amounted to a dispute under s.9(1) of the Act (as explained in ***Halki Shipping Corporation v Sopex Oils Ltd.***) It did not follow, however, that the court must grant a stay for arbitration because:

- the JV's Notice of Dissatisfaction with the adjudicator's decision did not include any challenge to jurisdiction or allege any breach of the rules of natural justice. The decision was therefore final and binding in respect of those matters and the JV had lost its right to challenge the validity of the adjudication decision, in court or in arbitration, although it retained its right to refer the underlying disputed issues to arbitration. The effectiveness of the adjudication decision was consequently not a matter to be referred to arbitration under the contract and section 9(1);
- regardless of the scope of any reference to arbitration, the parties expressly agreed in their contract that the adjudication decision would be binding on an interim basis;
- the court's reasoning in ***Macob v Morrison*** was clear, that a losing party at the point of enforcement of an adjudication decision in court must elect whether to challenge the validity of the adjudication decision in court or to treat it as valid and, therefore, capable of being referred to arbitration but, implicitly, binding on an interim basis. This should not be confused with the losing party's right to challenge both validity and merits in arbitration (subject to any loss of the right to challenge as a result of the decision becoming final and binding).

The court ruled that the JV had not identified any grounds of challenge to the decision for want of jurisdiction or procedural unfairness, any right to challenge the validity of the decision had been lost and the decision was binding unless and until revised in arbitration. For those reasons, it refused the JV's application for a stay.

Northumbrian Water Ltd v Doosan Enpure & Anor [2022] EWHC 2881

2. Repudiation and acceptance – was the adjudicator wrong not to consider both?

A claimant asked the court for a declaration that an adjudicator was in breach of the requirements of natural justice because the adjudicator had not considered the claimant's case that it had a lawful entitlement to terminate the contract (for which it had terminated), and had consequently deprived the claimant of a potential defence.

Terminating a contract at common law on the ground of repudiation has two fundamental elements, establishing that a party was in repudiatory breach of the contract and an acceptance of the repudiation. Without the second element the contract is not terminated.

The claimant's case in the adjudication was that its termination notice was a valid contractual termination notice and, alternatively, that the same letter was a valid communication which brought the contract to an end by common law termination, accepting the contractor's repudiatory breach. The adjudicator rejected the contention that the termination letter was an acceptance of repudiatory breach and decided that it was unnecessary to consider the question of repudiatory conduct. The court ruled that his decision not to do so was in no way a failure, let alone one which constituted a breach of natural justice.

In considering whether there had been a breach of natural justice the court referred to the judge's observations in Global Switch Estates 1 Ltd v Sudlows Ltd on the extent of the dispute referred to an adjudicator and what the adjudicator must consider. It emphasised the fact that:

> *"A responding party is entitled to raise any defences it considers properly arguable to rebut the claim…"*

It said that that is not widening the dispute, it is engaging with it and is the principle which underlies the observation that:

> *"If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice."*

The court in this case added some further observations, in summary, that:

- the court must assess the correct level of abstraction at which to consider the question the adjudicator had to determine (whether a referred claim or proffered defence), and should not be distracted by minor sub-issues. However, failure to consider a critical or fundamental element of a defence (even if properly described as a sub-issue) may make the decision unenforceable;
- the court must bear in mind the distinction between considering an asserted defence and concluding it is not tenable, and deciding not to consider an asserted defence at all. The former is unlikely to be a breach of natural justice whereas the latter may well be;
- the distinction between a deliberate or conscious decision to exclude consideration of a defence and an inadvertent omission is a relevant consideration, but it is not determinative. Much more important is the gravity of the omission;
- whilst a relevant factor may also be whether an error was brought about by tactical manoeuvring by the claiming party, this will usually be, at most, a secondary consideration;
- it is necessary to look at the substance of the decision rather than the form.

Manor Co-Living Ltd v RY Construction Ltd [2022] EWHC 2715

3. Unfair contract terms – was it reasonable to exclude the statutory implied term as to quality?

A company involved in hire purchase financing of coaches and buses, Dawson, entered into hire purchase contracts, on its terms and conditions, with a coach operator, Last Bus. The terms and conditions excluded terms implied by law, which would apply to the term as to satisfactory quality implied by s.10(2) of the Supply of Goods (Implied Terms) Act 1973.

Last Bus alleged that, in breach of this implied term, some or all of the coaches supplied under the hire purchase arrangements were not of satisfactory quality but was the implied term successfully excluded by the exclusion clause? To answer that question the court had to decide if the clause satisfied the requirement of reasonableness under s.11 of the Unfair Contract Terms Act 1977.

The court noted that more recent cases on the Unfair Contract Terms Act in the Court of Appeal show a marked reluctance to interfere (by concluding that an exclusion clause has not been shown to satisfy the requirement of reasonableness) in substantial commercial transactions entered into by parties of equal bargaining strength.

It also took into account the guidelines for the s.11 reasonableness test set out in Schedule 2 to the Unfair Contract Terms Act and, in deciding that the exclusion clause satisfied the requirement of reasonableness, it noted that:

- Last Bus was a substantial commercial party well able to acquire the coaches, without contracting on a hire purchase basis with Dawson. There was no suggestion, or basis for suggesting, that Dawson, in effect, took advantage of Last Bus, or that the exclusion was so unreasonable that it might have occurred to Dawson that in signing up to it, Last Bus must have not properly understood or considered it;
- if Last Bus was not content with Dawson's exclusionary terms, it was in a position to secure such contractual assurances as to quality as the supplier of the coaches, EvoBus, was willing to offer, either alongside the use of hire purchase via Dawson (or another finance house), or if necessary by buying directly; and
- there was a long and consistent prior course of dealing between Last Bus and Dawson, which Last Bus had freely agreed to, and never once raised objection to, or concern about, the exclusion clause (or its materially equivalent predecessors).

Bearing in mind the approach taken in cases between substantial commercial parties of equal bargaining power, the court ruled that there was no real prospect of Last Bus resisting Dawson's primary argument on reasonableness, that it was fair and reasonable to include the exclusion clause in the hire purchase contracts.

See: **Last Bus Ltd (t/a Dublin Coach) v Dawson group Bus And Coach Ltd & Anor [2022] EWHC 2971** at: https://www.bailii.org/ew/cases/EWHC/Comm/2022/2971.html

4. CLC and NEC issue retentions guidance

The Construction Leadership Council, in collaboration with NEC, has published joint guidance on the use of retention clauses under NEC3 and NEC4 contracts and subcontracts.

The publication discusses how NEC contracts deal with defective work and retentions, and the factors involved in deciding whether a retention fund is needed and the amount of retention.

See: https://www.constructionleadershipcouncil.co.uk/news/retentions-payments-under-nec-contracts/

5. Building Safety Act – BSR duties brought into force

On 1 December secondary legislation brought into force sections of the Building Safety Act dealing with the Building Safety Regulator's duty to facilitate building safety (4(1), (2), (3) & (4)) and to establish a building advisory committee (9(1) & (2)) and a residents' panel (11).

See: https://www.legislation.gov.uk/uksi/2022/1210/contents/made

6. Building Safety Levy - government starts second consultation

The government has launched a second consultation on the Building Safety Levy, seeking views on its design and implementation. The Levy will be paid by developers and is to be charged on new residential buildings requiring building control approval in England, to meet building safety expenditure.

The consultation closes on 7 February 2023.

See: https://www.gov.uk/government/consultations/the-building-safety-levy-consultation

(The first (July 2021) consultation can be found at: https://www.gov.uk/government/consultations/the-building-safety-levy/consultation-on-the-building-safety-levy)

7. Remediation funding scheme pilot for medium-rise buildings launched

The government has launched a pilot, to be run by Homes England, for a scheme to provide funding for the remediation or mitigation of the fire safety risks linked to unsafe external wall systems on medium-rise buildings (11-18m) where a responsible developer cannot be identified.

The pilot precedes a wider rollout next year, funded by the Building Safety Levy, for buildings between 11-18m tall, where the developer cannot be traced or held responsible for remediation work, for instance, because they have gone out of business.

Approximately 60 buildings across England, which have interim safety measures in place, such as waking watches, are to be invited to apply for the pilot.

More details on eligibility and the application process for the full scheme will be announced next year. Buildings are to be assessed through a fire risk

assessment carried out in line with the British Standards Institute PAS 9980 standard, to ensure that recommended work is proportionate, and the funding is properly targeted.

See: https://www.gov.uk/government/news/leaseholders-in-medium-rise-buildings-helped-with-cladding-fixes

8. Monitoring of developer progress included in Levelling Up Bill amendments

Included in a number of amendments to the Levelling Up and Regeneration Bill are a requirement for developers to report annually on build-out of housing permissions, and giving local planning authorities the power to decide whether to entertain future applications made by developers who have previously failed to build out existing planning permissions. The government is also to consider new financial penalties for companies failing to deliver housing despite having planning approval.

Brownfield land is to be prioritised for development, with the government launching a review into how such sites are used.

See: https://www.gov.uk/government/news/plans-to-level-up-and-build-new-homes-tabled-in-parliament;

https://hansard.parliament.uk/commons/2022-11-17/debates/22111745000010/LevellingUpAndRegenerationBill;

and

https://www.gov.uk/government/news/communities-put-at-heart-of-planning-system-as-government-strengthens-levelling-up-and-regeneration-bill

9. The Buildings Register

The HSE November Building Safety Regulator ebulletin records that the Building Safety Act 2022 requires all higher-risk buildings in England to be registered on a Buildings Register and that, under the Act, higher-risk buildings are defined as 18 metres or more in height, or 7 storeys or more with at least two residential units (usually referred to, by the HSE, as high-rise buildings.

The HSE expects building registration to open in April 2023 subject to the required secondary legislation being in place. All existing and new buildings in scope will need to be registered.

The Act also introduces two new roles, Accountable Persons (APs) and the Principal Accountable Person (PAP). It will be the PAP who is responsible for completing the registration process for their building.

The HSE also say that, over the coming months, they will keep up to date, with more information on the PAP/AP roles and the registration process, those who currently own or are responsible for managing buildings.

Subscribe here to receive the Building Safety Regulator ebulletin.

10. Cladding repairs: £8million government funding for council enforcement teams

The government has announced more than £8 million in government funding for council enforcement units to pursue freeholders who are refusing to begin high rise cladding repairs.

The funding from the Department for Levelling Up, Housing and Communities will be split among 59 councils in England and prioritised for those with the highest number of unsafe buildings, particularly focused in London, Manchester and Birmingham.

See: https://www.gov.uk/government/news/government-bolsters-enforcement-teams-to-quicken-cladding-repairs

11. CMA looking at possible market study on housebuilding

Following correspondence between Michael Gove, the Secretary of State for Levelling Up, Housing and Communities, and the Competition and Markets Authority, the CMA has reported that its staff have been developing proposals for work in the housebuilding sector, including a possible market study for the board's consideration in January.

See: https://www.gov.uk/government/publications/secretary-of-state-asks-competition-markets-authority-to-undertake-a-housebuilding-market-study

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