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Legal developments in construction law:

January 2024

1. Notice of adjudication – how important is that?

Included in a number of jurisdictional challenges to an adjudication award was a claim that the notice of adjudication was defective, in not complying with the applicable rules. Paragraph 1(3) of the Scheme for Construction Contracts (England and Wales) Regulations 1999 (which applied in this case) says that the notice of adjudication "*shall set out briefly*" four matters but the contractor said that the notice failed adequately to set out three of those matters, namely, the nature and a brief description of the dispute, details of where and when the dispute arose and the nature of the redress sought.

In deciding that the notice was valid, the court considered the applicable principles. It was common ground that, if the notice is sufficiently defective in failing to comply with paragraph (1)(3) of the Scheme, then the whole adjudication process is a nullity and relevant shortcomings in the notice of adjudication cannot be put right in the referral, subject to an important caveat.

If there is no reference at all to (for example) where and when the dispute arose or to any redress sought then the notice will be inadequate and any following adjudication will be without jurisdiction. However, if the nature and brief description of the dispute and the relief sought are set out, an issue may then arise as to whether a particular decision on a particular point (or indeed the decision as a whole) is outside the terms of the notice. In that event, the notice will not be a nullity: instead the relevant decision may be a nullity as being a determination made without jurisdiction to do so.

The court also noted, from the summary in ***Stellite Construction Limited v Vascroft Contractors Limited*** that:

- the notice of adjudication defines the ambit of the adjudicator's jurisdiction and any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute identified in that notice. The notice of adjudication (and referral notice) are, however, not necessarily determinative of the true dispute: the background facts also need to be considered.

- It is for the party who refers the dispute to adjudication to define the issues which are referred and the adjudicator has no jurisdiction to vary the basis on which the reference has been made. The adjudicator's jurisdiction includes any defence to the claim advanced in the notice of adjudication.

- "*Dispute*" is a word interpreted broadly to mean "*whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference*".

- To determine whether an adjudicator's decision is responsive to the dispute referred to them it is necessary to:
    - determine from the adjudicator's decision what they actually found;
    - analyse what claims and assertions were made by the referring party prior to adjudication; "*[b]roadly, and in the round*";
    - analyse whether the whole of the pre-adjudication claims and assertions were referred to adjudication;
    - consider the pleadings in the adjudication to determine what the dispute encompassed, or, through the response and the reply and the evidence deployed by both parties during the adjudication, became.
- Generally, given the limited adjudication timetable, on the question of the scope of the referred dispute the courts are going to have to give adjudicators some latitude and not take an unduly restrictive view.

The court added that it will be rare that a notice of adjudication will be "knocked out" as being defective, and any ensuing adjudication ruled to be a nullity, simply by looking at the notice alone, unless something is obviously missing (e.g. names and addresses of the parties). It thought that any challenge that the nature of the dispute is not adequately described is best approached by identifying the particular issue or dispute that is said not to fall within the notice of adjudication, considering what the adjudicator decided and then considering whether or not the dispute and decision does fit within the notice of adjudication (which gave the adjudicator jurisdiction to decide the same, or not). If a particular decision is one made without jurisdiction, then a further question of severability may arise.

Iluminesia Ltd (t/a AlterEgo Facades) v RFL Facades Ltd [2023] EWHC 3122

2. Court of Appeal revisits UCTA, exclusion clauses and reasonableness

In considering a standard form exclusion clause in a hire purchase agreement, the Court of Appeal had to decide just how the Unfair Contract Terms Act reasonableness test might apply.

It noted that exclusion clauses in contracts based on one party's written standard terms of business, and also those in hire purchase contracts, are, under the Act, subject to the test of reasonableness, the burden being on the party relying on the term to show that the test is met. The rationale, they said, is obvious: customers contracting with a business on its written standard terms, or with a hire purchase company (also likely to be on the company's standard terms), are considered, on the face of it, not to be of equal bargaining power, at least in relation to the terms of business which have not been individually negotiated but may have been no more than "small print" on the back of the primary contractual documents. Parliament has decided that businesses seeking to rely on those terms to exclude what would otherwise be their liability under the contract must prove the reasonableness of those terms.

That is not to say, however, that a customer and a business dealing on the latter's standard terms may not be found to be of equal bargaining power. The respective strength of the bargaining position of the parties is the first matter identified in Schedule 2 to UCTA, when deciding whether the reasonableness test is satisfied.

The Court also noted that in cases where commercial parties were found to be of equal bargaining strength (particularly where they have insurance), the Court had emphasised that the parties' bargain should generally prevail and the clause was therefore held to be reasonable under UCTA. That is (and could only be) an application of the statutory reasonableness test in the

circumstances of the case, with particular regard to Schedule 2(a) of UCTA. It was not a repudiation of the application of the statute or an effective reversal of the burden of proof in relation to the reasonableness of a term.

Even where the parties are large commercial concerns and of equal bargaining strength as regards the price to be paid under the contract, that does not mean that they are of equal bargaining strength in respect of the terms. A supplier may be willing to negotiate the unit price, but will only supply on its standard terms, a position taken by all other suppliers in the market. That crucial distinction must be borne in mind when considering the reasonableness of standard terms and, to a large extent, epitomises the rationale for controlling standard terms of business by statute.

Last Bus Ltd (t/a Dublin Coach) v Dawsongroup Bus and Coach Ltd & Anor [2023] EWCA Civ 1297

3. What, exactly, is "England", for the purposes of the Construction Act?

The relevant Part of the Construction Act applies only to construction contracts relating to the carrying out of construction operations in England, Wales or Scotland, but how, exactly, is "England" identified, as there is no definition in the Act? This was an issue confronting the court in ***Van Elle Ltd v Keynvor Morlift Ltd***.

The court concluded that nothing in the various Acts, OS maps, supporting explanations, Conventions and Orders considered determined the question of what is meant by "England" in the Construction Act. That could only be achieved by interpreting s.104(6) in the context of the whole of the Construction Act and the relevant surrounding circumstances, including the above to the extent relevant.

The starting point, it said, ought to be the recognition that the question is only ever likely to arise in relation to construction operations undertaken over, under or adjacent to water, because, if they are undertaken wholly on land within the mainland, there is unlikely to be any possible room for dispute.

After careful consideration of the materials, the court's view was that the Construction Act applies to construction contracts which relate to the carrying out of construction operations in England, where England ends on the baseline as established by relevant UN Conventions and Orders in Council. It followed that the references to "the land" in s.105(1) include land covered by water and, hence, land covered by inland waters up to the baseline which, in the case of rivers such as the river in question (the Fowey), extends to the mouth of such rivers. On this analysis, it was not realistically open to the defendant to argue that the piling works contract, the subject of this case, was not a contract for construction operations in England.

Van Elle Ltd v Keynvor Morlift Ltd [2023] EWHC 3137

4. Adjudicator failed to take into account substantive defences? What is the natural justice test?

A piling contractor claimed that an adjudicator had failed to take into account its substantive defences on weather downtime, rates and other matters. This, it said, was a breach of natural justice but what is the legal test?

In deciding that there was no breach of natural justice the court referred to the legal principles summarised in *Construction Adjudication* by Sir Peter Coulson (4th edition, 2018) and to the author's summary of the relevant position in ***Pilon Ltd v Breyer Group PLC***:

- The adjudicator must attempt to answer the question referred to them. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question, then, whether right or wrong, their decision is enforceable;

- if the adjudicator fails to address the question referred to them because they have taken an erroneously restrictive view of their jurisdiction (and have, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make their decision unenforceable, either on grounds of jurisdiction or natural justice;

- however, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable;

- any such failure must also be material. In other words, an error must be shown to have had a potentially significant effect on the overall result of the adjudication.

In Construction Adjudication Sir Peter Coulson suggested that such challenges rarely succeeded for two reasons:

- "Firstly, an inadvertent failure to address a particular issue is in the nature of an error within the adjudicator's jurisdiction rather than a breach of the rules of natural justice.
- Secondly, and if that is wrong, it would be an unusual case where the court would both draw the inference that an issue had not been addressed and conclude that the failure to address the issue was so significant that it meant that the adjudicator had not decided the dispute referred to them and/or that the conduct of the adjudication was so unfair that the decision should not enforced. The more significant the issue, the less likely it is to be inadvertently overlooked; the less significant it is, the more likely it is that it has been taken account of in the round."

Van Elle Ltd v Keynvor Morlift Ltd [2023] EWHC 3137

5. Statutory adjudication in construction disputes "a resounding success"

25 years after the introduction of statutory adjudication, The Centre of Construction Law & Dispute Resolution, King's College London, in collaboration with The Adjudication Society, has published its second report on construction adjudication in the United Kingdom. In a foreword enthusiastically commending the report, Mrs Justice O'Farrell DBE says that adjudication has been "*a resounding success in achieving timely decisions in construction disputes*".

Included in its many findings are:

- so-called 'smash-and-grab' adjudications are the most common category of claim;
- the number of referrals reached the second-highest number on record between May 2022 – April 2023 at 2,078;
- adjudication referrals have been consistent at approximately 2,000 per annum for the last five years, outstripping the number of claims issued in the TCC and the Commercial Court combined, and comfortably exceeding referrals to arbitration;
- 55% of respondents supported a pilot scheme to trial the publication of redacted adjudication decisions;
- 27% of respondents suspected adjudicator bias in the past year on at least one occasion. The most common reason given was the adjudicator's relationship with the parties or party representatives, selected by 43% of respondents. A majority of respondents would find it useful to have a uniform guideline on conflicts of interest for adjudicators;
- the majority of respondents were in favour of repealing most of the section 105 exceptions to the Construction Act, but not the residential occupier exclusion in section 106.

See: https://www.adjudication.org/sites/default/files/KCL_DPSL_CONSTRUCTION_ADJUDICATION_REPORT-2023.pdf

6. FIDIC Emerald Book reprint and new guide published

FIDIC has published a reprint of its Emerald Book contract for underground works and a new guide to its use, which take on board user comments and queries and give rise to further amendments. The guide provides an overview of the Emerald Book and outlines key differences from the FIDIC Yellow Book, on which it is based. The Emerald Book is a joint initiative with ITA-AITES (the International Tunnelling and Underground Space Association).

See: FIDIC | FIDIC publishes Book contract reprints and new guide to its use | International Federation of Consulting Engineers

and

2019 Emerald book -list of amendments 2023_0.pdf (fidic.org)

7. Future Homes and Buildings Standard consultation

The government has launched a consultation on the plans for achieving the Future Homes Standard and Future Buildings Standard. It sets out technical proposals for changes to the Building Regulations, the associated Approved Document guidance and calculation methods.

The consultation, which relates only to buildings in England, closes on 6 March 2024.

See: https://www.gov.uk/government/consultations/the-future-homes-and-buildings-standards-2023-consultation/the-future-homes-and-buildings-standards-2023-consultation

8. NPPF updated

The National Planning Policy Framework has been revised in response to the Levelling-up and Regeneration Bill: reforms to national planning policy consultation and sets out the government's planning policies for England and how these are expected to be applied.

See: https://www.gov.uk/government/publications/national-planning-policy-framework--2

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