



## Legal developments in construction law

### Current issues

#### 1. Court foils claimant's attempt to shut out defence arguments

A notice of adjudication is said to define a dispute and the adjudicator's jurisdiction (though this is not always the case). But can it be drafted so as to exclude particular defences?

A contractor's notice of adjudication claimed payment based on what the contractor said was due, where this differed from the contract administrator's valuation, and on what the contract administrator said was due, where it did not want to challenge the valuation. The adjudicator, however, dealt with the issues the contractor had tried to exclude and the contractor claimed the award was unenforceable because the adjudicator had acted in breach of the rules of natural justice, without jurisdiction and in breach of an implied term of his appointment.

Rejecting the challenge, the court said that an adjudicator's jurisdiction cannot be limited in this way. One cannot refer to adjudication a disputed claim to payment and dress up the definition of the dispute in such a way as jurisdictionally to prevent a defending party from raising any defence, good or bad, in the adjudication. To refer a payment claim and say, at the same time, that the referring party is not referring parts of the claim which might be challenged by the defending party is illogical, unmeritorious and wrong. It is a device which cannot and should not work.

Kitt & Anor v The Laundry Building Ltd & Anor  
[2014] EWHC 4250

#### 2. But a dispute (once there is one) does not have to deal with everything

An employer claimed that an adjudicator had no jurisdiction because the dispute, an essential ingredient of adjudication, had not crystallised at the time of the notice of adjudication. The challenge failed because the detailed claim had been asserted and expressly rejected. Nothing more is required for a dispute to have crystallised. In addition, the contract administrator had promised to respond on a number of matters, but failed to do so in the eight months before the notice of adjudication. That inactivity clearly amounted to a rejection of the contractor's claim.

The employer also challenged jurisdiction on the basis that the dispute referred to the adjudicator was strictly limited to just one part of an interim application. That challenge also failed. A claimant is entitled to prune its original claim for the purposes of the reference to adjudication. Subject to questions of the relevant contract notices, however, a responding party is entitled to defend itself against a claim for money due by reference to any legitimate available defence (including set-off).

St Austell Printing Company Ltd v Dawnus  
Construction Holdings Ltd [2015] EWHC 96

### 3. So when is a final certificate not final?

A final certificate under a JCT contract was stated to be conclusive evidence as to loss and expense and other matters, unless proceedings were started within 28 days of its issue. The contractor started court proceedings in the 28 day period, disputing the certificate, but, some time after the period expired, the contractor wanted to dispute the same issues in adjudication. Could it do that?

No, said the court. The proper construction of the relevant clause was that (subject to a qualification where an adjudicator's decision is issued after the final certificate) the challenger has to challenge the final certificate in one set of proceedings, which is the only way in which the Final Certificate can be challenged. Even if that was not the case, as a matter of interpretation, business common sense dictated that any challenge to the final certificate should be in one set of proceedings, promptly commenced. And the court's decision did not fetter the right to adjudicate "at any time". Nothing prevented the issue of adjudication proceedings but the final certificate would, of course, be conclusive evidence on the relevant matters because those proceedings had not been issued in time.

Marc Gilbard 2009 Settlement Trust (trustees of) v OD Developments and Projects Ltd [2015] EWHC 70

### Future issues

### 4. Government plans for procurement changes

Following a public consultation on public procurement reforms, the Cabinet Office has published a policy statement and draft illustrative regulations on two policy measures, better pre-procurement engagement with suppliers and giving due consideration to applying Lean sourcing principles. The statement also explains the Government's position on six other areas that could be the subject of regulations placing obligations on contracting authorities to:

- make appropriate use of electronic invoicing;

- make procurement advertisements, related documents and/or bidding processes accessible to potential bidders without charge (for example, electronically);
- include the appropriate considerations of SMEs within procurement strategies;
- apply minimum and/or maximum timescales for carrying out procurements below the specified financial thresholds;
- debrief unsuccessful bidders; and
- make appropriate use of standard terms and conditions.

See:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/394647/Clause\\_38\\_-\\_policy\\_statement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394647/Clause_38_-_policy_statement.pdf) and

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/394648/Clause\\_38\\_-\\_illustrative\\_regulations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394648/Clause_38_-_illustrative_regulations.pdf)

### 5. CDM 2015, 6 April and the CDM co-ordinator role change

Subject to parliamentary approval of the CDM 2015 regulations, over the six month transition period from 6 April 2015 the CDM co-ordinator role on current projects will disappear and be replaced, on projects continuing after 6 October, by the "principal designer". Key provisions of the transition are, in summary:

If, immediately before 6 April 2015, the project has a CDM co-ordinator:

- and *will* finish by 6 October 2015, a "principal designer" does not need to be appointed;
- but *will not* finish by 6 October 2015, a "principal designer" must be appointed, in writing, before 6 October 2015.

(In both cases the CDM co-ordinator's revised duties during the transition period, including handover of the health and safety file, are set out in paragraph 5 of Schedule 4 of the draft regulations.)

If, immediately before 6 April 2015, the project involves (or reasonably foreseeably will involve) more than one contractor, the project has no CDM co-ordinator or principal contractor appointed,

- and the construction phase has started, the client may appoint, in writing, a “designer” as “principal designer” (and must appoint, in writing, a contractor as “principal contractor” as soon as practicable after 6 April 2015). If no principal designer is appointed the principal contractor must prepare and update the health and safety file;
- and the construction phase has not started, the client must appoint, in writing, a “designer” with control over the construction phase as “principal designer” (and a contractor as “principal contractor”) as soon as practicable (and in any event, before the construction phase begins).

If a relevant project has only one contractor and the construction phase has started, the contractor must draw up, or arrange for, a construction phase plan as soon as practicable after 6 April.

See the HSE draft guidance (<http://www.hse.gov.uk/pubns/priced/draft-l153.pdf>) and the regulations (<http://www.legislation.gov.uk/uksi/2015/51/contents/made>) and, in particular, regulations 5 and 37 and Schedule 4 and paragraphs 181 to 186 of the guidance.

## 6. CDM 2015: Who can be a “principal designer”?

A “principal designer”, whose role replaces that of the CDM co-ordinator, is a “designer” with control over the pre-construction phase appointed in writing by the client; “designer” is defined by the draft regulations as:

*“...any person (including a client, contractor or other person referred to in these Regulations) who in the course or furtherance of a business—*

*(a) prepares or modifies a design; or*

*(b) arranges for, or instructs, any person under their control to do so,*

*relating to a structure, or to a product or mechanical or electrical system intended for a particular structure, and a person is deemed to prepare a design where a design is prepared by a person under their control;”*

*‘design’ “...includes drawings, design details, specifications and bills of quantities (including specification of articles or substances) relating to a structure, and calculations prepared for the purpose of a design;”*

A designer (including a principal designer) must have the *skills, knowledge and experience* and, if they are an organisation, the *organisational capability*, necessary to fulfil their appointed role, in a manner that secures the health and safety of anyone affected by the project. A designer (or contractor) must not accept an appointment unless they fulfil these conditions and the person appointing them must take “reasonable steps” to satisfy themselves that they fulfil the conditions.

See the HSE draft guidance (<http://www.hse.gov.uk/pubns/priced/draft-l153.pdf>) and the regulations (<http://www.legislation.gov.uk/uksi/2015/51/contents/made>) and, in particular, regulations 2(1), 5 and 8 and paragraphs 58-65, 72-75 and 94-96 of the guidance.

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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