

Spring 2009

CONSTRUCTION LAW UPDATE

ADJUDICATION

Multiple contracts, Fiona Trust and stay of execution

There was a rush of cases at the end of last year and the beginning of this year in the Technology and Construction Court (TCC). Gullands acted for the Claimants in two of these cases.

In *Air Design (Kent) Limited v Deerglen (Jersey) Limited [2008] EWHC 3047*, the Claimant issued proceedings in the TCC to enforce by way of summary judgment application an Adjudicator's award in its favour in the sum of approximately £140,000. The Defendant had in the adjudication challenged the Adjudicator's jurisdiction on the basis that there were four separate contracts. Deerglen said (a) the Notice of Intention to Refer was deficient because it referred disputes under separate contracts, and (b) the Adjudicator had no jurisdiction over multiple disputes without Deerglen's consent. On that basis that the Defendant resisted the application and in addition, the Defendant sought a stay of execution.

The Claimant said that there was one main "base build" contract and that the other arrangements were variation agreements. The Judge decided that insofar as it was relevant, it was his view that there was one contract between the parties, but in any event he considered that the Adjudicator had acted within his jurisdiction in reaching his decision. The substantive dispute before the Adjudicator had required him to consider whether there was more than one contract and accordingly it was within the Adjudicator's jurisdiction to decide that there was one, even though it may have been varied by agreement. It was also part of his jurisdiction to decide whether or not the original base build agreement had been varied by subsequent agreement.

The Claimant's Counsel also relied on the case of *Fiona Trust [2007] UKHL40*, a House of Lords decision. Here the Court took a pragmatic and commercial view as to what the Arbitrator could decide and rule upon. The words "disputes arising under a contract" were wide enough to include "disputes in connection with a contract". The Judge found that the Adjudicator appointed under the Deerglen contract had jurisdiction to determine not only the value of sums due under that contract but any variations, as the JCT adjudication clause provided that a "dispute or difference" which had arisen out of the contract could be referred to him.

Accordingly judgment was given in favour of Air Design and the Judge then had to decide the application by Deerglen for a

stay of execution. Deerglen argued that the Claimant's financial position was such that it would not be able to repay to Deerglen any sums later found to be due. Air Design argued that their financial status was the result of the Defendant's unwillingness to comply with its payment obligations and that they were a small company which depended upon cashflow from its contracting counterparties such as the Defendant. The Judge was guided by the case of *Wimbledon Construction Co 2000 v Derek Vago [2005] BLR 374* on when a stay should or should not be granted. He noted that there was no suggestion that Air Design was insolvent and that their financial position was the same or similar to when they contracted with Deerglen. The stay of execution was refused.

Contracts in writing, payments into Court and interest

In *Allen Wilson Joinery Limited v Privetgrange Construction Limited [2008] EWHC2802* the Defendant's challenge to the application for summary judgment to enforce the Adjudicator's award was on the basis that there was no contract in writing for the purpose of Section 107 of the Construction Act. This is a jurisdictional challenge which is now on its deathbed, because the Construction Bill currently going through Parliament is planning to repeal Section 107.

The Judge considered the leading authority of *RJT Consulting Engineers Limited v DN Engineering (Northern Ireland) Limited [2002] BLR 217*. What has to be evidenced in writing is literally the agreement which means all of it, not part of it. The Judge in *Allen Wilson* went on to say that he agreed with the *RJT* case. Whilst Adjudicators and indeed Judges should be robust in determining whether trivial matters said to have been agreed only orally between the parties can prevent what otherwise would be a written contract, the exercise of determining what is trivial must be an objective one in relation to the particular contract and parties concerned. What may be "trivial" in one contract may not be in another.

The Judge said that he formed the view, not without some hesitation, that there was a triable issue as to whether there was a written contract at least on some of the aspects of the issues relating to terms said to have been orally agreed. However, the Judge decided that it was a case in which a conditional order should be made, so because he found that some of the aspects of the factual case put forward by Privetgrange were somewhat improbable, he ordered them to pay a sum of money into Court as a condition of leave to defend.

As to interest, the Judge followed *Carillion Construction Limited v Devonport Royal Dockyard Limited [2005] EWCA*

1358 as to the power to award interest under the Scheme for Construction Contracts 1998. The situations in which the question of interest is "necessarily connected with the dispute" are limited.

Failure to give reasons

In the case of *Thermal Energy Construction Limited v AE&E Lentjes UK Limited* [2009] EWHC 408, the Judge refused to enforce the Adjudicator's decision. One of the issues raised by the responding party in the adjudication was a defence by way of counterclaim operating by way of set-off in relation to its liability to its client for liquidated damages under the main contract. Although the Court found that the Adjudicator had a duty to give reasons, that duty differed to that of an Arbitrator under Section 68 of the Arbitration Act 1996 because an Adjudicator's decision is only temporarily binding and is given in a limited timescale. However, in the *Thermal* case, the Adjudicator had not dealt with the set-off and counterclaim issue at all and had not given any reasons to indicate that he had dealt with it. So the Adjudicator had failed to comply with his obligations.

In summary, in the *Thermal* case, it was emphasised that enforcement will only be refused because of failure to give reasons in extreme circumstances where the Defendant can show (1) the Adjudicator did not give any or any intelligible reasons and (2) the Defendant suffered substantial prejudice as a result of the Adjudicator's failure to give reasons. The

prejudice was that the Defendant had lost the prospect of the Adjudicator deciding the set-off and counterclaim in his favour, and if the Defendant was to launch a further adjudication to seek to recover these losses, they would firstly have to comply with the Adjudicator's decision if it was in force.

Natural justice and crystallisation of dispute

In *Bovis Lend Lease Limited v the Trustees of the London Clinic* [2009] EWHC 64, it was held that there had been no material breach of the rules of natural justice and that it would be a rare case in which it can be said that there has been a material breach of the rules of natural justice where the party making the complaint did not raise the issue during the course of the adjudication. One case could be for example when an Adjudicator receives evidence or argument from one party which has simply not been communicated at all to the other party.

Another issue in *Bovis* was whether a dispute had crystallised. The Trustees argued that the Adjudicator lacked jurisdiction to decide the loss and expense elements of the referral as they said that was new and based on new expert evidence. The Judge held that unless the claim as presented is nebulous and ill-defined, the fact that a claim for payment is refused or not accepted on the basis that insufficient information has been provided will usually give rise to a dispute.

Pre-action Conduct

In April 2009, a Practice Direction for Pre-action Conduct comes into force and will replace the current Practice Direction on Protocol. The Pre-action Protocol for Construction and Engineering Disputes came into force on 2 October 2000 and it set out what steps each party is obliged to take in an effort to resolve a dispute without resorting to court action. Failure to comply may result in adverse costs consequences for the defaulting party.

The new regime is intended to have greater prominence in the Civil Procedure Rules (CPR) with clearer language and structure. It now becomes more important than ever for the parties to comply with the requirements as the new Practice Direction sets out more clearly the approach of the Court in exercising its powers relating to pre-action conduct. The Judge now has clear guidance on compliance and the consequences of non-compliance and therefore will be more inclined to exercise his or her case management powers more actively if there has been non-compliance without good reason.

Sanctions that may be imposed are: (1) suspending the Court action pending pre-action conducts steps being taken; (2) order the defaulting party to pay the costs or some of the costs of the other party; (3) order costs to be paid on an indemnity basis, i.e., near enough full costs; (4) penalties on interest.

The new Practice Direction also provides that (1) a party has to give the other information on its funding arrangement if it enters into one and (2) costs in relation to experts should be minimised, for example by instructing a joint expert and (3) where proceedings are started, the Claim Form or Particulars of Claim should state whether the parties have complied with pre-action conduct or the relevant Protocol. In essence, the new Pre-action conduct aims to give guidance on pre-action procedure rather than to impose any significant new requirements.

This Update is for guidance only. Legal advice should be obtained for specific issues.

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