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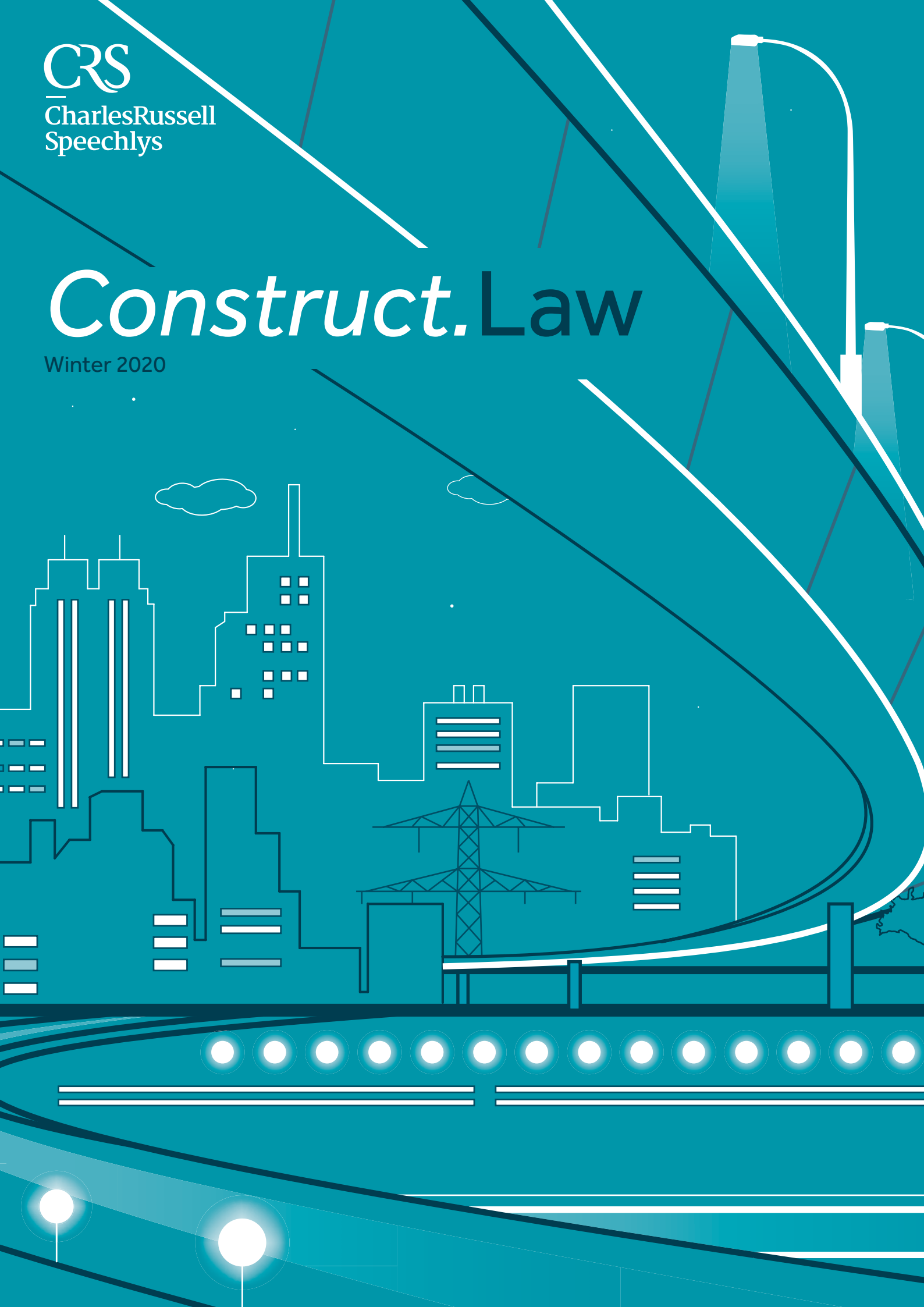

Contents

Introduction

Welcome to the latest edition of Construct.Law. Our winter edition focuses on topical legal issues affecting the construction, engineering and projects sector at the end of a uniquely challenging year. Articles address a wide ranging selection of topics across the lifecycle of a project, from modular construction to termination. There is the usual round up of adjudication cases, including some significant decisions regarding enforcement by insolvent companies. We also continue our essential law series on variations.

We hope you enjoy reading this edition of Construct.Law. Please do get in touch if you would like to discuss any of the issues covered by Construct.Law or if there are any topics which you would like us to cover in future editions.

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Modular construction: addressing deposit payments in building contracts

Modular construction has become increasingly popular in recent years. Once synonymous with 'pre-fab' houses and concrete tower blocks, the potential cost, programme and quality benefits mean it is now seen as a potential solution to the existing housing crisis

Christopher Busaileh, Senior Associate, Construction, Engineering & Projects

Modular construction does, however, give rise to a number of potential legal issues. In this article we will consider one such issue concerning payment protection for the employer.

The problem

Often the modular manufacturer is a sub-contractor/ supplier to the main contractor. This is particularly the case where only specific elements of the building (for example, bathroom pods in a hotel) are constructed off-site as opposed to the entire development. The nature of off-site manufacture means that factory slots need to be reserved, often months in advance and typically a modular manufacturer will require a deposit payment before a slot is reserved. The modular manufacturer will then usually require further payments to be made during the manufacturing process and before the items are ready for delivery to site.

The problem is that such payments are not adequately covered in the payment provisions in standard form building contracts. These tend to assume that 'traditional' construction methods are used and therefore the contractor's right to payment for materials usually arises when those materials are delivered to site.

There may be exceptions to this where payment can be made prior to delivery if certain conditions are met. These conditions often include the relevant items being identified in the building contract, proof that ownership in the item has vested in the contractor being provided, that it is insured and that it is set aside and labelled at the off-site premises.

The problem here is that these conditions cannot be satisfied where an item is yet to be manufactured or is in the process of being manufactured. Therefore, the contractor has no right to recover these payment from the employer unless it has a specific entitlement to an advance payment under the building contract.

Possible Solutions

The contractor could use its own cash reserves to fund the payments to the modular manufacturer. However, if the project requires a substantial amount of modular manufacturing this is unlikely to be acceptable to a contractor as it could have a significant impact on their cash flow. The alternative is to amend the payment provisions so that the employer makes payments for the modular manufacturing before the relevant items are delivered to site. However, this potentially means the employer would take the risk of the contractor becoming insolvent before the items are finished and delivered to site.

Advance Payment Bond

Perhaps the safest option for the employer is to have any upfront payment secured by an on-demand bond. Advance payments can be made to cover the payments required by the modular manufacturer. The advance payment is re-paid by deductions from subsequent payments due to the contractor. For example, the payments that would be due when the off-site items are delivered to site. The monies would be secured by a bond so that the employer can recover its advance payment in the event that the contractor becomes insolvent before the entire sum has been repaid.

The main drawback is one of cost. Depending on the extent of the advance payment required, a bond may be prohibitively expensive. For the employer to be properly protected an advance payment bond needs to be on-demand in nature. The distinction between on-demand and performance bonds merits an article in its own right but for present purposes it is sufficient to note that, in the event that the contractor becomes insolvent, the employer could not recover the advance payment under a performance bond until the works had been completed and its overall losses ascertained. On-demand bonds tend to be expensive (and, in some cases, contractors are simply unable to provide them) but they should allow an immediate pay out if the contractor becomes insolvent with any advance payment outstanding.

The other drawback from the contractor's perspective is that if they provided an advance payment bond to the employer without getting a back to back bond from the modular manufacturer, they would be taking the risk of the modular manufacturer's insolvency. They would have to source an alternative modular manufacturer without being entitled to further payment from the employer.

Step-in provisions

A more cost-effective solution could be to include a contractual mechanism to allow the employer to step in to the contractor's agreement with the modular manufacturer in the event the contractor becomes insolvent. The easiest way to achieve this would be to include step-in provisions in a collateral warranty between the modular manufacturer and the employer. Such provisions would stipulate that, in the event the contractor becomes insolvent, the employer would have the option of 'stepping in' to the contractor's position under its agreement with the modular manufacturer.

The risk for the employer is that, when stepping in, he takes on all existing liabilities of the contractor to the modular manufacturer. If, despite the employer paying the contactor for sums due to the modular sub-contractor, this has not been passed on to the modular manufacturer, the employer would effectively have to pay twice. That said, this risk could be mitigated by having robust payment provisions in the main contract where the contractor would need to provide proof of payment to the supplier before being entitled to payment from the employer.

Vesting certificates

Advance payment bonds and step-in rights are primarily designed to manage the risk of the main contractor becoming insolvent. However, what about the risk that the modular manufacturer becomes insolvent? This is primarily the risk of the main contractor who would remain under a contractual obligation to the employer to deliver the modular elements of the project notwithstanding the insolvency of the modular manufacturer.

Ideally, and as with an employer, the main contractor would obtain an advance payment bond from the modular manufacturer to mitigate this risk where up-front payments are required. However, the main contractor (and the employer) might also consider obtaining vesting certificates over off-site components or their constituent parts. Vesting certificates can make clear that ownership has passed, that the offsite items are adequately insured, are set apart and identifiable as the property of the main contractor or employer. Importantly they give the main contractor or employer a right to access the modular manufacturer's premises to retrieve these items should the modular manufacturer become insolvent or not deliver the items to site as required.

Vesting certificates are only possible if there is something that has been manufactured that can then "vest" in the main contractor and/or the employer. Further, they are only useful where those parts could be used by a replacement modular manufacturer. In that sense, they are only an effective form of protection from the point when useable components have been manufactured.

Conclusion

Ultimately, the solution to this issue will depend on the circumstances of the parties and the amount of the payments required before the relevant items are delivered to site. In some cases an employer may be willing to take on the risk of contractor insolvency and make the payments. In other circumstances, the value of those payments and the wider project is such that an advance payment bond is justified. What parties should ensure in any project involving modular construction is that the payments required by the modular manufacturer are discussed at tender stage and an appropriate payment arrangement agreed. The last thing either party wants is to get to a point where a factory slot needs to be reserved in order to keep to the programme but with no agreement as to who is responsible for taking the risk of that payment.

Winter 2020

Construct.Law

‘Fixing’ the final date for payment under construction contracts

Parties to construction contracts are typically well aware of the payment regime the Construction Act imposes, including the employer’s obligation to pay the contractor all notified sums in full by the final date for payment. This may create a problem for the employer if the contractor does not provide a valid VAT invoice in respect of the notified sum. The Act requires the employer to pay the sum due (including any VAT). However, if it does not receive a valid VAT invoice, this could create VAT accounting problems for the employer and, potentially, lead to an inability to reclaim the VAT.

Christopher Hadnutt, Associate, Construction, Engineering & Projects

A common solution for employers (and for main contractors in respect of their subcontractors) is to link the final date for payment to the submission of a valid VAT invoice for the notified sum (i.e. so that it is a certain number of days following the submission of the VAT invoice). This seeks to ensure that the employer will not be obliged to pay until it knows its VAT position is covered. However, the recent decision of the TCC in *Rochford Construction Limited v Kilhan Construction Limited* has arguably put an end to the validity of this practice.

The dispute in Rochford v Kilhan

The contractor, Rochford, had appointed Kilhan as its subcontractor in connection with the construction of the reinforced concrete frame on a project. The subcontractor made an application for payment for just under £1.4 million on 20 May 2019, covering the period to 30 April 2019. The contractor issued an interim payment notice on 23 October 2019, certifying just over £1.2 million.

A dispute arose and the adjudicator decided that the final date for payment in respect of the subcontractor’s application was 19 June 2019. Accordingly, the contractor’s payment notice was issued well out of time and, as a result, the contractor was required to pay the sum claimed by the subcontractor in full. The contractor complied with the adjudicator’s decision, and then brought fresh court proceedings to obtain a final decision on the matter.

This article will focus on the question as to what the final date for payment was (and therefore whether the payment notice could function as a pay less notice).

The contract terms

The contract did not contain detailed payment provisions. The relevant wording was limited to the following:

> **“The brief description of subcontractor works to be carried out**
>
> **Works are lump sum…RCL will issue activity schedule to KCL, application date end of month…commercial… valuations monthly as per attached payment schedule end of month. Payment terms thirty days from invoice as per attached payment schedule. S/C payment cert must be issued with invoice.”**

Importantly, the payment schedule referred to in this provision was not ultimately incorporated in the contract.

Rochford’s position on the final date for payment

As the contract stated: “Payment terms thirty days from invoice as per attached payment schedule”, the contractor argued that, notwithstanding the fact that no payment schedule existed, this provision established a final date for payment which was 30 days from the date on which the subcontractor issued the corresponding invoice. As the subcontractor never issued an invoice, the payment notice could not have been issued late.

The subcontractor raised two counterarguments. The court described one of these as legal and one as essentially factual. Ultimately, although the case was decided on the factual argument, the court agreed with the subcontractor in both instances.

The factual issue

The ‘factual argument’ centred on the problem that there was no clear means for the subcontractor to determine when it was supposed to issue its invoice. The contract stated both that the invoice should be issued in accordance with a payment schedule, which did not exist, and that the payment certificate (which had not been provided) should be issued with the invoice. The contract did not spell out what the subcontractor should have done where no payment certificate was issued.

The court said that the Act was intended to ensure certainty over the dates on which sums should be paid, and that this is precisely what the contract failed to achieve. The contract referred the subcontractor to one of two items (the payment schedule or the payment certificate), neither of which existed, to determine when to issue its invoice. There was accordingly no certainty as to when the invoice should be issued, making it an unsuitable basis for determining the final date for payment. Further, the court could see no reason to excuse the contractor’s failure to issue a payment certificate, which forms part of the statutory payment regime, by reference to the non-issue of an invoice, which has no status under the statutory regime whatsoever.

The legal issue

The court was able to decide the matter on the basis of the factual argument. However, it did go on to comment on the ‘legal’ argument.

This principally related to the wording of section 110(1) of the Act, which states:

> “110 Dates for Payment
>
> 1. Every construction contract shall –
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide a final date for payment in relation to any sum which becomes due. The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.”

The key point was that while the Act allows the contract to specify “a mechanism” to determine when payments become due, it referred to the parties agreeing “how long the period” is to be between the due date and final date for payment.

The court accepted that this permits the due date to be fixed by reference to the occurrence of an event (as is often the case for projects using milestone payments). However, when it comes to the final date for payment, this must be a fixed period of time after the due date. It cannot be set by reference to an event, or the issue of an invoice or notice.

There were two further provisions the court also found to be relevant on this point. The first was section 109(2) of the Act, which in effect gives the parties complete freedom to decide the circumstances under which stage payments become due. This was held to be in marked contrast to the wording of section 110(1)(b).

The second point was the Act’s prohibition against ‘pay when certified’ clauses and prohibition against the due date being linked to the issue of a notice by the payer. The relevant sections make no mention of the final date for payment. The court held that the prohibition against such clauses would be frustrated if the employer was permitted to introduce such practices as a means to determine the final date for payment. This would clearly be contrary to the aims of the Act. The court held that the inference is that the possibility to peg the final date of payment to an event rather than a fixed period was never considered acceptable under the Act.

Consider your final date for payment terms

Many employers and main contractors will be concerned by the court’s comments in this decision, as it is common practice to link the final date for payment to the provision of a valid VAT invoice. Although it is arguable that it is within the contractor’s power to ensure that a valid VAT invoice is issued, and it should therefore bear the cash flow risk of failing to do so, this decision appears to rule out the validity of such a practice.

Parties should therefore look closely at the final date for payment terms under their construction contracts.

Contracts that do not contain valid final date for payment provisions will have the relevant provisions replaced by the Scheme. This provides a final date for payment 17 days after the due date, which could be significantly shorter than the period otherwise provided by the contract. This could mean that payless notices that would otherwise be valid could be out of time, with all the consequences of smash and grab adjudications and obligations to pay the notified sum that would follow. This is something that parties may seek to take advantage of in the event of a payment dispute.

Payers should therefore carefully consider when the period for serving a valid payless notice will actually expire if the final date for payment under their contract is replaced by the final date for payment under the Scheme.

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Omitting works from an NEC contract: Valuation under the contractual mechanism

The recent decision in *Van Oord v Dragados [2020] CSOH 87*, is a useful reminder to parties to construction contracts about the potential dangers of varying the scope of works under the contract and how such variations may be assessed under the contract, in particular under an NEC form of contract.

Eveline Strecker, Knowledge Development Lawyer, Construction, Engineering & Projects
Anna Sowerby, Trainee Solicitor, Construction, Engineering & Projects

Background

Dragados was the main contractor for the design, management and construction of the Aberdeen Harbour expansion. Van Oord was engaged by Dragados as its subcontractor to complete the soft-dredging works under the NEC3 form of subcontract (Option B).

As the works progressed through 2018 and 2019, Dragados began to instruct the omission of certain works from the scope of Van Oord's subcontract. The works were not simply omitted, but were given to another sub-contractor to complete. As a result, Van Oord was denied not only the opportunity to carry out a significant portion of its works but its profit on those works.

The matter went to adjudication with the adjudicator finding largely in favour of Dragados.

'Defined Cost' under NEC v bill of rates?

Dragados argued that the compensation events mechanism was appropriate for all compensation events, including breaches of contract. As the omission of works constituted a compensation event under the NEC subcontract, Dragados claimed that this reduced the total amount payable to Van Oord for the remaining works to be carried out. The amount payable for the works which remained should be valued on the basis of the 'Defined Cost' (the actual costs), rather than the amounts included in Van Oord's bill of rates.

Van Oord commenced court proceedings and contended, among other things, that:

- Dragados was not entitled to give the work omitted from Van Oord's scope of work to another sub-contractor;
- this amounted to a breach of contract; and
- Dragados was not entitled to reduce the amount payable to Van Oord, rather payment should have been made on the basis of the original bill of rates.

The decision

In relation to the first issue, Lord Tyre in the Scottish Court of Session did not identify a contractual entitlement for Dragados to omit the works and transfer them to another sub-contractor. The Court noted that even if the variations clause provides for omissions to be made from the scope of works, this does not necessarily mean they can be given to a third party to complete.

The principles identified in the English decision in *Abbey Developments Limited v PP Brickwork Limited [2003] EWHC 1987 (TCC)* were followed in this case, namely:

- The contractor has a duty to carry out the work and has the right to complete the work;
- Variation clauses must be considered carefully, so as not to deprive the contractor of their right to complete the work – there must be wording entitling an omission of work and giving it to another contractor; and
- The reason or motive behind the omission is irrelevant. The entitlement to omit work and give it to another to complete all turns on whether the contractual clause allows for the change.

The Court also identified that there was a breach, being the instruction to change the Subcontract Works Information by way of the omission of works. Despite it being a breach, the omission of works was considered to be a 'compensation event' under the NEC subcontract, meaning that it would fall to be considered within the compensation event mechanism. The Court held that this was the only method of assessment, even if it resulted in Van Oord being entitled to a reduction in payment.

Lord Tyre identified that the use of the compensation calculation in the NEC subcontract, which is based on identifying the 'Defined Costs', was a more objective way of giving effect to the change to the scope of works, including a change that occurs as a result of a breach of contract.

Going forward

It is unsurprising that the Court held that omitting the scope of works and giving these works to another party was a breach of contract. However, parties to construction contracts, in particular an NEC form of contract should take note of the Court's use of the contractual compensation mechanism as a means of assessing the consequences of omitting works. Just because the instruction, i.e. the omission of works, resulted in a breach of contract, this did not prevent it from also being a change to the subcontract which should then be assessed in accordance with the contractual mechanism.

This decision highlights the fact that contractual compensation mechanisms may not work in your favour, even in circumstances where the other party has breached the contract.

Although this was a Scottish decision, it is more widely relevant as the NEC contracts are used extensively across the UK. Care should be taken when it comes to drafting and negotiating variation clauses. If changes to the scope of works are envisaged, ensure that the contract properly provides for this so that the affected contractor (or subcontractor as in this case) is no better or worse off.

Common issues with termination of construction contracts

One noticeable consequence of the COVID-19 pandemic has been an increase in the number of disputes relating to the termination of construction contracts.

Andrew Keeley, Partner, Construction, Engineering & Projects

In May 2020 the Construction Leadership Council published 'Best Practice Guidance' for dealing with contractual issues caused by COVID-19. The guidance aimed to encourage collaborative behaviour, warning that without fair and reasonable administration of contracts, COVID-19 could have a significant and detrimental effect on the construction industry.

One suggestion was that "The parties should consider agreeing to waive any relevant termination triggers in the contract", for example, if it is necessarily to temporarily suspend the works due to COVID-19.

In some cases we have indeed seen commendable examples of collaboration. However, we have also seen a significant rise in disputes, as parties seek to escape from contracts in light of new and unforeseen commercial pressures.

Ways to terminate

There are a number of ways in which a contract may be prematurely brought to an end. The most common are:

- **Agreement**

If the parties are able to agree commercial terms, then the contract can be terminated by mutual consent. This enables both parties to avoid the cost and uncertainty of a legal dispute, providing the agreed terms are carefully documented.

- **Contractual termination**

Consultant appointments usually include a right for one or both parties to terminate at will, without giving a reason (also known as termination for convenience). In contrast, termination rights under building contracts are usually much more limited, reflecting the greater investment required by contractors when taking on projects.

Insolvency almost invariably gives rise to a contractual right to immediately terminate, although it is important to check the specific definition of insolvency in the relevant contract. For example, it may be necessary to wait until a formal winding-up order has been made.

If the contractor has completely abandoned the site, this is also likely to provide a relatively straightforward basis for termination (e.g. JCT clause 8.4.1.1), although it may be necessary to give a warning notice first, and allow the contractor a period of time to rectify the default.

Failure to pay may entitle the contractor to terminate, although the contractor must also be careful to strictly follow the contractual notice requirements before suspending or terminating, to avoid inadvertently breaching the contract themselves.

In recent months, the contractual right to terminate following a defined period of suspension has attracted attention as, for example, either party might be entitled to terminate if the works are suspended for two months due to a force majeure event. This could arguably include COVID-19, although the Government's revised guidance for construction sites states that work may continue, if done safely.

Other contractual grounds for termination can be more controversial. Clause 8.4.1.2 of the JCT Design and Build Contract 2016 and JCT Standard Building Contract 2016 states that the Employer can terminate if:

- the Employer gives notice that the Contractor is failing to proceed "regularly and diligently" with the works; and
- the default is continued for 14 days from receipt of that notice.

The leading case is *West Faulkner Associations v London Borough of Newham (1994) 71 BLR 1*, in which the Court of Appeal held that:
"Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of works..."
Keating on Construction Contracts (10th Ed) suggests at para. 20-085 that:

"This construction is very wide and would appear to have the consequence that almost any failure by the Contractor to comply with a major contractual requirement would amount to a failure to proceed regularly and diligently, thereby putting the Contractor at risk of a determination notice under Cl.8.4.1.2."

Nevertheless, the question of whether a contractor is failing to proceed regularly and diligently with the works is a subjective issue to be decided by a court or adjudicator, and there is usually a considerable element of risk when relying on this ground. It is insufficient that the contractor is simply running late, as liquidated damages provide a remedy for delay. An unjustified contractual termination might be itself deemed a repudiatory breach by the employer.

There is a similarly subjective right to terminate under the JCT sub-contracts: following 10 days' notice of default, the contractor may terminate if the sub-contractor "without reasonable cause fails to proceed with the Main Contract Works so that the reasonable progress of the Sub-Contract Works is seriously affected"

Time-permitting, an employer might be able to obtain some comfort in advance by seeking a declaration from an adjudicator prior to termination, although this would still risk a conflicting final determination by a court or arbitrator.

- **Repudiation**

In addition to express contractual rights, every party has a common law right to terminate a contract on grounds of the most serious breach. A breach that gives rise to this right is known as a repudiatory breach. This includes:

- breach of a 'condition' i.e. a fundamental term whose every breach will trigger the right to terminate; or, more commonly
- breach of an 'intermediate terms' i.e. a term whose breach is only repudiatory if it deprives the aggrieved party of substantially all the benefit that was intended under the contract.

For example, a complete refusal to perform the contract by one party is likely to be a repudiatory breach. In contrast, mere delay by the contractor is unlikely to amount to a repudiation unless time has been made of the essence. Even failure to attend site for several days may be insufficient to evidence an intention by the contractor to repudiate his contractual obligations if, for example, he has retained some plant and equipment on site.

A repudiatory breach gives rise to a claim for damages, like any breach of contract. The innocent party can choose whether to treat the contract as discharged or affirm the contract and insist on performance. While you need not accept the repudiation immediately, if you delay there is a risk that you will eventually be deemed to have affirmed the contract by your inaction and waived your right to terminate. You may therefore wish to protect your position by expressly reserving your rights. There is also a risk that the offending party will rectify its breach and thereby end any continuing right to accept the former repudiation.

Contracts may also be ended by illegality, mistake or frustration, although these are relatively rare in a construction context.

Practical tips

Assess whether the right to terminate is likely to have arisen – serving an unjustified notice of termination could itself be a repudiatory breach of contract, allowing the other party to sue for damages. A termination notice cannot be revoked once given. It is notoriously difficult to predict which party's interpretation of the facts will be favoured by a court or adjudicator, whose ultimate judgment may turn on a clinical analysis of ill-tempered correspondence, hastily written in the heat of the moment. Therefore, before seizing an apparent opportunity to terminate a contract, you should consider your options and strategy carefully.

If relying on a contractual termination right, carefully check the notice provisions. For example, a JCT Standard Building Contract 2016 provides that:

- termination notices should be delivered by hand or sent by Recorded Signed for or Special Delivery Post; and
- notice of default should be given by the Architect/Contract Administrator whereas the subsequent notice of termination should be given by the Employer.

On or before termination, employers should:

- ensure that the appropriate insurance policies are in place, as the contractor's insurance obligations are likely to end on termination of the building contract;
- secure the site as quickly as possible to prevent unpaid subcontractors and creditors removing plant, equipment and materials until title in the goods has been established;
- ensure the site is safe: when the employer regains control of the site from the contractor, the employer will owe a duty to lawful visitors to see that the site is safe for the purposes of their visit;
- ensure that the works are adequately protected against damage following the removal of scaffolding, temporary roofing etc; and
- undertake an immediate audit of on-site plant, equipment and materials and a valuation of work done at the date of termination.

Winter 2020

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Routine Maintenance or Major Repair? The meaning of 'design life' obligations

The TCC recently handed down its judgment in *Blackpool Borough Council v Volkerfitzpatrick Limited*, which included claims that the upgrade of the Blackpool tram depot failed to meet its design life. The detailed judgment addressed a variety of interesting issues. However, this article will focus on the helpful guidance given by the court in respect of what is meant by 'design life' where the term is not defined in the contract.

Christopher Hadnutt, Associate, Construction, Engineering & Projects

Background

Blackpool Borough Council appointed Volkerfitzpatrick Limited (VFP) under a form of NEC3 contract with amendments to design and build a new tram depot as part of a major upgrade to the long-running Blackpool tramway system.

VFP's works were completed in 2011 and brought into operation in 2012. The Council complained that several elements of the new depot suffered from corrosion so soon after installation as to put VFP in breach of its obligations to design the works to achieve the contractually specified design life. The Council claimed for repairs to the corroded elements of approximately £6,700,000. However, the amount awarded to the Council was just over £1,100,000, and a large proportion of this difference came down to the court's interpretation of the design life requirements applicable to certain parts of the works.

Contractual clauses

The Works Information contained a general statement that "unless otherwise specified in the Functional Procurement Specification, [the works] have a design life of at least 20 years".

The contract also contained a 'Functional Procurement Specification', which set out various requirements applicable to the works, including a requirement for a 50 year design life for the "building structure". The contract incorporated a design development log, which further specified a range of design life requirements for various parts of the works.

It was also material to the court's decision (although not strictly to its analysis of what is meant by 'design life') that the conditions of contract incorporated a 'fitness for purpose' obligation which required the completed works to comply with any requirement included or referred to in the contract. The court held that the design life obligation would be a 'fitness for purpose' obligation, as was the case in the Supreme Court's decision in *MT Hojgaard v E.ON Climate & Renewables UK*.

In *MT Hojgaard v E.ON* the court had interpreted the particular wording of the design life obligation as a strict liability obligation. It was therefore a strict warranty that the design of the works would enable it to have a lifespan equal to the contractual design life, and any failure to achieve this would constitute a breach of contract (regardless of any evidence that the contractor has designed the works using reasonable skill and care).

The meaning of 'design life'

The Council's claims centred on whether VFP had met its contractual design life obligations in respect of certain works. In order to assess this, the court had to consider what is meant by the term 'design life', as the contract itself contained no definition.

In addressing this question, the court drew upon two British Standards: BS ISO 15686-1:2000 ('buildings and constructed assets – service life planning') and BS EN 1990:2002 ('basis of structural design'). The court summarised the position in these documents as follows:

"BS ISO 15686-1:2000, entitled "buildings and constructed assets - service life planning", contains a definition of design life as the service life intended by the designer. In turn the service life is defined as the period of time after installation during which a building or its parts meets or exceeds the performance requirements. A performance requirement is defined as a minimum acceptable level of a critical property. There is also a definition of durability as the capability of a building or its parts to perform its required function over a specified period of time under the influence of the agents anticipated in service."

The court did not consider that this passage answered the question at hand, but nonetheless approved the inter-relation between the connected concepts of "design life", "service life", "performance" and "durability".

The court went on to consider the second standard:

"BS EN 1990:2002, entitled "basis of structural design", contains at 1.5.2.8 a reference to "design working life", which means the "assumed period for which a structure or part of it is to be used for its intended purpose with anticipated maintenance but without major repair being necessary". Maintenance is defined in the same standard as being the "set of activities performed during the working life of the structure in order to enable it to fulfil the requirements for reliability"."

The court noted the importance of recognising that no asset can be expected to perform throughout its entire design life without any maintenance at all. The key distinction is between "anticipated maintenance" and "major repair" – while some routine maintenance is expected, an asset should not require major repair during its design life.

What exactly constitutes "major repair" was determined to be a matter of "fact and degree in any given case". In the present case, the court took guidance from a contractual requirement that any required maintenance of the works should not include anything which is 'non-standard' or 'unusually onerous'. The court concluded that these contractual provisions could illustrate the sort of repairs that might be 'major' for the purpose of assessing design life.

This finding was relevant to a determination that VFP was in breach of the design life obligation in respect of blistering to the wall cladding panels. It was accepted that the cladding panels may have met the design life obligation if they had been cleaned 'frequently and intensively'. The court held that such maintenance requirements would not have fallen within the ambit of "anticipated maintenance" for design life purposes, as the court did not think such maintenance would have been either 'standard' or 'non-onerous'.

Contractual design obligations

Going forward, parties to construction contracts with design obligations should note that 'design life' may equate to 'lifetime to first major repair', even though the judge did not go so far as to approve such a definition in this case.

Arguably, the judgment outlines a means by which one can determine whether undefined design life obligations have been complied with – that is, by asking whether and when major repair has been necessary. However, as lawyers so often say, each case will depend on its own particular facts and contract terms.

TCC stays proceedings where smash and grab decision remained unpaid

The recent judgment in the case of *Kew Holdings Ltd v Donald Insall Associates Ltd [2020] EWHC 1862 (TCC)* again emphasised the Technology and Construction Court's position that it will as much as possible give effect to adjudicators' decisions and paying parties' attempts to avoid payment will hold little truck with them.

Michael O'Connor, Partner, Construction, Engineering & Projects

The Facts

Kew engaged Donald Insall Associates to provide architectural services as part of a project to convert and refurbish The King's Observatory in Richmond to form a private residence.

In 2018, disputes arose between the parties concerning Donald Insall's entitlement to unpaid fees. Donald Insall commenced a smash and grab adjudication and was awarded just over £200,000.

Kew failed to pay the sums due and Donald Insall obtained judgment enforcing the award in February 2019.

Kew again failed to pay the judgment sum and Donald Insall obtained a final charging order over The King's Observatory and sought an order for its sale.

In response, Kew commenced legal proceedings seeking circa £2m in damages alleging, late and inadequate drawings, inadequate advice and overcharging.

Donald Insall applied to have the proceedings struck out, claiming it was an abuse of process in light of the failure to pay the smash and grab adjudication decision and comply with the subsequent court order.

The Decision

The court noted that:

"The commencement of these proceedings [by Kew] without honouring the adjudication award and the judgment, in flagrant disregard of the "pay now, argue later" regime of the HGCRA, amounts to unreasonable and oppressive behaviour."

However, the court was mindful of the draconian nature of ordering a strike out of legal proceedings and therefore settled upon a stay of the legal proceedings unless and until Kew had paid the sums ordered as a result of the smash and grab adjudication.

The court dismissed the contractor's application to strike out the proceedings, opting instead to stay the matter until Kew had paid the sums ordered by the court on 5 February 2019. A stay effectively means that court proceedings can't proceed until a certain act is done.

Comment

Since the Court of Appeal's decision in Grove v S&T, it has been clear that the paying party in a smash and grab adjudication must pay the sum ordered before it can commence a true value adjudication over the disputed application for payment.

The TCC has now confirmed that this requirement cannot be circumvented by the commencement of legal proceedings.

For any party involved in adjudication and the enforcement of adjudicators' decisions, this judgment reinforces the view that attempts to avoid compliance with orders of payment of smash and grab adjudications will not be looked upon favourably by the TCC and attempts to do so, will simply add to the cost burden of those parties involved.

An uphill battle? Adjudication enforcement by an insolvent company

Following the recent Supreme Court decision in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd*, it is clear that companies in liquidation have the right to adjudicate a dispute. However, a successful adjudication is only half the battle: the insolvent company must still persuade the court to enforce the decision.

Andrew Keeley, Partner, Construction, Engineering & Projects

In *John Doyle Construction Ltd v Erith Contractors Ltd [2020] EWHC 2451 (TCC)*, the Technology and Construction Court (TCC) has recently given further guidance on the circumstances in which enforcement may be possible. In short, it still appears that enforcement will be an uphill battle for liquidators.

Background

This case concerned a final account dispute. The claimant, John Doyle Construction Ltd (JDC), was employed to carry out landscaping work at the Olympic Park by Erith Contractors Limited (Erith). The works were completed prior to the 2012 Games, under an amended NEC3 contract. JDC entered administration in June 2012 and then creditors' voluntary liquidation in June 2013.

The dispute was not adjudicated until June 2018, five years later. JDC's liquidators had been unable to agree the final account with Erith. The liquidators then purported to assign the debt to Henderson Jones, a company which specialises in purchasing claims from insolvent companies. Eventually the liquidators and Henderson Jones sought to enforce the adjudicator's decision using the expedited summary judgment procedure in the TCC.

Principles to be applied by the court

The judge (Fraser J) set out the following principles to be applied by the court when considering an application for summary judgment of an adjudicator's decision in favour of a company in liquidation:

1. Whether the dispute in respect of which the adjudicator has issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.

This principle is necessary because parties will often refer a small or tightly defined dispute for adjudication for tactical reasons. Adjudication decisions on narrow issues, such as 'smash and grab' disputes, will rarely be susceptible to enforcement on a summary basis by companies in liquidation.

2. Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.
3. Whether there are other defences available to the defendant that were not deployed in the adjudication.

Principles (2) and (3) are similar. The defendant may be entitled to set off claims that were not decided in the adjudication. The usual principle that counterclaims cannot be set off against adjudicators' decisions does not apply to insolvency set off. This is likely to present a significant difficulty for liquidators in some enforcement cases, particularly where there are mutual dealings under other contracts (which the adjudicator would not have jurisdiction to consider).

However, the mere presence of cross-claims, which might be of relatively insignificant value, will not necessarily defeat a claim for summary judgment. In the present case, this meant that a cross-claim by Erith for £40,000 on another contract would not by itself prevent enforcement as, even if this claim was entirely valid, it would still leave a significant balance due to JDC under the adjudicator's decision.

4. Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.
5. Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

Principles (4) and (5) are also similar. In *Meadowside Buildings Development Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd [2019] EWHC 2651 (TCC)*, the court considered three main ways in which security might be provided by a liquidator: undertakings by the liquidator, a third party providing a guarantee or bond, and After The Event (ATE) insurance.

Here, there was a real risk that Erith would be deprived of its right to have recourse to JDC's claim as security for Erith's cross-claim. JDC relied upon a draft letter of credit from Henderson Jones' bankers and an ATE insurance policy.

However, the court found that an intention to apply for a letter of credit in the future did not provide a sufficient safeguard to Erith. Similarly, the ATE insurance was also considered inadequate due to the terms of the policy (such as restrictions which might allow the insurer to avoid cover). For this reason alone, summary judgment was refused.

Fraser J noted that:

- As the security was offered through Henderson Jones, if that security had been deemed adequate it may then have been necessary to consider whether JDC's funding arrangements were potentially unenforceable as an abuse of process, contrary to the *Damages Based Agreement Regulations 2013* and/or champertous.
- Even if summary judgment had been granted, the court would have granted a stay of enforcement. This is the "usual outcome" where the claimant is insolvent and there is insufficient security.

In any event, Erith would not be ordered to pay the sum found due by the adjudicator.

Going forward

A number of interesting points were made by the TCC in this case:

- It is in the public interest that liquidators should be able to pursue and enforce debts owed to companies in liquidation in a cost-effective manner. A party to a construction contract should not be entitled to a windfall simply because the other party is in liquidation.
- The Supreme Court in Bresco has made it clear that a company in liquidation has the right to adjudicate its disputes under a construction contract.
- An adjudicator's decision may sometimes have utility for a liquidator without the need for enforcement; for example, a decision about which party has repudiated a contract might influence the liquidator's approach to valuing claims. However, this is likely to be relatively rare. A disputed decision on repudiation may provide limited assistance in resolving the mutual balance due between the parties.
- Where enforcement is required, companies in liquidation will face "undoubted difficulties".
- Summary judgment may be possible if adequate undertakings (or some other suitable security) are available from the liquidator.
- The streamlined procedure developed by the TCC for enforcement of adjudication decisions is not suitable for summary judgment applications such as this case, where the proceedings relate to historic claims brought by companies in liquidation. The exercise is likely to be more involved and require more time for investigation than is the case for conventional adjudication enforcement claims. Changes to the TCC Guide can therefore be expected. In the meantime, claimants who are in a similar position to JDC cannot expect their claims to be routinely expedited in the same way as conventional adjudication business in the TCC.

Winter 2020

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First known case to order enforcement of an adjudicator's decision in favour of a company in administration

Following the case of *John Doyle v Erith Contractors* in which the court refused to grant a stay of execution of an adjudicator's award due to John Doyle's administration, we now have what is possibly the first judgment post the Supreme Court's judgment in Bresco where an adjudicator's award was enforced in favour of a company in administration - *Styles & Wood (in administration) v GE CIF Trustees*.

Michael O'Connor, Partner, Construction, Engineering & Projects

This case was distinct from John Doyle, in that the administrators of Styles & Wood had not sold or assigned the claim to a third-party litigation funder and the administrators had offered to ring-fence the sums awarded by the adjudicator (approx. £700,000).

The main battleground was whether the £200,000 contribution to an adverse costs order under an ATE policy was sufficient in the event the defendant was successful in overturning the adjudicator's decision in arbitration proceedings.

The Defendants claimed that their costs of the arbitration would be somewhere between £800,000 and £1 million and on that basis the protection afforded by the ATE policy was insufficient.

In giving judgment, HHJ Parfitt analysed the facts of the particular case noting:

- GECIF had already spent c£280,000 on the adjudication and whilst the evidential arbitral process would go further, a lot of the work product already incurred and paid for could be built upon by GECIF in the arbitration. That work product was substantial (it included expert delay and quantum evidence) and could be utilised and built upon for the purposes of any arbitration.
- The £800,000 to £1 million costs estimate was "broad brush"; there was no analysis of the build up to these figures; and it was unpersuasive in the context of what is now expected of costs' breakdowns.

HHJ Parfitt concluded that the £800,000 to £1 million cost estimate was not realistic and that the £200,000 offered under the ATE policy was a figure "within the ballpark" of what might be appropriate. HHJ Parfitt also noted that it was open to GECIF to return to court to seek apply to the court for an incremental increase to the security of costs required should it transpire that greater security was required.

Based on this judgment it is clear that following the Supreme Court's decision in Bresco, courts are willing to order the enforcement of adjudicator's decisions in favour of insolvent companies, but this is subject to the right pre-conditions being met.

It is also clear that a party seeking to challenge enforcement in favour of a company in administration on the grounds that the level of costs protection being offered is insufficient, will need to demonstrate its anticipated costs and be able to explain clearly and accurately the basis on which those costs have been calculated. It will not be enough simply to argue that your expected costs will be higher.

Stay'in alive – Court accepts manifest injustice in granting stay

An underlying tenet of the Construction Act is to encourage cash flow. Accordingly, courts are reluctant to grant a stay of enforcement on an adjudicator's decision unless certain limited circumstances are found to be present.

Ben Wilkins, Associate, Construction, Engineering & Projects
Eveline Strecker, Knowledge Development Lawyer, Construction, Engineering & Projects

In the recent case of *JRT Developments Ltd v TW Dixon (Developments) Ltd [2020]* the TCC held that, on the basis of the "very unusual" facts of the case, there would be manifest injustice if the judgment were not stayed to allow substantive disputes of fact to be heard in a subsequent trial.

The Project

TW Developments Limited (TWD) was a company formed by Mr and Mrs Dixon for the purpose of carrying out a development of 14 houses on a farmland plot in Shropshire.

JRT Developments Limited (JRT), owned and controlled by Mrs Dixon's nephew, Mr Woodcock, was the contractor tasked with building the houses and related infrastructure. The development was his first major project and funding was provided by the Homes and Communities Agency (HCA).

The parties entered into a JCT Minor Works Contract with Design 2011 Edition in June 2016, though it was later disputed whether the contract also incorporated the terms of a separate document entitled "Commercial Agreement", executed on the same date. The disputed constitution of the contract, which would have a significant effect on its value, later formed an aspect of the cross-claim issued by TWD.

The relationship between the parties deteriorated and in June 2019 the contract was terminated by JRT. Although provided for in the contract, neither Architect nor Contract Administrator were ever appointed. In fact dealings between the parties were very informal. The parties did not operate the payment procedure contained in the contract in the three years prior to termination. Instead, JRT liaised directly with the HCA's valuer and issued invoices to TWD for the amounts approved by the HCA which were then paid by the HCA's funding.

Adjudication proceedings, enforcement and application for a stay

On 4 November 2019, JRT issued a purported payment notice totalling £925k, to which TWD failed to respond. JRT commenced a "smash and grab" adjudication and the Adjudicator decided in favour of JRT. JRT issued enforcement proceedings in March 2020. TWD issued proceedings seeking a declaration that the 4 November payment notice should be declared invalid.

At the enforcement hearing, TWD conceded JRT was entitled to summary judgment on the adjudication award. However, it sought a stay of enforcement pursuant to CPR 83.7(4), pending resolution of the legal proceedings on the basis of the following "special circumstances":

- the probable inability of JRT to repay the judgement sum at the end of the cross-claim trial, relying on the case of *Wimbledon Construction Company v Vago [2005]*; and
- the risk of manifest injustice if no stay was granted, as a result of TWD's inability to pay and all the circumstances of the case.

Consideration of the law and granting a stay

Referring to guidance provided by HHJ Coulson, as he then was, in the case of *Wimbledon*, HHJ Watson noted that she was satisfied that:

- it was very highly probable that JRT would be unable to repay the judgment sum if ordered to do so after the trial of the Part 7 proceedings;
- the financial position of JRT was substantially different from when the JCT contract was entered into and that this now posed a significantly higher risk than it did in 2016; and
- JRT's financial position was not caused either wholly or in significant part by TWD's failure to pay the sums awarded by the adjudicator.

As to whether a manifest injustice would be caused, HHJ Watson considered the decision in *Galliford Try Building Ltd v Estura [2015]* in which the court found that, in the unusual circumstances of that case, it would be unjust to the defendant to be forced to pay the judgment in full, and granted a partial stay of execution in a sum that would be fair to both parties.

HHJ Watson set out a number of the "exceptional circumstances" in the case at hand which justified a stay execution of the judgment sum until the trial of TWD's claim:

- HHJ Watson was satisfied that TWD could not pay any of the judgment sum without rendering itself immediately insolvent and being forced into liquidation. Accordingly, if the claim was not stayed, TWD would recover little, if any, of the judgment sum following trial.
- TWD's reliance on JRT (owned and controlled by Mrs Dixon's nephew) and the method of funding through HCA were unusual in a commercial contract. HHJ Watson noted that it was "clearly not a project where the relationship between the parties was that of employer and contractor at arm's length".
- A key aspect was the manner in which JRT obtained the adjudication award. During the three-year course of the contract, the JCT payment terms were ignored by both parties and it was only after JRT terminated the contract that it demanded money from TWD in excess of funding received from the HCA through the November 2019 payment notice. TWD's manager, Mr Neville (another nephew of Mrs Dixon), who was blind and had no previous experience of the construction industry, did not appreciate the significance of the November 2019 payment notice, but had promised to investigate it. Despite this, JRT referred the matter to adjudication as soon as it could do so. Although the November 2019 payment notice may well have been valid (to be determined in the subsequent legal proceedings), HHJ Watson considered these factual circumstances to be relevant when considering the fairness of enforcing the judgment sum.
- Finally, HHJ Watson also noted certain sums had been included in the payment application that were clearly not payable to JRT and JRT had provided no explanation for this. Whilst it would not be appropriate to pre-judge the proceedings for the true valuation of any sums due, HHJ Watson considered it likely that, following trial, there would be an order for a significant repayment to TWD.

Enabling justice to be done

As has been emphasised in recent months during the COVID-19 pandemic, the construction industry works on tight margins and the risk of insolvency for contractors is high. Accordingly, courts are reluctant to frustrate the underlying purpose of the Construction Act by preventing enforcement.

Yet, as noted by HHJ Coulson (as he then was) in *Hillview Industrial Developments (UK) Ltd v Botes Building Ltd [2006]*, "I am also satisfied that the purpose of the 1996 [Construction] Act is to provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice".

As demonstrated in *Gosvenor London Ltd v Aygun Aluminium Ltd [2018]* (which extended the principles established in Wimbledon), the courts, while reluctant to interfere with adjudicator's decisions, are also reluctant to see the adjudication process being utilised to create injustice. Notwithstanding the significantly high bar demanded for an enforcement to be stayed in order to prevent manifest injustice, JRT Developments highlights that courts are prepared to exercise their discretion and order a stay when the circumstances demand it.

Winter 2020

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Essential law: Variations- part three

Continuing our series on the basics of construction law, Katherine Keenan considers some of the issues that can arise when a contractor undertakes variations without a written instruction.

Katherine Keenan, Associate, Construction, Engineering & Projects

Whether a contractor is entitled to be paid for carrying out a variation where no written instruction is given is a perennial issue in construction projects. Everyone is working hard to complete a job on time, instructions are given on site to change the works, these changes are implemented but the paperwork never quite catches up. Then a dispute arises.

What are the consequences of such oral instructions? It will depend on the wording of the contract and the actions taken by the parties, but there are a number of potential outcomes:

- There was a valid variation instructed under the contract entitling the contractor to additional time and money.
- There was no valid variation instructed and so the contractor is in breach by changing the works it was required to complete under the contract.
- There was no valid variation instructed such that the contractor is not entitled to additional time or money, but the employer has given the contractor permission to change the works so it is not in breach by changing the works.
- There was no valid variation instructed but the contractor is still entitled to additional money for the varied works on another basis.

The contract

There are a range of ways that a contract can address how a variation has to be instructed. It may:

- Not require the variation to be instructed in writing. In such circumstances, the oral instruction should entitle the contractor to additional time and money provided the instruction is in fact a variation.
- Provide that if a contractor confirms an oral instruction in writing, it will be deemed effective unless the employer objects within a set time period. The contractor is potentially at risk if it proceeds before either the employer has confirmed the position in writing or the set period has expired.
- Allow oral instructions to be retrospectively confirmed in writing after the change has been carried out. If the employer refuses to exercise its discretion under such a clause, an adjudicator, arbitrator or court may have the power to exercise that discretion.
- Stipulate that only written instructions are valid under the contract and that oral instructions have no effect.

Acceptance of work instructed orally by an architect is not on its own sufficient to show an implied promise to pay

Contracts that require instructions to be in writing

If the contract stipulates that any variation must be instructed in writing but the variation is carried out on an oral instruction, the contractor is unlikely to be entitled to payment unless it can establish:

- **Implied promise to pay –** Where the employer orders work that it knows will cause extra cost, there may be an implied promise by the employer that the work should be paid for as an extra even if not instructed in accordance with the requirements of the contract. This is particularly the case where any other inference from the facts would be to attribute dishonesty to the employer. When the employer insisted that certain work be undertaken without an instruction, as it did not consider it amounted to additional work, the court has held that a promise was to be inferred from the employer to pay for it should it be found to be extra work. Acceptance of work instructed orally by an architect is not on its own sufficient to show an implied promise to pay. However, there are cases where the employer has requested additional works, has seen the expenditure on them and taken the benefit of that expenditure, and the court has held that the employer has to account for the value of the extra work.
- **A collateral contract –** A variation may be deemed to be undertaken pursuant to a separate contract, with a corresponding entitlement to be paid a reasonable sum for that variation. This may be arguable if the works fall outside the scope of the variations clause under the contract, are carried out after completion of the original contract work, or are considered to be "so peculiar and so different" that they are deemed to be outside the contract.
- **Waiver –** By the employer of the requirement to instruct variations in writing. The party wishing to rely on the waiver will need to demonstrate the waiver and reliance upon it. Was the employer aware of the work being carried out? Has the employer given any indication that the formal requirements under the contract did not need to be followed? Further, is there any clause in the contract providing that a waiver of any right is only effective if given in writing?

Often contractors are dealing with the contract administrator or employer's agent, who do not typically have authority to bind the employer. If the contractor is seeking to rely on one of the exceptions outlined above, it may have to demonstrate that it has been agreed by the employer.

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Winter 2020

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Essential law: Variations - part four

Continuing our series on the basics of construction law, James Worthington and Vanessa Jones address the scope to omit works under a building contract

James Worthington, Partner, Construction, Engineering & Projects
Vanessa Jones, Associate, Real Estate

As a general rule, the starting point is that there is no common law right in building contracts to omit works from the agreed scope. The courts have held that a contractor has both an obligation to do the works instructed under a building contract, and a corresponding right to be able to do those works.

This principle protects the contractor from a situation where it has, for example, turned away work or procured specialist equipment on the basis that it will be carrying out the work agreed under the building contract in the amounts specified in the contract. If an employer had free rein to omit those works, the contractor could be exposed to significant losses.

In what circumstances can the employer omit works?

For the employer to omit works, there must be an express provision in the contract which allows for such omission. For example, the JCT Design and Build Contract 2016 includes in the definition of a "change", at clause 5.1.1.1, the right to issue an instruction for the "addition, omission or substitution of any work".

However, even these express provisions will be subject to limitations on the extent of the work that can be omitted, and whether that work can be redistributed to other contractors (or carried out by the employer itself).

What can or cannot be omitted?

As an omission is, by its nature, a variation, it will necessarily be subject to the restrictions on variations discussed in our first article in this series (page 22).

In particular, the employer cannot issue an omission instruction that changes the fundamental characteristic of the works or the basic bargain between the parties. An instruction to omit will need to be considered with this in mind – the works must still be capable of being identified as the "works" following the omission. The courts will not allow the right to omit works to be used as, in effect, a right to terminate for convenience.

Can the employer redistribute the works, taking the work from one contractor and giving it to another, or even to itself?

The courts have found that the employer should not be able to relieve itself from having struck a bad bargain through the omissions clause, by taking work from one contractor and passing it to another. Building contracts will therefore generally contain an implied term (or, in some cases, such as certain FIDIC contracts, an express term) that instructions to omit works for the purpose of awarding those works to another contractor are prohibited. If the employer intends to do this, there needs to be clear wording in the contract allowing it.

The same principle applies where the employer would otherwise carry out the omitted work itself. An omission instruction must be for the genuine purpose of omitting those works from the overall works (that is, where it is no longer required for the contract). The employer cannot simply omit the works and carry them out itself, without an express provision to the contrary.

Looking at the JCT Design and Build Contract 2016, redistribution of the works is not expressly permitted and therefore any instruction of that nature could lead to the employer being in repudiatory breach.

What happens if an employer omits works when it is not entitled to do so?

If an employer omits work where it is not entitled to do so, the courts have held that can be a repudiatory breach of the building contract (because it shows an intention by the employer not to be bound by the contract). A repudiatory breach gives rise to a common law right for the contractor to either elect to affirm the breach, or to terminate the contract. In either case, the contractor would be entitled to claim damages incurred as a result of the breach, including damages for the profit it would have made on the omitted work. If the contractor elects to terminate, the contractor could also claim for the loss of profit on the remainder of the uncompleted works.

What is the valuation of the omitted works?

Where a valid instruction to omit is issued, it is likely that the contract sum will be varied to reflect that omission. The basis of the variation to the contract sum will depend on the terms of the valuation regime for variations in the relevant contract. However, such valuation will usually be based on either the price of the omitted work under the contract or the cost to the contractor that would have been attributable to the omitted work.

How will omitting works affect the completion date?

This will depend on the terms of the relevant contract. For example, under the JCT Design and Build Contract 2016, an omission can allow the completion date to be brought forward, but the completion date can never be brought forward earlier than the original completion date.

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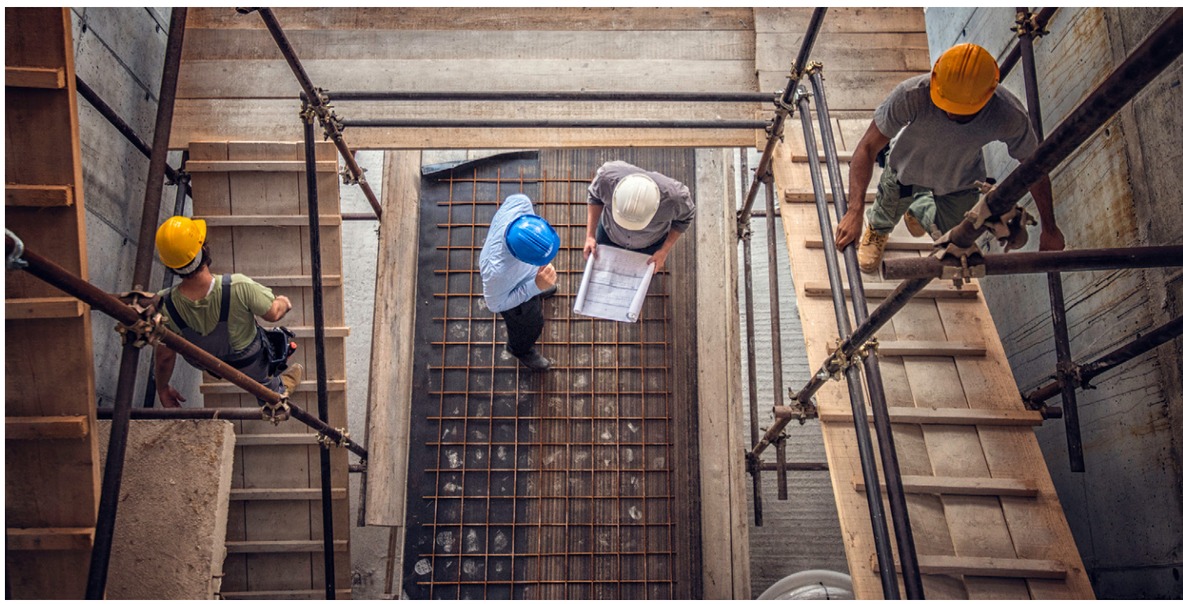

Winter 2020

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Our Construction, Engineering & Projects group provides the full range of dispute and transactional services for large scale construction and engineering projects, in the UK and internationally.

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