

Construction law update

8 May 2007

Introduction

1. The title of this seminar is *Construction Law Update* but this paper is necessarily limited to some particular themes concerning construction law where there have recently been developments of interest, rather than a comprehensive trawl through every case with the word "*construction*" in it.
2. It is a feature of modern construction litigation that whilst there seem to be innumerable cases concerning ancillary matters such as adjudication enforcement, costs, and procedural points there are relatively few reported cases as to the substantive law governing liability and damages. As a result this paper is somewhat lopsided in its content.
3. It also seems to be a feature of the present time that a high proportion of cases are determined by a modest number of specialist TCC judges. That is also reflected in the cases mentioned in this paper.
4. This paper is divided into the following headings:

- (1) the *Housing Grants, Construction and Regeneration Act 1996*
(including adjudication);
- (2) arbitration and expert determination;
- (3) liability related matters;
- (4) contract administration;
- (5) contractual interpretation;
- (6) professional negligence;
- (7) damages.

(1) The Housing Grants, Construction and Regeneration Act 1996

(a) Application of the 1996 Act

5. Decision of His Honour Judge Wilcox in *Bennett (Electrical) Services Ltd v Inviron Ltd*: Court of Appeal decision in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] BLR applied where “contract” was alleged to be contained in a letter of intent expressed to be subject to contract. The Court held that the letter of intent did not amount to a construction contract. Judgment dated 19 January 2007 reported on BAILII.

6. See also *Midland Expressway v Carillion Construction Ltd (No2)* (2006) 106 Con LR 154 (judgment in fact dated 24 November 2005) where the Court considered (i) what amounts to a construction dispute and (ii) whether a contractual provision inhibiting the timing of a reference to adjudication was effective.
7. See also *Melville Dundas v Hotel Corporation of Edinburgh* [2006] BLR 474 (now of course the subject of a decision of the House of Lords on another issue – see below). The parties had reached a settlement in relation to the further payment of outstanding sums owing on a construction contract. Settlement agreement held not to have been a construction contract.

(b) Payment provisions under the 1996 Act
8. See again *Midland Expressway v Carillion Construction Ltd (No2)* above: section 113 of the 1996 Act and PFI contracts.
9. Payment provisions of the 1996 Act considered in the House of Lords' recent decision in *Melville Dundas Ltd v George Wimpey* [2007] UKHL 18
10. The decision of the Court of Session, Outer House (Lord Clarke) was reported in Scots Law Times: issue 1: 21-1-2005. The decision of the Inner House has been reported at [2006] BLR 164.
11. The contractor had gone into receivership and the employer had determined its employment under the JCT WCD building contract. The contractor had then

sought to recover payment of its last interim payment application in circumstances where no withholding notice had been served. The employer sought to argue that under the terms of the form the material sum was no longer “due” for the purposes of section 111 of the Act. The employer was successful at first instance and the contractor was successful on appeal.

12. The employer has therefore brought an appeal to the House of Lords where it was decided, effectively for policy reasons, that s111 could not have been intended to rob a clause like 27.6.5.1 of its efficacy by requiring a notice which could never be supplied. The employer’s refusal to pay the last interim payment was therefore upheld.

(c) Adjudication

13. There continues to be a steady stream of reported cases concerning the enforcement of adjudication decisions. Many of these do not involve substantial new law. At the same time a number of points of principle, which might previously have been thought settled, continue to trouble the Courts. Some questions that have recently been considered are identified below.
14. In what circumstances can a party rely upon breaches of natural justice in order to prevent enforcement of an adjudicator’s decision? See the Court of Appeal decisions in *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] BLR 1 at paragraph 22 and in *Carillion Construction v Devonport Royal Dockyard* [2006] BLR 15 at paragraphs 85 and 86. See subsequent cases that have considered the same issue such as *Kier Regional Ltd v City &*

General (Holborn) Ltd [2006] BLR 315 (decision of Jackson J) and *Multiplex Constructions (UK) Ltd v West India Quay Development Company (Eastern) Ltd* [2006] EWHC 1569 (TCC) (decision of Ramsey J).

15. Is an adjudicator's decision still valid although late? All of the TCC judge's seem to have tried this issue at some stage but their respective approaches to the problem are not necessarily consistent. Most recently His Honour Judge Havery considered the point in *Epping Electrical Co Ltd v Briggs and Forrester (Plumbing Services) Ltd* [2007] EWHC 4 (TCC) (judgment dated 19 January 2007) and in *Aveat Heating Ltd v Jerram Falkus Construction Ltd* (1 February 2007).
16. In *Epping* the adjudicator reached his decision within the required period, but only delivered it outside that period. The learned judge held that (i) there was a distinction between reaching a decision and having it dispatched, (ii) on the facts of the case the Defendant had only agreed an extension of time for the reaching of a decision if it was also issued by the end of that period, (iii) the 28 day time period for reaching a decision was mandatory, not directory, and (iv) paragraph 25 of the Construction Industry Procedure was non-compliant with section 108 of the 1996 Act and hence of no effect.
17. In *Aveat* it was held that (i) in a dispute is only "referred" to another party when that other party gets notice of it, (ii) a provision that the adjudicator's decision was effective even if issued after the time allowed for providing it within was contrary to s108(2), (iii) as to whether in consequence the Scheme

provisions take effect in place of the contractual adjudication procedure, the Scheme and contract provisions could not co-exist where it was not made clear how they should co-exist, (iv) date of the notice of adjudication was the date it is received by the Adjudicator, and (v) in calculating whether there has been compliance with time limits fractions of a day are to be ignored.

18. Also noteworthy:

- (1) *Hart v Fidler* [2007] BLR 30: (i) adjudicator's decision was made without jurisdiction, (ii) there was a failure to serve the referral notice within 7 days of the notice of adjudication, (iii) the adjudicator had no jurisdiction to extend the latter, and (iv) in any case the letter of intent that formed the basis of the referral was not a construction contract.

- (2) *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC) (21 December 2006) (His Honour Judge Coulson QC) (i) where a contractual adjudication scheme applies, it is the terms of the agreement that are of primacy, (ii) although the 7 day period for service of the referral notice (from date of notice of adjudication) was mandatory, as a matter of construction if adjudicator only appointed on last available day referral notice could be validly served on next day, as long as served as soon as possible, and (iii) the adjudicator's decision was reached as a matter of fact within time – although not communicated until later.

19. See also earlier cases including

(3) *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314 (His Honour Judge Toulmin CMG QC);

(4) *Barnes & Elliott Ltd v Taylor Woodrow Holdings Ltd* [2004] BLR 111 (His Honour Judge Lloyd QC);

(5) *Simons Construction Ltd v Aardvark Developments Ltd* [2004] BLR 117 (His Honour Judge Seymour QC);

(6) *St Andrews Bay Development Ltd v HBG Management Ltd* [2003] CILL 2016;

(7) *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005] BLR 384 (Inner House);

20. Can a party set off against an adjudicator's decision and if so in what circumstances? Now considered by Ramsey J in *William Verry Ltd v Camden London Borough Council* [2006] EWHC 761 (TCC) where it was held (i) there is no general principle permitting cross claims to be raised to defeat summary judgment applications in respect of adjudication decisions, (ii) save that there was a discrete exception in the case of LAD entitlements that "flow

logically” from the relevant adjudication decision itself, (iii) therefore sums found due in the subject adjudication under interim payment dispute should not give way to a subsequent analysis in a disputed final account dispute, and (iv) similarly in the case of a defects counter claim, the effect of the statutory scheme is to prevent a right of set off defeating a summary judgment application..

21. See also earlier decisions:

(1) *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2000) 75 Con LR 71; *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd* [2002] BLR 125; *Bovis Lend Lease Ltd v Triangle Development Ltd* [2003] BLR 31; *Parsons Plastics v Purac* [2002] BLR 334.

(2) *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187; *Ferson Contractors Ltd v Levolux AT Ltd* [2003] BLR 118; *MJ Gleeson plc v Devonshire Green Holdings Ltd*; *David McLean Contractors Ltd v The Albany Building Ltd* (decision of His Honour Judge Gilliland QC dated 10 November 2005, reported on Lawtel).

22. Note that in *William Verry Ramsey J* also considered the circumstances in which a stay might be granted – previously considered in *AWG Construction Services v Rockingham Motor Speedway* [2004] EWHC 888 and in *Wimbledon Construction Co 2000 Ltd v Vago* [2005] BLR 374.

23. Same issues raised twice: see *Quietfield v Vascroft Construction Ltd* (CoA) and more recently *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* (Ramsey J).
24. Other recent adjudication cases include: costs of adjudication: *John Roberts Architects Ltd v Parkcare Homes (No2) Ltd* [2006] BLR 106 adjudicator's power to award costs not limited to situation where substantial determination; *Midland Expressway Ltd v Secretary of State for Transport* [2006] BLR 325: right to withdraw dispute from adjudication.
25. See also Court of Appeal decision in *Lead Technical Services Ltd v CMS Medical Ltd* [2007] EWCA Civ 316 dated 30 January 2007: successful appeal from decision of His Honour Judge Grenfell in Leeds District Registry:

(2) Arbitration and expert determination

26. For useful guidance as to the proper interpretation and application of section 9 of the *Arbitration Act 1996* see *Albon v Naza Motor Trading SDN BHD (No3)* (judgment dated 29 March 2007).
27. Note also the following recent cases on arbitration:
 - (1) decision of the Court of Appeal in *Fiona Trust & Holding Corporation v Yuri Privalovi*: wide meaning given to the words "arising out of" in the context of international arbitration;

- (2) decision of Colman J in *A v B and others* [2007] EWHC 54 (Com): appropriate to award indemnity costs against a party that sought to ignore an arbitration or jurisdiction clause deliberately in order to gain an unjustifiable procedural advantage;
 - (3) Court of Appeal decision in *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340: jurisdiction of the Court of Appeal to consider an appeal from a decision refusing permission to appeal under section 69 of the *Arbitration Act 1996*. *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388 applied.
28. Expert determination considered by the Commercial Court in *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] EWHC 503 (Comm): expert's failure to give reasons for his decision.
29. Note new pre-action protocol new CPR part 36 as of 6 April 2007.

(3) Liability related matters

30. Standard contractual terms limiting liability to the contract price: *Shepherd Homes Ltd v Encia Remediation Ltd*; application of Lord Denning's red hand test in modern commercial setting.

31. See also Court of Appeal decision in *Decoma UK Ltd v Haden Drysys International Ltd* [2006] EWCA Civ 723.

(4) Contract administration

32. Extension of time under JCT WCD form (1998 edition) considered in *Reinwood Ltd v Brown & Sons Ltd* [2006] CILL 2413. Held that no particular formality was required for the grant of an extension of time provided that the document contained the information required by the contract. The Court also put forward guidance as to whether a contractor's notice of determination was given unreasonably or vexatiously.
33. The effect of practical completion in a JCT MW contract (1993 edition) was considered by the Court of Appeal (Dyson LJ with two others) in *TFW Printers v Interserve Project Services Ltd* [2006] BLR 299. The issue before the Court on appeal from His Honour Judge Knight QC was whether the employer's obligation to maintain joint names insurance ceased at practical completion. Held that as of PC the building was the employer's responsibility only. The Court of Appeal relied upon the fact that, among other considerations, the architect cannot instruct variations after PC.
34. The role of the construction manager was considered in *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] BLR 113. Held by Jackson J that an employer could not appoint himself as construction manager in the absence of express wording to that effect. See paragraph 45 of the judgment.

35. See also *Construction Partnership UK Ltd v Leek Developments Ltd* [2006] CILL 2357 (judgment 26 April 2006). The Court considered the notice requirements for determination for default under a JCT form. His Honour Judge Gilliland QC concluded that “*actual delivery*” of the requisite notice included delivery by fax or post and was not limited to physical presentation of the documents in person.

(5) Contractual interpretation

36. See *Maggs v Marsh* [2006] BLR 395 CA. The Court of Appeal considered the relevance of post contract conduct by the parties to the interpretation of a partly oral contract.

(6) Professional negligence

37. Causation: the Court of Appeal recently considered causation / break in the chain of causation in *Pearson Education Ltd v Charter Partnership Ltd* [2007] EWCA Civ 130.
38. Limitation: when does time run against a negligent designer for the purpose of the *Limitation Act 1980* in circumstances where he has an ongoing duty of review? This issue was previously considered by Dyson J (as then he was) in *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edward Ltd* [2001] BLR 74. However the question has now been considered in further detail by Ramsey J in *The Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC) (judgment dated 17

November 2006). He also considered the effect of article 5 of the RIBA conditions of engagement for the appointment of an architect CE/95.

(7) Damages

39. See *Bella Casa Ltd v Vinestone Ltd* [2006] BLR 72. Claimant owner of residential property sought to recover damages for loss of use calculated by reference to the cost of borrowing the money necessary to purchase the property based upon analysis in *The Greta Holme* [1897] AC 596 and other cases. Claim substantially rejected by His Honour Judge Coulson QC.
40. The correct measure of damages for defects was also considered by His Honour Judge Coulson QC in *McGlinn v Waltham Contractors Ltd* (The Times 20 March 2007): see section K of the judgment. The judge considers the application of *Ruxley Electronics v Forsyth* [1996] AC 344 and significantly *The Board of Governors of the Hospitals for Sick Children v McLaughlin & Harvey Plc* 19 Con LR 25.
41. See also decisions in *Amec Process and Energy Ltd v Stork Engineers and Contractors BV* [2002] CILL 1883 and *Sisu Capital Fund Ltd v Tucker and Others* [2005] EWHC 2321 concerning the recovery of costs incurred by a successful party in using its own resources to prepare for trial.
42. In *Amec* the contractor claimant incurred considerable costs using its internal staff to prepare a complex delay claim. The work would otherwise have been done by solicitors and/or experts. His Honour Judge Thornton held that,

whatever the law prior to the Civil Procedure Rules, post CPR a party could recover such costs which were lower than they would have been had the same work been carried out externally.

43. In *Sisu* Warren J held that the circumstances in which such costs could be recovered were strictly limited, eg to legal work carried out by qualified in-house solicitors.

(8) Hot off the press

44. Measure of damages: *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* [2007] UKHL 12.
45. Anti-suit injunction to restrain an arbitration where there are contemplated legal proceedings which would involve the same parties and risk contrary findings on shared issues: *Blue Circle Estates Ltd v Jarvis*: [2007]: unreported decision of Jackson J dated 8 May 2007!!

VINCENT MORAN
KEATING CHAMBERS

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