HFW

CONSTRUCTION BULLETIN

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WELCOME TO OUR END OF YEAR ROUND-UP OF KEY CONSTRUCTION LAW DEVELOPMENTS FROM 2020

This bulletin reviews the eight most interesting, or noteworthy developments of the year, with a particular focus on the UK market.

As well as cases on design life and good faith, we review the statutory changes to the right to suspend or terminate and this year's developments in adjudication case law. We also discuss the recent inevitable boom in remote hearings but other than that, this bulletin is COVID-free - no articles on Force Majeure!

The penultimate page of this bulletin sets out a round-up of our team news – including our Band 2 ranking in Legal 500.

HFW LONDON CONSTRUCTION TEAM

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> **"When exercising a discretion under a contract the decision maker should keep a record of how it arrived at its decision"**

GOOD FAITH

The English courts have, over the past year, considered the circumstances in which a contractual discretion needs to be exercised in good faith.[1]

It is well established that there is no general doctrine of good faith in English contract law. However, English law has developed piecemeal solutions in response to problems of unfairness and so the concept of good faith can still affect a commercial contract. One such circumstance is where the contract contains some sort of discretion, in these cases the courts may act to protect parties by implying a type of good faith obligation known as a *Braganza* duty.

What is a *Braganza* duty?

The Supreme Court's leading decision in *Braganza v BP Shipping Ltd*[2] ruled that where a contractual term gives one party under a contract the power to exercise a discretion that affects the interests of both parties, this discretion must not be exercised arbitrarily, capriciously, irrationally, or for an improper purpose. This standard is known as a *Braganza* duty.

The test for a party exercising a discretion:

1. The decision maker must not take into account matters that it ought not to and must take into account matters that it ought to; and
2. the decision maker must not come to a conclusion that no reasonable decision maker could ever have come to.

What contractual discretions attract a *Braganza* duty?

In construction contracts it is extremely common to see decision making powers conferred on a specific party. Not every contractual discretion will be subject to a *Braganza* duty and the language of the contract will be an important factor in determining which contractual discretions will be subject to this duty. However, the English courts have given some guidance and the following circumstances could potentially attract a *Braganza* duty (unless there is wording to the contrary).

- A contractor's discretion to suspend works because of the employer's breach of contract.
- A party's discretion to extend time for completion (for example, where contractual processes have not been followed).
- An employer's discretion to approve certain actions of the contractor, such as the appointment of subcontractors or key personnel.
- A party's unilateral discretion in setting or varying the charges or interest rate in a contract.
- A party's discretion to assess and reclaim overpayments.

What must I do practically to comply with a *Braganza* duty?

Importantly, a *Braganza* duty does not prevent a decision maker from considering its own interests; instead, it is comparable to putting one's cards face upwards on the table and assessing the decision-making process.

When exercising a discretion under a contract the decision maker should keep a record of how it arrived at its decision, it should record what information it took into account, what information it did not, and it should follow any stipulated contractual processes. Ultimately, there should be some logical connection between the evidence and the reasons for the decision.

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1 *TAQA Bratani Ltd v Rockrose UKSC8 LLC [2020] EWHC 58; Equitas Insurance Limited v Municipal Insurance Limited* [2019] EWCA Civ 718; and *Multiplex Construction Europe Ltd v R&F One (UK) Ltd* [2019] EWHC 3464 (TCC) to name but a few.

2 *Braganza v BP Shipping Ltd* [2015] UKSC 17

LITIGATION'S VIRTUAL FUTURE

Covid-19 has changed the way litigation is being practiced around the world. Gone are lawyers and clients crammed into rooms for mediations and settlement meetings. Gone are witnesses and experts flying half-way across the world to attend trials. Litigation is now being conducted through a symphony of virtual meetings, mediations and hearings conducted from home.

We recently represented the claimant in a major offshore infrastructure dispute valued in excess of €140million. The fourteen-day adjudication hearing took place entirely virtually through Microsoft Teams. Oral evidence was heard from seventeen witnesses and ten experts on a broad range of areas and specialisms, interspersed with submissions from legal representatives. No one had to leave the comfort of their home and the hearing was extremely successful.

With regard to arbitrations, our construction team will shortly begin an entirely virtual arbitration expected to last two weeks with evidence from seven experts and seventeen witnesses. The claim is valued in excess of £70million. The willingness of both litigants and tribunals to hear claims virtually is increasing and as more virtual hearings are conducted, the clearer the benefits become.

With court proceedings, the Coronavirus Act 2020 has radically expanded the use of video and audio link hearings. Considerably more interlocutory hearings and court trials are taking place virtually, leading to the type of efficiency savings considered further below.

Attendance

A key practical benefit is that lawyers, witnesses and experts do not need to travel to and from a designated venue each day. Parties' representatives simply log on to their computer from wherever in the world they are. All flight and accommodation costs are eliminated. All non-productive travel time ceases to exist. All venue hire costs are removed.

Virtual hearings are more likely to start on time and there is unlimited flexibility to sit later or start earlier. Moreover, 'rest' days can be incorporated into the schedule which is not usually practical with "in person" hearings with a hired venue.

The Hearing

Another benefit to virtual hearings is the use of electronic bundles. They can facilitate smoother hearings because there is less wasted time, searching for paper documents. Witnesses and experts can instantly be presented with documents displayed on the screen for everyone to view. This focuses everyone's attention on the same document, at the same time, with no distractions.

The virtual hearing can also offer a superior forum for presenting photographs, videos and explaining complex aspects of a case, using different technologies. It is far easier to use interactive spreadsheets, charts and graphics, whilst at the same time highlighting and annotating in real-time, to emphasis particular points. The virtual platform facilitates this easy use of technology, which in-person can be cumbersome.

Conclusion

Virtual hearings have many benefits to non-virtual hearings. They can lead to considerable savings in costs, reduce demands on witnesses and allow greater flexibility in the hearing process itself. They also facilitate the use of technology to present evidence in formats not ordinarily accessible.

There can, of course, be downsides to the process. In person meetings and discussions can provide a degree of flexibility which remote connections lack and there is also the risk of technological breakdown.

It seems that certainly for short hearings and also international matters involving people from different countries, even after people get back to the office remote link-ups will be used far more in the future.

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"Litigation is now being conducted through a symphony of virtual meetings, mediations and hearings conducted from home."

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"The case illustrates the importance of clearly defining the contractual design requirements to ensure consistency across the legal and technical aspects of a contract."

DESIGN LIFE

The decision in *Blackpool Borough Council v VolkerFitzpatrick Limited*[1] provided useful guidance on design life obligations in construction contracts, with reference to the Supreme Court's decision in *Højgaard v E.ON*[2].

Background

The case, involving Blackpool Borough Council (BBC) and VolkerFitzpatrick Limited (VFL), concerned a new tram depot, designed and built by VFL under a modified NEC3 contract. The depot, finished in 2011, is located 40 metres from the sea and subject to harsh environmental conditions.

In 2015, BBC alleged that elements of the depot were corroding prematurely and did not meet the contractual design life obligations. VFL disputed this and argued that BBC had failed to maintain the depot correctly.

Meaning of Design Life

There was no contractual definition of "design life" so the Court referred to two British Standards. It is worth noting the principles the judge drew from the British Standards. The first mentions a definition of design life *"as the service life intended by the designer"*. The second suggests service life should account for necessary maintenance and discusses *"design working life"* as being the period *"with anticipated maintenance, but without major repair being necessary"*.

Applying these principles, the judge held that, *"It cannot realistically be thought that a structure should be intended to be maintenance free for the whole of its design life, whereas it can reasonably be assumed that it ought not to need major repairs over that period."* In addition, the distinction between maintenance and major repair is one of fact and degree *"limited to maintenance which is not 'non-standard' or not 'unusually onerous'"*.

Application in the Case

The distinction between maintenance and major repair was particularly relevant when it came to the protective coating applied to certain parts of the steelwork. Would the steelwork achieve its twenty five-year design life in circumstances where there was a loss of the protective coating irrespective of the underlying steelwork being able to perform its structural function?

BBC argued that the twenty five-year design life obligation applied to the whole component, including the protective coating. Therefore, any requirement for major repairs to the coating would amount to a failure to achieve the design life. However, the judge disagreed and held the primary factor in determining design life was the ability of the steelwork to fulfil its structural function.

The judge agreed with Lord Neuberger's view in Højgaard that the design life obligation is not an absolute warranty of actual performance. The test will require an assessment of whether the design is capable of achieving its design life. That assessment, in itself, does not turn on reasonable skill and care – and in that sense involves strict liability. However, it will be judged by reference to the sufficiency of the design, rather than being a more general performance warranty.

Conclusion

The case illustrates the importance of clearly defining the contractual design requirements to ensure consistency across the legal and technical aspects of a contract. In addition, the case expands on Lord Neuberger's interpretation of design life in *Højgaard*, and suggests that going forward the distinction between major repair and routine maintenance will be key when a court considers its meaning.

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1 *Blackpool Borough Council v VolkerFitzpatrick Limited & others* [2020] EWHC 1523 (TCC)

2 *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd & another* [2017] UKSC 59 BLR 477

EXPERTS AND CONFLICTS OF INTEREST

Choosing the right forensic expert is a key issue for any party involved in a construction dispute. For this reason, companies can get very proprietorial about the experts they use. This led to one disgruntled party seeking an injunction in a TCC case decided earlier this year.

In recent years, the market for expert services has become increasingly concentrated, with a relatively small number of international consultancies dominating the market. Such firms undoubtedly provide an excellent service but, inevitably, they are under commercial pressure to act for as many players in the industry as possible.

In the construction industry, a single project can spawn multiple disputes. As such, the question is not whether a consultancy can act on multiple cases, but whether it can act both for and against the same party. This issue arose earlier this year in the TCC case *A v B*,[1] where the developer of a petrochemical plant (employer) sought an injunction to prevent a consultancy firm acting for another party.

The contractor building the plant had started an arbitration against the employer. To defend the contractor's claim, the employer appointed an expert from the consultancy firm. The employer also had a potential third party claim against a separate EPCM contractor who had produced designs for the project, thus passing on the contractor's delay claim. The EPCM contractor, itself started a second arbitration against the employer and appointed its own team of experts using the same international consultancy.

The employer therefore found itself relying on a delay expert from the consultancy firm in the first arbitration while, at the same time, other experts from the same consultancy were assisting the EPCM contractor in the second arbitration. The employer, suitably unimpressed sought an injunction to prevent the consultancy's experts acting against it. The consultancy defended its actions on the basis that different experts were involved, based in different offices with appropriate information barriers in place.

This illustrates an interesting development in the market for expert services. Traditionally, many expert consultancy firms have tended to refuse instructions to act against established clients, not because there is a conflict of interest, but to preserve valuable commercial relationships. However, new commercial considerations may have arisen such that these firms (often nowadays owned by private equity investors), perhaps now take a more hardnosed, and arguably short-term, view.

In the circumstances, it is perhaps unsurprising that the TCC found that *"a clear relationship of trust and confidence arose [between the consultancy and the employer], such as to give rise to a fiduciary duty of loyalty"* and granted an injunction preventing the consultancy acting against the employer.

The consultancy may have been correct that the individual expert him/herself was not conflicted because it is the individual expert who gives evidence and expresses their opinion – not the company that employs them. However, in practice, expert work (especially delay and quantum) on large cases involves comparatively limited personal opinion evidence. Instead, it often entails the presentation of delay analyses or auditing cost figures, which can often be a team endeavour. Perhaps reflecting this practice, the TCC also held that the duty of loyalty extended not just to the individual expert but to the wider company for which they worked. This will no doubt influence how the market for forensic expert services operates in future and it will be fascinating to see how the market adapts.

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1 [2020] EWHC 809 (TCC).

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"a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty"

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"While following Bresco, a company in liquidation has a right to adjudicate, it may face significant hurdles in enforcing an adjudicator's decision."

ADJUDICATION CASE LAW UPDATE 2020

In this adjudication case law update we have selected our pick of noteworthy English adjudication cases from 2020, flagging the key takeaways for the construction industry.

Insolvency and adjudication

The most talked about adjudication case of 2020 was undoubtedly the Supreme Court case of *Bresco v Lonsdale*[1]. Our full briefing on that case can be read here[2]. In summary, Bresco (a company in liquidation) sought to commence adjudication against Lonsdale under the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the Act). Lonsdale asserted that the adjudicator had no jurisdiction as a result of the rules on insolvency set-off (a mandatory and automatic set-off of cross-claims between a company in liquidation and each of its creditors). Lonsdale therefore sought an injunction preventing the adjudication from progressing.

The Supreme Court, over-turning the decisions of the Court of first instance and Court of Appeal, found that a company in liquidation *does* have the right to adjudicate under the Act. However, an important part of the Supreme Court's reasoning was that while a Court may ultimately decline to enforce an adjudicator's decision, due to a lack of adequate security from the insolvent party to cover the costs of any subsequent proceedings or cross-claim, this did not preclude the insolvent party's right to adjudicate. The rationale to this approach is that adjudication is an important specialist form of dispute resolution that should be available to liquidators and the Court is well placed to assess whether adequate security is available at the enforcement stage. This brings us neatly on to our next case...

John Doyle v Erith[3]

John Doyle was a company in liquidation and was seeking enforcement of an adjudicator's award of approximately £1.2 million, relating to its final account for hard landscaping works at the 2012 Olympic Park. The central question considered by the Court was: *In what circumstances will a company in liquidation be entitled to summary judgment on a valid adjudicator's decision?*

Fraser J, following *Bresco* and the case of *Bouygues v Dahl Jensen*[4], summarised the 5 principles to be applied when considering an application for summary judgment on an adjudication decision in favour of a company in liquidation[5]. These were:

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.
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.
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 a cross-claim.

In respect of principle (1), Fraser J explained that to be enforceable, the decision would have to be in respect of all the parties' financial dealings under the construction contract. "Smash and grab" adjudication will therefore rarely, if ever, be enforceable by way of summary judgment by a company in liquidation.

In respect of principles (4) and (5), Fraser J explained that these expressed the same principle from Bresco, that adequate security would have to be provided by the company in liquidation. Fraser J referred to

the three mechanisms of security previously considered by the court in the case of *Meadowside v Hill Street Management*,[6] citing these as a non-exhaustive list of the type of security that could be provided, being:

- Undertaking by liquidators;
- Third party guarantee or bond; and
- ATE insurance.

Fraser J stressed the importance that the security offered by the company in liquidation had to cover both (i) the principal sum being enforced under the adjudicator's decision and (ii) any adverse costs orders of subsequent litigation. If there was no such security, the "pay now, argue later" ethos of adjudication is undermined, as there would be no mechanism to "argue later" in order to undo the "pay now". Fraser J found that John Doyle had failed to provide adequate security and its application for summary judgment therefore failed.

Comment

Unless an adjudicator's decision deals with all the outstanding matters between the parties and adequate security is provided, then a company in liquidation will not be able to enforce the decision. So while following *Bresco*, a company in liquidation has a right to adjudicate, it may face significant hurdles in enforcing an adjudicator's decision.

When is a new expert report a new dispute?

In *MW High Tech (MW) v Balfour Beatty (BB)*[7], MW (the contractor) sought to resist enforcement of an adjudicator's decision in favour of BB (the subcontractor), awarding a 282 day extension of time under a JCT D&B Subcontract, 2011 Edition. MW argued that under the subcontract, it was entitled to 16 weeks to assess any delay claim[8]. As BB had served a new delay report on MW 8 days prior to starting the adjudication, MW argued that *no dispute* capable of referral to adjudication had crystallised.

The Court stated that the relevant question was *"whether additional information, objectively assessed, gave rise to a new claim"* and that this is a *"matter of fact and degree"* in any given case. On the facts, the Court found that the delay report did not amount to a fresh notification, as while the delay analysis was updated, the report relied on materially the same delay events that had previously been notified. The decision was therefore enforced.

Comment

Parties often obtain expert reports in preparation for construction disputes. This case, while specific to adjudication and highlighting that each case will turn on its facts, is a useful reminder that when serving an expert report prior to escalating a dispute, it is important to not materially digress from grounds previously relied upon, to avoid jurisdictional challenges on grounds that the new expert report meant there was an "uncrystallised" dispute.

Get your timing right!

The case of *Lane End Developments v Kingstone Civil Engineering*[9] is a cautionary tale about the importance of following the correct formalities when commencing a dispute (in this case, an adjudication). The adjudication was commenced by Kingstone under the Scheme[10], which requires that a party must first give a notice of adjudication to the other party, and the referring party shall then make the request to appoint an adjudicator[11]. Unfortunately for Kingstone it made its request to appoint an adjudicator *before* it served its notice of adjudication. On this basis, the Court had little choice but to find that Kingstone had failed to follow the threshold requirements to validly appoint the adjudicator and the enforcement proceedings were dismissed.

During the hearing, Kingstone sought to argue that Lane End had waived its right to challenge the adjudicator's jurisdiction via its participation in the adjudication. The Court's findings in response to this were clear. The threshold requirements for the appointment of an adjudicator are so fundamental to the process that they cannot be waived.

Comment

The message from this case is simple: when commencing a dispute, get the procedure right! This case was in the context of an adjudication under the Scheme, but this principle applies to all forms of dispute resolution.

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1 Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited [2020] UKSC 25.

2 https://www.hfw.com/downloads/002193-HFW-Supreme-Court%20blesses-use-of-adjudication-in-construction-disputes.pdf

3 John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd [2020] EWHC 2451 (TCC).

4 Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd [2000] EWCA Civ 507.

5 John Doyle, para 54.

6 Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd [2019] EWHC 2651 (TCC).

7 MW High Tech Projects UK Limited v Balfour Beatty [2020] EWCH 1413 (TCC).

8 JCT D&B Subcontract 2011, clause 18.2.

9 Lane End Developments Construction Limited v Kingstone Civil Engineering [2020] EWHC 2388 (TCC).

10 Scheme for Construction Contracts (England and Wales) Regulations 1988 (the Scheme).

11 Paragraph 2(1) of the Scheme.

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> "a failure to make disclosure does not necessarily lead to automatic removal of the arbitrator"

HALLIBURTON COMPANY V CHUBB BERMUDA INSURANCE LTD: THE OPTICS OF ARBITRATOR BIAS

The landmark decision of the UK Supreme Court in *Halliburton v Chubb* has brought some welcome clarification to the obligation on arbitrators to disclose multiple overlapping appointments to avoid concerns of perceived partiality and bias.

Background

The case concerned the Deepwater Horizon oil spill in the Gulf of Mexico in 2010. Halliburton commenced an arbitration against its insurer, Chubb, and Mr Rokison QC - one of Chubb's proposed candidates - was appointed chair by the High Court.

Before accepting his appointment, Mr Rokison disclosed to Halliburton that he had previously been involved in arbitrations involving Chubb, including two pending references. During the arbitration Halliburton learnt of Mr Rokison's subsequent appointment in two overlapping arbitrations both arising from the Deepwater Horizon incident; one of which had not been disclosed to Halliburton. Halliburton questioned the arbitrator's impartiality and requested he resign. Chubb refused to consent to any resignation so Halliburton commenced court proceedings to remove Mr Rokison.

First Instance and Court of Appeal

In dismissing Halliburton's claim, the Judge at first instance applied the common law test for apparent bias and determined that there were no justifiable doubts about the chair's impartiality. Consequently, Mr Rokison was not required to make further disclosure.

The Court of Appeal affirmed this decision. However, they found that whilst the arbitrator did not act improperly in discharging his duties, he should have disclosed his subsequent appointment to Halliburton at the relevant time. Nevertheless, that failure did not justify his removal.

Supreme Court

To determine whether an arbitrator was impartial the Supreme Court (i) applied the objective common law test of the fair-minded and informed observer and (ii) took into account the facts of the particular case and the particular characteristics, custom and practices of the relevant field of international arbitration.

The Supreme Court agreed with the Court of Appeal that where the fair minded and informed observer would conclude that was a real possibility of bias, the arbitrator *will* be under a legal duty to disclose such appointments. However, a failure to make disclosure does not necessarily lead to automatic removal of the arbitrator, but is rather a factor that the fair-minded and informed observer would consider when making a determination.

In summary, the Supreme Court found Mr Rokison QC had breached his legal duty of disclosure of the subsequent arbitrations. However, applying the common law test, and taking into account the relevant facts known at the time of the application for removal, the Supreme Court decided that the arbitrator should nevertheless not be removed.

Comment

The decision provides a timely reminder of the importance of maintaining public confidence in the impartiality of arbitrators. From a practical perspective, the decision helpfully clarifies when an arbitrator has a legal duty to disclose appointments.

It should not be forgotten that the decision focuses on a relatively narrow situation where there are multiple overlapping appointments. Therefore the current scope of an arbitrator's disclosure obligations in other potential conflict situations arguably remains unclear.

Nevertheless, given the attention that this decision has received, we suspect it is likely to result in greater transparency and disclosure by arbitrators of past, present and anticipated future appointments to avoid Halliburton-type proceedings, which must be a positive outcome.

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OMITTING WORK FROM SCOPE

Parties to construction contracts will often ask whether they can omit work and give it to a different contractor. This issue comes up frequently, and as is often the case, the answer is "it depends". It depends on what it says in the contract.

The Scottish Outer House decision of Lord Tyre in *Van Oord UK v Dragados UK*[1] provides useful guidance to parties trying to assess whether work can be lawfully omitted, and confirms the applicable legal principles.

Background

Dragados subcontracted Van Oord under an NEC Option B contract, to carry out soft dredging works for the Aberdeen Harbour Expansion Project. During the course of the project, Dragados instructed omissions from Van Oord's scope, and transferred that work to other subcontractors. The question for the Court was whether this was a breach of the subcontract.

The Decision

Lord Tyre applied the principles set out in TCC decision *Abbey Developments v PP Brickwork*.[2] Although the decision largely confirms the previous legal position, it is helpful nonetheless, particularly because *Abbey Developments* was never reported in an official law report.

The case confirmed there is no principle of law which debars an employer from omitting work and giving it to another contractor. It is simply a matter of contractual interpretation as to whether the contract bestows such a power on the employer.

Lord Tyre reiterated that a contract for execution of works confers on the contractor (or subcontractor in this case) both a duty to carry out the work and a corresponding right to complete the works. He held that clear words were needed in the contract to entitle an employer to omit work and have it done by someone else.

The subcontract in this case expressly permitted the contractor to omit and redistribute the subcontractor's work if the contractor received a corresponding instruction under the main contract. However, there was no corresponding instruction for the transfers made.

Lord Tyre considered it significant that the parties expressly provided for a particular situation where the contractor was entitled to give an instruction to omit and transfer work. He said this raised an inference that in *other* circumstances, the contractor was not so entitled. He held that the subcontract did not contain clear words permitting the contractor to omit works and award them to another subcontractor, save in the narrow circumstances expressly provided, and therefore Dragados was in breach.

Principle behind the Decision

The principle behind *Van Oord* and *Abbey Developments* is that omissions clauses must be used for the purpose they were intended – i.e. to omit work no longer required. They must not be used to circumvent the basic bargain struck by the parties. As in *Van Oord*, they cannot be used (absent very clear wording) to effectively re-tender the works by omitting work and giving it to another, cheaper, contractor. They also cannot be used to effectively terminate the contract by omitting all of the remaining works (see *Stratfield Saye v AHL Construction*[3]).

Van Oord is a reminder to parties who consider there is a possibility they will want to omit substantial portions of the awarded scope of work, that they must ensure their contract is drafted to cater for this eventually (and if necessary for awarding the work to third parties).

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1 [2020] CSOH 87
2 [2003] EWHC 1987 (TCC)
3 [2004] EWHC 3286 (TCC)

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"clear words were needed in the contract to entitle an employer to omit work and have it done by someone else."

ANDREW ROSS
ASSOCIATE, LONDON

"The Act includes various restrictions on the exercise of contractual termination rights."

TERMINATION: CONTRACTUAL RIGHTS CURTAILED

New legislation restricts the rights of parties to construction contracts to terminate or even suspend works. Consequently, even if your contract says you can terminate or suspend, you may not be able to exercise this right. These reforms are likely to lead to significant changes to how parties operate their contracts and credit lines.

We discussed these reforms in detail in a lengthy article earlier this year[1] and now set out a review of the key points.

Background

The Corporate Governance and Insolvency Act 2020 was introduced to give parties 'breathing space' when they experience economic difficulties to give them an opportunity to trade out of insolvency. The Act includes various restrictions on the exercise of contractual termination rights.

What restrictions have been introduced?

The Act applies to suppliers/ contractors supplying goods and services to insolvent companies. It imposes three restrictions on their rights to terminate or suspend that supply.

1. Contractors cannot exercise contractual rights, triggered by insolvency, including termination rights.
2. During the insolvency period, contractors cannot exercise termination rights that accrued before the start of the insolvency period.
3. Contractors cannot make further supply conditional on paying outstanding sums that fell due before the insolvency period.

The Act defines the "insolvency period". Its precise duration depends on the form of insolvency procedure.

Exceptions to the restrictions

The new restrictions will not apply in two situations:

- If the contractor and insolvency practitioner agree to terminate the contract.
- If a court rules the restrictions would cause the contractor "hardship". The act does not define "hardship". Logically, it would seem that it must be more than the conventional difficulties associated with supplying an insolvent company.

Ambiguities

Allowing insolvent firms to continue trading risks prejudicing their suppliers. To address this, suppliers retain rights to terminate/ suspend for non-payment after the insolvency occurs. Striking this balance, has led to nuances and ambiguities in the restrictions.

Practical steps

Termination and suspension are critical contractual levers. Previously, we suggested a number of practical steps that contractors may wish to take to preserve those so far as possible in light of the Act. Examples include:

Before insolvency – Monitor cash flow and credit lines closely. Contractors may wish to act quickly to exercise termination rights if insolvency is imminent.

After insolvency – Terminating during this period may still be possible but may be a high-risk strategy. See our previous blog for a full discussion.

Future Contracts - Contractors may wish to seek shorter payment periods and express rights to terminate immediately in the event of any non-payment.

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1 https://www.hfw.com/Termination-Contractual-Rights-to-Terminate-Curtailed-August-2020

OUR TEAM NEWS

We have had a busy year, which in common with everyone else has been challenging and unpredictable.

The move to remote working was easier than any of us expected when first imposed, but as the year progressed, we were reminded of the many benefits of working in an office.

We have also had a number of cases where the final hearing was conducted remotely; see Chris Philpot's article about our positive experiences.

Our key news from the year:

- The team was ranked Band 2 for Contentious Construction and Band 3 for Non-Contentious Construction in Legal 500.
- We welcomed two new associates to the team who came to us from other construction practices. Andrew Ross joined in January this year and Chris Utton in February.
- We welcomed Roxanne Langford into the team. Roxanne completed her training contract at HFW in September, whereupon she joined us as a newly qualified solicitor.
- Richard Booth was chairman of the Adjudication Society this year and in October hosted the Society's first (and hopefully only) virtual conference.
- Ben Mellors continued in his role with the Technology and Construction Solicitors Association, being re-elected to the board in November.

HFW's construction law team is one of the UK's leading specialist practices. We have a particular focus on large infrastructure, transport and energy projects. The London team not only works on projects in the UK and continental Europe but also further afield - especially the Middle East, where we work closely with our local Dubai and Kuwait construction teams.

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