Legal Update

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Welcome to our Autumn Legal Update. This issue looks back at some of the significant cases and legal issues over the last 12 months. Unsurprisingly, adjudication cases feature prominently. Other related legal developments covered are the Office of Fair Trading’s (OFT) ground-breaking bid rigging investigation into the construction industry and the UK’s new Bribery Act. Our Survivors Guide 01 feature examines some of the ways contractors involved in PPP/PFI projects can minimise their risks.

Case Updates

**Employer’s insolvency not caught by pay-when-paid clause**

*William Hare Ltd v Shepherd Construction Ltd [2010] EWHC Civ 283*

The appellant main contractor, Shepherd Construction Ltd, appealed against a decision that it could not rely on a ‘pay-when-paid’ clause in its sub-contracts to refuse payment to its sub-contractors after the employer had gone into administration. The relevant clause provided that if the employer became insolvent by an administration order made against it under the Insolvency Act 1986 Pt II, Shepherd was not obliged to make payment to William Hare. The Enterprise Act 2002 amended the Insolvency Act to provide for other types of administration but the clause in the sub-contract was not amended. Although the employer went into administration by a self-certifying route – which was not one of the insolvency events identified in the clause – Shepherd sought to rely on the clause to avoid making payment to William Hare. Shepherd argued that the clause should be construed as covering all routes to administration under the Insolvency Act as that was what had been intended. The Court of Appeal rejected this, finding that Shepherd could not refuse payment to William Hare in reliance of the pay-when-paid clause because the employer’s insolvency did not fall within its terms.

This case is an illustrative lesson for parties to look closely at the wording of any pay-when-paid clause dealing with upstream insolvency. Parties should also carefully check any bespoke amendments to a standard form contract to ensure they reflect current insolvency practice.

**The extent of the TCC’s power to intervene in ongoing adjudications**

*Aceramais Holdings Ltd v Hadleigh Partnership Ltd [2009] EWHC 1864 (TCC)*

A dispute arose between the parties and Hadleigh commenced adjudication. Aceramais disputed the adjudicator’s jurisdiction on the basis there was no written contract and sought a declaration from the court that the adjudicator lacked jurisdiction. The court allowed the adjudication to proceed finding there was a contract in writing between the parties. Along with this finding the court gave guidance on the extent of its power to intervene in an ongoing adjudication. It held that it could only exercise its discretion to intervene in the rarest of cases where the case is clear cut and where the court can act quickly and stop the adjudication. Where the issue in dispute can only be determined by way of trial, it is likely the court will not grant declaratory relief as a trial would undermine the adjudication process. This case illustrates the court’s high threshold for intervention in ongoing adjudications. Unless a party can satisfy a court that the issue is clear cut, it may be inappropriate to go to the court for declaratory relief in relation to an ongoing adjudication. It is therefore advisable for parties to take part in the adjudication whilst reserving their position on the adjudicator’s jurisdiction, leaving jurisdictional arguments to be heard at the enforcement stage.

‘Refer at any time’? Not quite. A Court can restrain a party from proceeding with adjudication.

*Mentmore Towers Ltd v Packman Lucas [2010] EWHC 457 (TCC)*

Packman was engaged by Mentmore to provide engineering services in relation to a residential development. The project ran into difficulties and work was suspended. Packman commenced adjudication against Mentmore and was awarded £419,715. Mentmore failed to pay the sums awarded and Packman commenced proceedings to enforce. The court enforced the award but Mentmore failed to pay. Undetered, Mentmore then issued its own proceedings seeking court declarations as to the amounts due to Packman which they argued were less than the sums paid on account. Packman successfully made an application to the court to have this action stayed on the basis that there had been unreasonable and oppressive behaviour (and some element of bad faith) by Mentmore in pursuing those claims without first honouring the adjudicator’s decision and the judgement of the court enforcing it. Mentmore then issued three notices of adjudication and Packman applied for a further injunction to prevent Mentmore from taking any further steps in those adjudications. The question for the court was whether it had the power to grant an injunction restraining a party from pursuing further adjudications.

The court found it did have such power, stating that there was no reason why a referral to adjudication that was unreasonable or oppressive should not be restrained. The court held that Mentmore should not be allowed to pursue their claims for a final assessment of the amounts due to Packman without first honouring the adjudicator’s award. The decisions of adjudicators were to be strictly enforced unless there had been some excess of jurisdiction or breach of natural justice. The court found that the referrals were an attempt to circumvent the underlying ‘pay now, argue later’ purpose of the HGCR Act 1996.

**Crystallisation of a dispute and reserving your position in adjudication**

*Allied P&L Ltd v Paradigm Housing Group Ltd [2010] BLR TCC*

Allied P&L referred a dispute to adjudication in relation to the construction of a residential development and the adjudicator found for Allied. Paradigm sought to resist enforcement on the basis that the adjudicator had no jurisdiction because there was no dispute as no letter of claim had been received before the notice of adjudication was served. The court found that on the evidence there was a dispute, namely a challenge to a withholding notice, further holding that there was no requirement to issue a letter of claim before commencing adjudication proceedings. The court restated the law on when a dispute has crystallised, stating that for a dispute or difference to have arisen, there should have been a claim, assertion or an adoption of a position communicated to the other party which was expressly or by implication rejected or at least not accepted. The court also found that Paradigm had not sufficiently reserved its position in relation to its jurisdictional challenge because it had not clearly spelt out the basis of its reservation. Paradigm had therefore acceded to the jurisdiction of the adjudicator.
Legal Developments

Bribery Act 2010

The recently enacted Bribery Act 2010 is a significant step by UK authorities to stop bribery and corruption in business. It will impact upon all commercial organisations seeking contracts both in the public and private sector both in the UK and abroad. The Bribery Act repeals the existing legislation and creates four new offences:

Section 1: Active Bribery (bribing another person)

It is an offence to give, promise or offer financial or other advantage to another person:

– intending to induce a person to perform improperly a relevant function or activity
– intending to reward a person for the improper performance of such a function or activity
– knowing or believing that the acceptance of the advantage would itself constitute the improper performance of a function or activity

This offence applies to the public and private sector. It is irrelevant whether the advantage is offered, promised or given directly or through a third party. The offence applies even where a third party agent is used to pay a bribe.

Section 2: Passive bribery (offences relating to being bribed)

This offence applies to the ‘improper performance’ of functions and activities which includes:

– requesting, agreeing to receive or accepting a financial or other advantage intending that a relevant function or activity should be improperly performed
– requesting, agreeing to receive or accepting a financial or other advantage and the request, agreement or acceptance itself constitutes improper performance of a relevant function or activity
– requesting, agreeing to receive or accepting a financial or other advantage as reward for the improper performance of a relevant function or activity by another
– in anticipation of or in consequence of requesting, agreeing to receive or accepting a financial or other advantage, improperly performs a relevant function or activity

The key element of this offence is ‘the improper performance of functions and activities’. The benefit need not be for the requester and the request, agreement or acceptance can be through a third party.

The active and passive bribery offences apply to acts committed overseas if the act or omission would have been an offence if done in the UK and the offender has a connection to the UK. This connection could be based on residence for an individual, or incorporation in the UK for a company.

Section 6: Bribery of Foreign Public Officials

The offence relates to the bribing a foreign public official, and provides that a briber must either:

– intend to influence the foreign public official in his capacity as a foreign public official
– intend to obtain or retain business or

an advantage in the conducts of business – directly or through a third party offer, promise or give an advantage to the public official or another person at the request of the public official or with his assent.

A key feature of this offence is that it is not necessary for the briber to know or intend the public official to act improperly. It is sufficient that the briber intends to influence the public official. This offence contains a ‘local law’ provision that provides that an offence would not have been committed where the advantage was permitted under applicable local law.

Section 7: Corporate offence (failure of commercial organisations to prevent bribery)

This offence applies where a corporate or partnership fails to prevent those performing services on their behalf from paying bribes. It is punishable by an unlimited fine for the company, whilst company individuals with responsibility for anti-corruption measures face personal criminal liability and up to 10 years’ imprisonment.

It is a defence to this offence to show that an organisation had in place at the time ‘adequate procedures’ to prevent such bribery. The Act does not detail what ‘adequate procedures’ means but the Government has agreed to add an amendment that will require the Secretary of State to provide guidance on this. It is expected that such guidance will not be prescriptive but be in the form of a statement of principles supported by examples of good practice. This will leave the burden on the individual organisation to implement its own procedures.

Matters to note

– The corporate offence applies to companies or partnerships which are either formed under UK law or which carry on business in any part of the UK. This means that it could also impact on foreign companies doing business in the UK.
– The proposed new offence of bribing a foreign public official and the corporate offence of failure to prevent bribery by persons working on behalf of the business, including employees, agents and subsidiaries (whether domestic or foreign) may particularly be applicable to UK contractors or consultancies operating abroad.

The significant risk areas are:

– Tender process and award
– Planning consents and permissions
– Joint venture partners
– Suppliers
– Guarantees and undertakings

All UK companies and overseas companies doing business in the UK should review their procurement, bidding and internal procedures carefully and update training, policies and contracts of employment to comply with the new law.

Systech Solicitors Survival Guide 01: PFI/PPP Projects

Metronet’s bankruptcy and Transport for London’s recent take over of Tubelines underlines the risks for contractors involved in PPP/PFI projects. Companies should:

– Create a risk matrix: Identify key risks and who bears such risks within the project documents. Ensure that this matrix is updated in light of amendments to the output specifications, variations or additional agreements.
– Pricing and payment: Due to the long term nature of such projects, parties must ensure an appropriate procedure for price fluctuation and adjustments to the contract payments are in place.
– Document management: Project documents can be complex, voluminous and follow a particular hierarchy so ensure you have robust document management procedures in place.
– Interface risks: Because project documents are created by a number of different advisors representing different disciplines, interface issues between technical and legal documents may arise. Ensure you are aware of how the contractual obligations sit with the technical/output specifications and any conflict or ambiguity is addressed.

Systech Solicitors – Shaun Whitlock Profile

Shaun is a Solicitor specialising in construction and engineering. He has worked in construction for over 25 years. He trained as a quantity surveyor with John Laing, later working for Mowlem and Alfred McAlpine. Shaun has advised on construction law for the past 11 years and has worked with Systech Solicitors since it’s formation. Shaun deals with both contentious and non-contentious work and most recently has been advising the construction team on one of the UK’s largest PFI healthcare projects. Shaun also conducts litigation and adjudication matters as well as providing training and general advice to parties in the construction and engineering sector.

Shaun is a Member of the Royal Institution of Chartered Surveyors and a Fellow of the Chartered Institute of Arbitrators and has been called to the Bar of England and Wales.

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