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DISPUTED CONSTRUCTION ACCOUNTS

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A "really knowledgeable, experienced construction lawyer". One market source notes: "He has always provided excellent outcomes to legal problems." - Chambers Legal Directory 2017 edition.



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DISPUTED CONSTRUCTION ACCOUNTS

TYPICAL ISSUES

- Routes to recovery
- The usual battlegrounds:
 - Service of notices and “smash and grabs”
 - Liquidated damages
 - Loss and expense
 - Variations
 - Retentions
- Recent case law

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

- Adjudication
 - A speedy form of dispute resolution applicable to construction contracts. An independent third party adjudicator makes a decision based on written submissions from the parties, often within 28 days. No entitlement to recover costs.
- Litigation
 - A formal court process. The parties must comply with various procedural steps (disclosure, witness statements, expert evidence) following which the trial takes place before a Judge. Can be a lengthy and expensive process (successful party normally recovers a significant proportion of its costs). Judgments are public.

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ROUTES TO RECOVERY

- Arbitration
 - Similar to court proceedings in terms of procedure, timescale and costs, but takes place in front of a privately appointed (and paid) arbitrator. The proceedings are private.
- ADR
 - Various forms of ADR, such as mediation, where a third party assists the parties in reaching a resolution of the dispute.

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ROUTES TO RECOVERY

Does insolvency change anything?

- Michael J Lonsdale (Electrical) Limited v Bresco Electrical Services Limited (in liquidation) [2018] EWHC 2043.
- Jurisdiction - Court of Appeal held that liquidation set-off does not in principle preclude adjudication.
- Utility argument - the court held that since, where the responding party has a cross claim, an adjudicator's decision in favour of a company in liquidation would not normally be enforced, continuing with the adjudication was "an exercise in futility".
- Court upheld the injunction to restrain the adjudication.
- Bresco granted permission to appeal to Supreme Court.

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

- Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Company Ltd (judgment given 10 October 2019).
- Court recognised potential exceptions to the Bresco position, for example where:
 - the adjudication dealt with all the parties' mutual claims (ie opposite to a smash and grab);
 - there is a satisfactory guarantee in relation to any sum awarded, and/or where the sum is temporarily ringfenced.
- On the facts, the court did not grant summary judgment to enforce the award, but highlighted possible exceptions to the Bresco rule.

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

What about CVAs?

- Cannon Corporate Limited v Primus Build Limited [2019] (January).
- Court of Appeal enforced Adjudicator's decision despite Referring Party being in a CVA.
- Court dismissed the appeal noting "Although each case will turn on its own facts, there are potentially important differences between a company in liquidation and a company in a CVA".

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

Court stated:

- “[A CVA] is designed to try and allow the company to trade its way out of trouble. In these circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work...courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties.”
- Judge agreed with analysis set out in an earlier case that “The adjudicator has in effect already considered both claim and counterclaim and both parties have agreed to litigate the matter...”
“In those circumstances ... it is impossible to see how or why the supervisor would wish to undertake some yet further consideration of the claim and counterclaim”

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

BUT

- Indigo Projects London Ltd v Raizin & Or [2019] (May).
- Claimant had adjudication award based on failure to serve pay less notice.
- After issuing proceedings to enforce the award, Claimant entered CVA.
- Held that it would not be just to enforce the adjudicator's decision after the company had entered CVA.
- It was relevant that the adjudicator's decision was not on the merits of one party's case, nor was it a true valuation of the work, rather it was a smash and grab, based solely on failure to serve pay less notice.

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

BUT

- If the sum were paid after the commencement of the CVA, it would be a recovery that would go into the general fund for creditors.
- It would not be taken into account as part of the exercise of assessing the balance of dealings between the parties, as it would have done had it been paid before the CVA.
- Judge held it would be wrong in principle to enforce the decision and would distort the process of accounting between the parties.

DISPUTED CONSTRUCTION ACCOUNTS

NOTICES AND SMASH AND GRABS

- HGCRA 1996 as amended (“Construction Act”) & Scheme:
 - Right to stage or interim payments & adequate mechanism for determining what payments become due & when;
 - Final date for payment of any sum which becomes due;
 - Provision for Payment Notices failing which the Act provides mechanism for determining “notified sum” based on Employer’s Payment Notice or Contractor’s application.
- Paying party may give a Pay Less Notice, absent which the ‘notified sum’ **must** be paid by final date for payment.
- A “smash and grab” is a claim by a contractor pursued by way of an adjudication based on a failure to serve the correct notices, and is often successful, irrespective of the true value of the works.

DISPUTED CONSTRUCTION ACCOUNTS NOTICES AND SMASH AND GRABS

- Grove Developments Ltd v S&T (UK) Ltd
- Design & build of new Premier Inn Hotel at Heathrow (JCT D&B 2011).
- Adjudicator's decision required for payment of application in the sum of £14m.
- Payment Notice out of time, Pay Less Notice held to be invalid
- Grove considered sum due to be £0.00.
- Grove commences Part 8 proceedings for:
 - declaration of right to cross adjudicate;
 - determination of validity of (i) Pay Less Notice & (ii) Notices for deduction of LADs.

DISPUTED CONSTRUCTION ACCOUNTS NOTICES AND SMASH AND GRABS

Judgment

- An Employer does have the right to bring a second adjudication to establish the true value, after paying the notified sum.
- The Act creates a hierarchy of obligations with the adjudication provisions being subordinate to the payment provisions.
- The operation of the provisions of the Act relating to the interim application, payment notice and pay less notice did not provide a valuation of the works done. The provisions were for cash flow purposes, and it remained open to either party to challenge the correctness of the notified sum by adjudication.

DISPUTED CONSTRUCTION ACCOUNTS

LOSS AND EXPENSE

What is loss and expense?

- Additional costs incurred as a result of delay or disruption to the progress of the works, caused either by matters within the employer's control or breaches of contract by the employer. Costs may be incurred as a result of:
 - delay to the works
 - disruption to the works
- Categories of loss and expense include:
 - Increased preliminaries
 - Overheads
 - Wasted management time
 - Loss of productivity / inefficient working

DISPUTED CONSTRUCTION ACCOUNTS

LOSS AND EXPENSE

- Contractual provisions normally include entitlement to loss and expense and mechanism for claiming.
- Check and follow notice requirements.
- Contractor needs to show delaying event and associated financial effects.
- Can be difficult where there are numerous events.
- There may be multiple causes of loss and expense - better if you can link each loss caused to a particular event of disruption or delay.
- Records, records, records!

DISPUTED CONSTRUCTION ACCOUNTS

LOSS AND EXPENSE

- If Contractor cannot separate individual causes and consequences of events to establish loss, consider global claims
- Society of Construction Law Delay and Disruption Protocol:
 - *“A global claim is one in which the contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events.”*
- Global claims are discouraged by the protocol
- If it is shown that any material part of the global loss is not due to an Employer Risk Event, and it is not possible for the assessor to assess that value of that part, the entire claim *may* fail

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LOSS AND EXPENSE

- Walter Lilly & Co v (i) Mackay and (ii) DMW Developments [2012]
- Mr Justice Akenhead

“the Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense”

“There is nothing in principle “wrong” with a “total” or “global” cost claim. However, there are added evidential difficulties ...

“The fact that one or a series of events or factors (unpleaded or which are not the risk or fault of the claimant contractor) caused or contributed ... to the global loss does not necessarily mean that the claimant contractor can recover nothing.”

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- LADs are applicable in the event of certain specified breaches of contract by the Contractor, generally where the contractor fails to achieve practical completion by the completion date
- LADs, as opposed to general damages, do not require the claimant to prove that the losses claimed have actually been suffered
- Avoids the expense and difficulty of having to prove the actual damage suffered as a result of the breach.
- The rate of liquidated damages must not be ‘unconscionable’ or ‘extravagant’
- The test used to be whether the LADs were a genuine pre estimate of loss.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

Following the cases of Cavendish Square v Makdessi or Parking Eye v Beavis the test now is:

“Whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.”

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- Contractual procedure for claiming liquidated damages
- Procedure generally governed by the provisions in the contract
- JCT Design & Build 2016
- Clauses 2.28 and 2.29 – provide that before liquidated damages can be deducted the Employer is required to give 3 separate notices in sequence.
- The 3 notices required are:
 - i. Non-Completion Notice
 - ii. Warning Notice cl 2.29.1.2
 - iii. Notice Requiring payment cl 2.29.2
- Potentially a fourth notice – Pay Less Notice

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

Non-Completion Notice

- Clause 2.28
- If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Employer shall issue a Non-Completion Notice.

Warning Notice

- Clause 2.29.1.2
- The Employer is required to serve a notice stating that it “may” require payment of or “may” withhold or deduct liquidated damages.
- The Warning Notice must be given before the due date for the final payment

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

Notice Requiring Payment

- Clause 2.29.2
- Notice that the Employer requires the Contractor to (i) pay liquidated damages and/or (ii) that the Employer will withhold or deduct liquidated damages at the rate stated in the Contract.
- The Notice Requiring Payment must be given not later than 5 days before the final date for payment for the final payment and can only be sent after the Non-Completion Notice or the Warning Notice.

A Fourth Notice?

- Pay Less Notice
- If the Notice Requiring Payment is based on (ii) above, i.e. that the Employer will withhold, then the Employer must also serve a Pay Less Notice.
- Also 5 days before the FDP for the final payment.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- What happens to liquidated damages for delay when a construction contract is terminated?
- Do liquidated damages clauses survive/apply?
- If so, is the Employer entitled to payment up until the point of termination or beyond?
- There are 3 potential outcomes when a Contractor fails to complete the works and a second contractor steps in:
 - i. The liquidated damages clause does not apply at all;
 - ii. The clause only applies up until the point of termination;
 - iii. The clause applies until the second contractor achieves completion.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- The commonly accepted position (recorded in most leading legal textbooks) had been that the Employer was entitled to:
 - i. Recover liquidated damages for delay at the contractual rate up to the date when the contract is terminated; and
 - ii. General damages thereafter.
- This is no longer regarded as the default.

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LIQUIDATED DAMAGES

Triple Point Technology, Inc. v PTT Public Company Ltd [2019]
EWCA Civ 230

- The liquidated damages clause in that case (Article 5.3) provided that:

“If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date [PTT] accepts such work...”

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- The clause in question (Article 5.3) was focused specifically on delay between the contractual completion date and the date when **Triple Point** actually achieved completion.
- It had no application to the situation in which the contractor never in fact handed over completed work to the employer.
- Therefore it was held that as the Contractor's employment had been terminated before the works had been completed, liquidated damages cannot be applied.
- Whether or not liquidated damages apply therefore very much depends on the precise wording of the liquidated damages clause in question.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- However, it is likely that where the wording of the clause links the application of liquidated damages to practical completion by the initial Contractor (as is the case under many industry standard forms of contract such as the JCT) then the liquidated damages clause will not apply at all in circumstances where the initial Contractor's employment is terminated prior to practical completion.
 - E.g. clause 2.27 of the JCT D&B 2016
- This does not mean that the Employer is left without remedy. The Employer can claim damages in the usual way by proving the actual loss it has suffered by reason of the delay rather than the pre-agreed LADs.

DISPUTED CONSTRUCTION ACCOUNTS

RETENTIONS

- Retentions are deductions (commonly 5%) from sums due to a contractor or subcontractor.
- Generally held to provide security in respect of the contractor's performance before and after practical completion.
- Under the JCT Design and Build Contract, half the retention is released on practical completion with the remainder held until end of Rectification Period and released following issue of the Notice of Completion of Making Good.
- Much debate and discussion in the construction industry regarding the potential abolition of retentions, or introduction of a scheme to ringfence retentions.

ANY QUESTIONS?