

ashfords



DISPUTED CONSTRUCTION ACCOUNTS

Ashfords LLP
ashfords.co.uk

SPEAKER

Patrick Blake

Head of Construction & Infrastructure Team

- Widely experienced in resolving disputes by way of negotiation, arbitration, mediation and litigation in the TCC and Court of Appeal
- Extensive experience advising on contracts on a range of projects across commercial, residential, health, educational and energy sectors



Patrick Blake

Partner

p.blake@ashfords.co.uk

+44 (0)1392 333884

+44 (0)7968 728868

DISPUTED CONSTRUCTION ACCOUNTS

TYPICAL ISSUES

- Contractual claims for payment – the usual battlegrounds are:
 - Defects and quality of works
 - Delay and prolongations claims involving:
 - Loss and expense
 - Liquidated damages
 - Extensions of time
 - Variations
 - Retentions
 - Service of notices
- Routes to recovery (incl. “smash and grab” adjudications)
- Recent case law and judicial guidance

DISPUTED CONSTRUCTION ACCOUNTS

EARLY INVESTIGATIONS

- Check the contractual consequences of termination for insolvency
- Check contractual provisions on payment, loss and expense, LADs etc.
- Establish facts, including:
 - payments made to date;
 - allegations of defects;
 - whether the project is in delay;
 - existing extensions of time (if any);
 - amount of work until completion.

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 the Employer 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!
- Expert evidence may be required – programming and quantum.

DISPUTED CONSTRUCTION ACCOUNTS

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”
- Be alert to global claims as there are evidential difficulties. If it is shown that any material part of the global claim is not due to an ‘Employer’s risk event’ then the entire claim *may* fail.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- **Liquidated damages (LADs)**, if specified in the contract, are typically applicable if the Contractor fails to achieve practical completion of the works 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.
- Test used to be whether LADs were a genuine pre estimate of loss.
- Current law is that the rate of liquidated damages must not be 'unconscionable' or 'extravagant'. The LADs provision should be a reasonable and proportionate protection of the Employer's legitimate commercial interest in the works if delayed.

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.”
- There will be a contractual procedure for claiming liquidated damages.
- Procedure generally governed by the provisions in the contract.
- For example, JCT Design & Build 2016 (clauses 2.28 and 2.29) requires the Employer to give 3 separate notices in sequence before LADs can be deducted.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- The 3 notices required are:
 - 1) Non-Completion Notice – that the works have not been completed by the relevant Date for Completion;
 - 2) Warning Notice stating that the Employer “may” require payment of or “may” withhold or deduct LADs – has to be issued before the due date for the final payment;
 - 3) Notice Requiring Payment confirming that (i) the Contractor must either pay the LADs and/or (ii) they will now be withheld or deducted – has to be given not later than 5 days before the final date for payment of the final payment.
- Potentially a 4th notice – Pay Less Notice if the Notice Requiring Payment is based on (ii) above – also to be given 5 days before the final date for payment of 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 still apply? 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:
 - the liquidated damages clause does not apply at all;
 - the clause only applies up until the point of termination;
 - the clause applies until the second contractor achieves completion.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- Until recently, the commonly accepted position (in most leading legal textbooks) has been that the Employer is entitled to recover:
 - liquidated damages for delay at the contractual rate up to the date when the contract is terminated; and
 - general damages thereafter.
- This is no longer regarded as the default after **Triple Point Technology, Inc. v PTT Public Company Ltd [2019] EWCA Civ 230**.
- The liquidated damages clause in that case was focused specifically on delay between the contractual completion date and the date when Triple Point actually achieved completion.

DISPUTED CONSTRUCTION ACCOUNTS

LIQUIDATED DAMAGES

- It had no application to the situation in which the Contractor never in fact handed over completed work to the Employer.
- Held therefore that as the Contractor's employment had been terminated before completion, LADs cannot be applied.
- Whether or not LADs apply now very much depends on the precise wording of the LAD clause in question.
- Likely that where the recovery of LADs is linked to practical completion by the original Contractor (as per the JCT and other standard forms of contract), LADs will not apply at all if termination occurs before practical completion (as often happen with insolvencies).
- Employer's remedy would be in general damages but with proof of actual loss caused by the delay rather than the pre-agreed LADs.

DISPUTED CONSTRUCTION ACCOUNTS

EXTENSIONS OF TIME and VARIATIONS

- **Extensions of time** are formally given by the Employer / Contract Administrator.
- Worth establishing the length of any extensions of time awarded. Extensions of time shield against LADs and support potential claims for loss and expense.
- **Variations** are changes to the original scope of works.
- Could entitle the Contractor to additional payment as well as loss and expense if the works took longer as a result of the variations.
- Consult with the directors.
- Expert evidence may be needed.

DISPUTED CONSTRUCTION ACCOUNTS

RETENTION

- **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 JCTs, 50% of the retention is typically released on practical completion with the remainder held until after the end of Rectification Period (normally 12 months after completion) and released after 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.

DISPUTED CONSTRUCTION ACCOUNTS

CONSTRUCTION CONTRACT NOTICES

- **Construction contract notices** are important to get right. Construction contracts are dates and notices driven, including for example:
 - due date / final date for payment;
 - payment notice / payless notice
 - Notices relating to LADs.
- Dates and notices in a construction contract about payment are derived from the Housing Grants Construction and Regeneration Act 1996 (“the Construction Act”) & the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”).

DISPUTED CONSTRUCTION ACCOUNTS

CONSTRUCTION CONTRACT NOTICES

- The Construction Act requires:
 - stage or interim payments and adequate mechanism for determining what payments become due and when;
 - final date for payment of any sum which becomes due;
 - provision for Payment Notices failing which the Act imposes a mechanism for determining the “notified sum” to be paid based on the Contractor’s application or a subsequent default Notice.
- Paying party may give a Pay Less Notice or the ‘notified sum’ **must** be paid by final date for payment.
- Could lead to a “smash and grab” style claim by a Contractor through adjudication based on the payer’s failure to serve the correct notices.
- Such claims often succeed, irrespective of the true value of the works.

DISPUTED CONSTRUCTION ACCOUNTS

NOTICES AND SMASH AND GRABS

- Leading case is the Court of Appeal judgment in **S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448**.
- Design & build of a Premier Inn Hotel at Heathrow (JCT D&B 2011). Payment Notice out of time, Pay Less Notice held to be invalid.
- Adjudicator's decision required for payment of application in the sum of £14m despite Grove considering the sum due to be £0.00.
- Grove commenced Part 8 proceedings for declaration of right to cross adjudicate and lost at first instance on this and other points.
- Court of Appeal confirmed that an Employer does have the right to bring a second adjudication to establish the true value, but only after paying the notified sum.
- Held that the Construction Act creates a hierarchy of obligations with adjudication provisions being subordinate to the payment provisions.

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

○ Adjudication

- a speedy form of dispute resolution applicable to construction contracts and established by the Construction Act;
- an independent third party adjudicator makes a decision based on written submissions from the parties, often within 28 days;
- no entitlement to recover costs;
- binding and enforceable until any final determination by litigation or arbitration.

DISPUTED CONSTRUCTION ACCOUNTS

ROUTES TO RECOVERY

○ **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 but the successful party normally recovers a significant proportion of its costs. Judgments are public.

○ **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 or expert determination.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

○ Adjudication and insolvency

- Starting position is that Courts are likely to stay the enforcement of an adjudicator's decision if the 'winning party' is insolvent or unable to repay sums awarded, if later required, as per *Wimbledon v Vago* [2005] EWHC 1086 (TCC).
- Recent case of **Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited [2019] EWHC Civ 27** has looked at whether an adjudicator has the jurisdiction to even look at a claim brought by a company in insolvent liquidation.
- Court of Appeal held that liquidation set-off does not in principle preclude adjudication. However the Court was swayed by the 'utility' argument and upheld an existing injunction to restrain the adjudication.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- Court held that where the responding party has a cross claim, continuing with the adjudication was “*an exercise in futility*” as the adjudicator’s decision would not normally be enforced.
- Bresco granted permission to appeal to Supreme Court.
- In the original case in the TCC in 2018, the Judge granted Lonsdale an injunction to prevent the continuation of an adjudication claim brought by Bresco on the basis that:
 - adjudicators do not have jurisdiction to deal with claims advanced by companies in insolvent liquidation; and
 - he was “*unable to see how it would be either just or convenient to permit an adjudication to continue in circumstances where the decision of the adjudicator will be incapable of enforcement*”.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- The Court of Appeal upheld the injunction stopping Bresco's claim but Coulson LJ found that:
 - an insolvent company's contractual claim did not cease to exist at liquidation; and
 - Bresco's right to refer a dispute to adjudication was not automatically lost when they went into liquidation.
- However he agreed that the injunction granted to restrain the continuation of the adjudication was the appropriate remedy in the circumstances.
- *On the facts*, there was nothing to demonstrate that it would be just or convenient for the underlying adjudication to continue.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- Bresco had been insolvent for nearly three years before the adjudication referral, there was no suggestion Bresco could ever trade again and Lonsdale's cross-claim had been issued by the time of the adjudication.
- There was no good reason to make Lonsdale incur the costs of defending a claim in adjudication that could not be enforced.
- Coulson LJ considered there to be a basic incompatibility between the adjudication and Insolvency Rules regime with:
 - the former being a method of obtaining an improved cashflow quickly and cheaply but likely to result in injustice; and
 - the latter involving the taking of a detailed account as between the company and creditor and the careful calculation of a net balance one way or the other.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- The incompatibility could be seen in the different processes that each regime entailed, in a comparison of the results that might be available and in a consideration of the wider issues that could arise if companies in insolvent liquidation regularly sought to refer claims to adjudication.
- It would only be in exceptional circumstances that a company in insolvent liquidation (and facing a cross-claim) could refer a claim to adjudication, succeed in that adjudication, obtain summary judgment and avoid a stay of execution.
- Thus, in the ordinary case, even though the adjudicator might technically have the necessary jurisdiction, it was not a jurisdiction which could lead to a meaningful result.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- Court has recently recognised potential exceptions to the Bresco position in **Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Company Ltd [2019] EWHC 2651** (judgment given 10 October 2019) for example where:
 - the adjudication dealt with all the parties' mutual claims (i.e. 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

RECENT CASE LAW AND JUDICIAL GUIDANCE

○ What about CVAs?

- The case of **Cannon Corporate Limited v Primus Build Limited [2019] EWCA Civ 27** is relevant. This was a conjoined appeal alongside *Bresco v Lonsdale*.
- Court of Appeal enforced an 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”*.
- Although the company was insolvent, there was a clear way forward under the CVA that would result in all creditors being paid in full and Primus continuing to trade. This was a key distinction with the insolvent liquidation in *Bresco*.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- The appeal came about because:
 - Primus was awarded more than £2.1 million in an adjudication (4th one) about a repudiatory breach of contract. The adjudicator considered but rejected nearly all Cannon's cross-claims.
 - Primus started enforcement proceedings. Cannon accepted judgment may be entered but sought a stay of enforcement.
 - HHJ Waksman QC declined to grant the stay because the financial position of Primus had arisen partly due to Cannon's refusal to pay the monies awarded to Primus. A stay of execution was refused.
- The case settled but the Court of Appeal used its discretion to hand down judgment and effectively dismissed the appeal.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- 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

RECENT CASE LAW AND JUDICIAL GUIDANCE

BUT

- Note the subsequent case of **Indigo Projects London Ltd v Raizin & Anor [2019] EWHC 1205**.
- Claimant had benefit of an adjudication award after a failure to serve pay less notice. **After** issuing summary judgment proceedings to enforce the award, Claimant entered a CVA.
- The Defendant, Raizin, resisted and sought a stay of execution on the basis that its counterclaims had not yet been determined so paying the award would result in the CVA supervisors distributing that sum amongst the general body of creditors and it would not be available to offset any cross-claim by Raizin.
- Held that it would *not* be just to *enforce* the adjudicator's decision so that the award would be paid *after* the company had entered into a CVA.

DISPUTED CONSTRUCTION ACCOUNTS

RECENT CASE LAW AND JUDICIAL GUIDANCE

- Because:
 - 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; and
 - the Judge held it would be *wrong* in principle to *enforce* the decision and would *distort* the process of accounting between the parties
- It was relevant that the adjudicator's decision was not on the merits and did *not* deal with all matters between the parties. It was not a true valuation of the work - rather it was a “smash and grab” style adjudication based solely on a failure to serve a pay less notice.

DISPUTED CONSTRUCTION ACCOUNTS

ANY QUESTIONS?