

2021 Case Law Update

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Introduction

- Update on cases heard in the last 12 months
- Relevant to issues on projects , covering:
 - NEC,
 - liquidated damages,
 - contractual interpretation,
 - payment,
 - design liability,
 - adjudication under a warranty

NEC Cases from 2021

Van Oord UK v Dragados UK

- Dispute arose from an NEC3 contract for dredging 2.15 million cubic metres of material to create a new harbour in Aberdeen
- Dragados transferred circa one third of Van Oord's works to two alternative subcontractors and sought to use CE process to reduce Van Oord's rate by circa 50%

Van Oord UK v Dragados UK

- Van Oord had used a 'blended' rate in its tender, which averaged out the cost of easier and more difficult works
- The works removed from Van Oord's scope were the 'easier' works
- Dragados terminated Van Oord's subcontract, the case concerned the value of Van Oord's works

Van Oord UK v Dragados UK

- Van Oord argued that Dragados had “manipulated the contract in its favour” as Dragados had insisted on the blended rate in the first place
- Van Oord further argued that Dragados had acted in breach of clause 10.1 and so should not be allowed to benefit from acting in contravention of its obligation to act in good faith

Van Oord UK v Dragados UK

- The Court held that clause 10.1 is “not merely an avowal of aspiration” but reinforces the general principle of good faith in contract.
- Court went on to say that a party cannot enforce an obligation in its favour if it is the counterpart of another obligation it has breached

Van Oord UK v Dragados UK

- Court held that the contractual mechanism to reduce the Prices only applies if the relevant change is a lawful one.
- Therefore when a party is in breach in reducing the scope of works it cannot use the contractual mechanism to reduce the rate.

Van Oord UK v Dragados UK

- This case sets a persuasive precedent (CoA equivalent) that parties must act in a spirit of mutual trust and co-operation in order to operate other mechanisms in the contract in its favour.
- Includes issuing certificates, notifying compensation events, etc

Greater Glasgow Health Board v Multiplex

- Another Scottish case dealing with NEC3
- The Greater Glasgow Health Board sought to recover circa £73m from a number of Parties for defects in the construction of a hospital in Glasgow
- GGHB referred the dispute to Court without adjudicating it first primarily for prescription (limitation) reasons

Greater Glasgow Health Board v Multiplex

- The contract contained a ‘tiered’ dispute resolution clause requiring referral to adjudication of all disputes prior to Court
- The question for the Court was whether adjudication was mandatory before Court could hear case
- S108(1) of the Construction Act allows adjudication “at any time”

Greater Glasgow Health Board v Multiplex

- Contract required adjudication prior to taking the dispute to Court.
- Multiplex (and other defendants) said that this meant that any dispute must be adjudicated on before taking to Court.
- GGHB said that dispute was not one that respective parties had intended would be referred to adjudication

Greater Glasgow Health Board v Multiplex

- Court held that the parties' contract required any dispute to be referred to adjudication first.
- Court said parties could have excluded certain claims from the tiered DR provisions, but contract said any dispute.
- Court stayed proceedings pending adjudication.

Greater Glasgow Health Board v Multiplex

- Unsurprising result – wording of the contract is clear.
- GGHB said would require 22 individual adjudications prior to going to Court.
- Practical issues for cases like this with multiple disputes and/or against multiple parties.

Liquidated Damages cases from 2021

Eco-World v Dobler

- Contract was a JCT 2011 Construction Management Trade Contract, but LD provisions are similar to other JCT forms.
- Dobler's Trade Contract was for façade and glazing works to three multi-storey residential blocks.
- Disputes on project led to multiple adjudications before this Part 8 hearing

Eco-World v Dobler

- EW took early possession of two of the three blocks.
- EW issued its provisional final account, resulting in a payment of circa £1m from Dobler to EW (mainly because of LDs)
- Dobler submitted a PLN, claiming a payment was due from EW to it of circa £1.4m

Eco-World v Dobler

- In the 2nd adjudication, Dobler (the Trade Contractor) argued that LD provisions were void and unenforceable because there was no mechanism for reduction in LDs following partial possession of blocks B & C.
- EW argued that it hadn't taken over Blocks B & C, and the LD provisions did not amount to a penalty.

Eco-World v Dobler

- Interestingly, in the Part 8 proceedings at Court, the parties flipped their positions.
- EW argued LD provisions were void and unenforceable, so it was entitled to claim general damages from Dobler.
- EW claimed circa £2.25m in general damages from Dobler (cap in contract would have limited LDs to £575k)

Eco-World v Dobler

- Dobler argued LD provisions were enforceable as contract allowed for EW to demand payment of less than the full amount of LDs
- Alternatively, Dobler said that the LD cap in the contract was a cap on general damages recoverable by EW (contract capped LDs to 7% of Contract Sum).

Eco-World v Dobler

- Court found that natural meaning of clause was that LDs were recoverable by EW until all works were complete, so LD provisions were not a penalty.
- Court held that cap on LDs also operated as a cap on general damages for delay.
- Court said it will be cautious to interfere in freely negotiated commercial terms.

Triple Point v PTT

- The case was an appeal to the Supreme Court from the Court of Appeal, which had decided that if a contract was terminated, it was not possible to levy any LDs against the party in delay
- This was against what was considered to be the orthodox approach – that LDs could be levied to the point of termination

Triple Point v PTT

- Triple Point were to provide software and other services to PTT. Contract provided for phased completion of work.
- Works were delayed, first two stages of Phase 1 were completed late, but Phase 2 works were not started.
- PTT accepted Phase 1 works and paid relevant invoices.

Triple Point v PTT

- Triple Point raised additional invoices and claimed payment, PTT refused to pay.
- Triple Point suspended works, PTT said this was wrongful suspension and terminated the contract.
- Triple Point then brought a claim for payment of the additional invoices.

Triple Point v PTT

- PTT counterclaimed for damages for wasted costs and LDs for delay of Phase 1 works to the date of termination.
- TCC found in favour of PTT, and awarded circa \$5m, of which circa \$3.5m was LDs.
- Triple Point appealed to the Court of Appeal.

Triple Point v PTT

- The Court of Appeal found that LDs were applicable for delays to works that had been accepted (stages 1 & 2 of Phase 1).
- LDs could not be applied for delays to other phases/stages for works not accepted.
- PTT appealed the decision to the Supreme Court.

Triple Point v PTT

- Supreme Court overturned the Court of Appeal's "*radical re-interpretation*" and confirmed that LDs were applicable for incomplete works up to termination.
- Court went on to say general damages would be applicable post-termination.
- Court said parties could clarify extent of LD liability when drafting their contracts.

Contractual interpretation cases from 2021

Mansion Place v Fox Industrial

- Case revolved around whether a telephone conversation between two of the parties' representatives meant that the Employer couldn't levy LDs against the Contractor.
- Works had been delayed, Contractor said it was entitled to EOT & L&E, Employer thought Contractor was culpable for delay.

Mansion Place v Fox Industrial

- Principals of Employer and Contractor had a telephone conversation, during which Contractor said agreement had been reached that it would forego claim for L&E and Employer would forego claim for LDs.
- Contractor's contemporaneous internal emails evidenced belief that such an agreement had been reached.

Mansion Place v Fox Industrial

- No indication from internal emails of Employer (that the relevant Director had been copied into) that an agreement had (or had not) been reached.
- After next payment application, Employer issued notices of intention to deduct LDs.
- Contractor started adjudication, relying on agreement reached on the call.

Mansion Place v Fox Industrial

- Adjudicator found in Contractor's favour. Employer went to Court to resolve the issue.
- Court agreed with adjudicator that an agreement had been reached.
- Decision based on contemporaneous evidence available – importance of making / keeping records.

Septo Trading v Tintrade

- Case concerning an international fuel oil sale contract.
- Interesting in a construction context because the Court of Appeal set out how the courts will approach interpreting alleged inconsistencies between bespoke terms and terms in a standard form.

Septo Trading v Tintrade

- The relevant agreement contained standard terms and special conditions.
- The standard terms required the fuel delivered to not be inferior to a specification contained in the contract.
- The special conditions said that if an inspector issued a quality certificate it was binding on the parties.

Septo Trading v Tintrade

- At first instance the Court held that the fuel supplied did not comply with the specification and that the terms could be read together.
- The buyer was entitled to \$3m. The seller appealed to the Court of Appeal.

Septo Trading v Tintrade

- Referring to previous case law, the CoA said that the first task is to establish if the clauses can be read together. If they can be, they should be and there is no inconsistency
- If the clauses can't be read together, there is an inconsistency, and the special condition should prevail over the terms in the standard form.

Septo Trading v Tintrade

- Caution should be exercised when including bespoke terms which amend standard terms.
- Consider effect of bespoke term first, and whether it impacts on standard terms. If it does, can the clauses be read together.
- Ensure the bespoke term reflects desired outcome of clause.

Payment cases from 2021

Downs Road v Laxmanbhai

- Downs Road (the Employer) would issue monthly payment notices for £0.97, then subsequently issued a detailed payment notice with a proper assessment of the sum due.
- For the application that was subject to the adjudication, DR issued the £0.97 PLN, but issued the subsequent assessment too late to be valid.

Downs Road v Laxmanbhai

- Laxmanbhai's application was for £1.88m, DR's late PN was for £657k net.
- Laxmanbhai went to adjudication, not on a 'smash and grab' basis, but on a true value basis.
- Adjudicator made a decision that Laxmanbhai was entitled to a further circa £100k.

Downs Road v Laxmanbhai

- Laxmanbhai threatened suspension if DR did not pay its application in full. DR started Part 8 proceedings seeking a declaration that the adjudicator's decision was unenforceable, on the basis that he had not considered a defence raised by DR.
- In response, Laxmanbhai sought declarations that both of DR's PN were invalid.

Downs Road v Laxmanbhai

- DR accepted the second payment notice was not valid as it was late, however it contended that its first payment notice was valid as it was issued on time.
- Laxmanbhai said the first payment notice was also invalid, because it did not set out “...*the sum that [DR] considered to be due...*”

Downs Road v Laxmanbhai

- DR said decision was unenforceable because of adjudicator's failure to consider a valid defence.
- Laxmanbhai said that either decision was enforceable, or, if it wasn't, there wasn't a valid payment notice, and no adjudicator's decision, leaving the sum due as Laxmanbhai's application for payment.

Downs Road v Laxmanbhai

- The Court decided that the £0.97 payment notice was not valid because it did not state the sum that the Employer considered to be due at the due date. This was evidenced by the subsequent payment notice for > £650k.
- The Court also decided that the adjudicator took an unduly narrow view of his jurisdiction.

Downs Road v Laxmanbhai

- Potentially adds a subjective element into the provision of payment notices, namely that the sum due must be the sum that the payer considers to be due.
- Requirement for 'sum considered to be due' is the same for pay less notices in JCT – requirement for subjective belief in the sum due required in pay less notices.

D McLaughlin & Sons v East Ayrshire Council

- Scottish case concerned a dispute following the construction of an extension to a school under a Scottish JCT contract.
- One issue concerned whether stating the incorrect due date on an application for payment rendered that application invalid.

D McLaughlin & Sons v East Ayrshire Council

- The parties agreed that the first due date was four weeks from the date the works started, and on the same date in the following months.
- However, the parties disagreed when the works started on site (by one day), and so the parties' interpretation of the due date also differed by one day.

D McLaughlin & Sons v East Ayrshire Council

- The Employer's position was that this meant the application did not "*...state the sum the Contractor considers to be or to have been due to him at the relevant due date...*"
- The Contractor said it was irrelevant whether they or the Employer had the date right, the application remained valid.

D McLaughlin & Sons v East Ayrshire Council

- The Court did not have to make a decision on when the works started as it decided the Council's claim was barred.
- However, the Court did reject the Contractor's argument that its application was valid in any event.

D McLaughlin & Sons v East Ayrshire Council

- The Court said that the service of the application places the Employer at risk of being liable for the full amount claimed.
- The Court said that if the Contractor specifies an incorrect due date in its application / payment notice, this fails to meet the requirements of the contract (and the Construction Act).

Other relevant cases from 2021

Multiplex v Bathgate & others

- Multiplex was the D&B main contractor on a large project in London.
- Multiplex's concrete frame sub-contractor went into administration during the works.
- Multiplex terminated their sub-contract and appointed a new sub-contractor, who found defects in slipform rig.

Multiplex v Bathgate & others

- Multiplex obtained judgment against the original sub-contractor and designers of the slipform rig.
- The designer of the rig were uninsured and based in Dubai, so Multiplex brought the claim against the third-party independent checker of the temporary works (RPM) and their insurer.

Multiplex v Bathgate & others

- Multiplex had no contractual relationship with RPM but argued that RPM owed them a duty of care and/or provided warranties to Multiplex.
- Court decided against Multiplex
- Case highlights the importance of considering which parties to obtain warranties from.

Toppan Holdings v Simply Construct (UK)

- This case concerned the beneficiary of a collateral warranty seeking to enforce an adjudicator's decision it had obtained.
- A previous case (*Parkwood Leisure v Laing O'Rourke Wales & West*) had established that collateral warranties are 'construction contracts' for the purposes of the Act.

Toppan Holdings v Simply Construct (UK)

- The warranty in the Parkwood case said that LOR “...warrants, acknowledges or undertakes...” The warranty in this case only said that the contractor “...warrants...”
- This, with the fact that the warranty in this case was executed 4 years post PC, led the judge to say this wasn’t a warranty for construction operations.

Toppan Holdings v Simply Construct (UK)

- Judge said when a contractor warrants a future obligation (...undertakes...), this will be a strong indicator that the warranty is an agreement for construction operations
- However, when works are complete (and like in this case defects rectified), likely there is no construction contract so no right to adjudicate

Toppan Holdings v Simply Construct (UK)

- Beneficiaries may insist on future warranties containing express stand-alone right to adjudication.
- This case is going to the Court of Appeal this year so the result may be reversed – watch this space!!
- Sensible to ensure warranties are executed during the works

Questions?

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