B&ES COMMERCIAL & LEGAL DEPARTMENT NEWS

C&L **FOCUS**

Navigate the adjudication maze with B&ES

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The B&ES allied legal firms have produced a range of articles to help members and to illustrate some recent cases in construction which are reproduced in full on the B&ES site.

In 2012 **B&ES launched a new adjudication service** to help offer B&ES members additional support when dealing with disputes. The 'B&ES Allies' were selected due to their in-depth knowledge of the construction industry and their commercial and cost- effective approach to dispute resolution. This issue of *C&L Focus* considers some samples of their detailed advice.

Setting off against a decision

Two recent cases highlighted by Prettys in the TCC, show the difficulties that a paying party will face in establishing a right to set-off a cross claim against an adjudicator's decision.

Two recent cases highlighted by Prettys in the TCC, show the difficulties that a paying party will face in establishing a right to setoff a cross claim against an adjudicator's decision. A right of set-off can arise either by operation of law; as an equitable remedy; or by virtue of a contractual provision allowing it. Each of these avenues were considered in the cases of ***Beck Interiors Ltd v Classic Decorative Finishing Ltd*** and ***Squibb Group Ltd v Vertase FLI Ltd***.

In the **Beck** case, Beck engaged Classic Decorative Finishing (CDF) as a subcontractor. Disputes arose and Beck referred its claims to adjudication. The adjudicator awarded Beck £43,000. CDF refused to pay so Beck commenced enforcement proceedings in the TCC. CDF resisted enforcement on the basis that Beck owed it almost €60,000 in relation to a project in Dublin.

The Court rejected CDF's argument and ordered enforcement of the adjudicator's award.

In the **Squibb** case, Vertase engaged Squibb as a sub-contractor. Works were completed 13 weeks late and a dispute arose as to who was responsible. The contract provided for LADs at the rate of £15,000 per week. Squibb referred a claim for an extension of time and loss and expense to adjudication and was awarded a 6 week extension and £167,000. In response Vertase refused to pay and served a withholding notice for more than £276,000, consisting of £105,000 for seven weeks of LADs and £171,000 in respect of Squibb's alleged failure to carry out certain works.

Squibb issued enforcement proceedings which Vertase resisted on the grounds that it was entitled to set-off against the award those sums set out in its withholding notice. Again, the TCC rejected Vertase's defence. It looked at the exceptions to the general rule that setting-off against an adjudicator's decision was rarely allowed. Whilst there was a set-off clause in the contract, the Court concluded that it was not wide enough to allow set-off against an adjudicator's award as it was a right limited to setting-off only against "any payments certified as due". Since the adjudicator's award was not a "payment certified as due", the contractual provision didn't apply to it and no set-off against it was allowed. Both these cases have highlighted again the considerable hurdles faced by a party seeking to avoid enforcement of an adjudicator's award. The principle of "pay now, argue later" remains key to the TCC's approach to enforcement.

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Practical Completion

The concept of "practical completion" is a frequent source of dispute on construction projects. Parties often disagree about what the term "practical completion" means and whether or not practical completion has been achieved.

What does it mean?

One of the main reasons why disputes about practical completion arise is that the term does not have a specific legal meaning. Over the years, the courts have considered the concept of practical completion on many occasions, resulting in a large number of different definitions, including:

- **The completion of all the construction work that has to be done *(Jarvis and Sons v Westminster Corp).***

- **Practical completion can be certified where there are very minor, 'de minimis' items of work left incomplete *(HW Nevill v William Press).***

- **Practical completion is a state of affairs in which the works have been completed free from patent defects, other than ones which can be ignored as trifling *(Mariner International Hotels v Atlas).***

Tying the threads of the different cases together, it is generally accepted within the construction industry that practical completion is achieved when all the necessary construction work is completed. Practical completion cannot be achieved when there are patent defects in the works, unless those defects are very minor.

However, whilst it might be possible to agree on a broad definition of what the term "practical completion" means, deciding whether or not practical completion has been achieved on a particular project is decidedly more difficult and will always have to be decided on a case by case basis.

Practical completion is a critically important stage in any construction project, particularly for the contractor.

Read more

More than one dispute?

Silver Shemmings considers how a party to a qualifying construction contract can only refer a single dispute to an adjudicator...

It has always been the case that a party to a qualifying construction contract can only refer a single dispute to an adjudicator when operating pursuant to the provisions of section 108 of the *Housing Grants, Construction and Regeneration Act 1996*.

If the adjudication was under a contractual provision rather than the Act and the supporting Scheme for Construction Contracts then it is possible that a provision in the contractual mechanism could act to allow more than one dispute to be referred at a single time. This comment is made in order to highlight that the provisions of a contract may act to change the statutory provisions albeit that most contracts follow the statutory requirements fairly closely. As a result there has been a lingering question about what constitutes a single dispute. There has been some earlier case law which touches on this issue but which does not give a detailed answer. That position has now been remedied by the judgment of Mr Justice Akenhead in the case of *Witney Town Council v Beam Construction (Cheltenham) Limited* [2011] EWHC 2332 (TCC) (12 September 2011).

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The battle of the forms

If terms and conditions are not attached to a purchase order, can they still be incorporated into the contract?

The recent case of *Trebor Bassett v ADT Fire & Securit*y demonstrates the Courts' approach to deciding who has won the battle of the forms. Hawkswell Kilvington use the example of when in 2003, Trebor decided to move their popcorn production facility from Leeds to Pontefract. ADT, who had supplied fire protection systems to Trebor in the past, supplied and installed the factory's CO^2 fire suppression system. One evening in June 2005, a fire broke out in the popcorn factory. The Fire Brigade were called, but believed that Trebor staff had already extinguished the fire and did not immediately enter the building. However, the fire continued to burn and the building was quickly destroyed. Trebor alleged that ADT's failure to design an adequate CO^2 suppression system had caused losses of £110 million. The Court ultimately decided that insufficient thought had gone into the design of the suppression system, with the effect that the fire was able to burn for too long before the system was triggered. ADT had fallen below the standard to be expected of an ordinarily competent fire prevention sub-contractor by failing to design the suppression system with reasonable skill and care.

One of the key issues in dispute was whether the parties had entered into a contract on Trebor's or ADT's standard terms and conditions. This was a very significant issue for both parties because although Trebor was claiming to have suffered losses of £110 million, ADT's standard T&Cs limited ADT's liability for breach of contract to twenty times the yearly service charge fee payable by Trebor – this amounted to just £13,000 in total. By contrast, if Trebor's standard terms were found to apply, ADT would be required to indemnify Trebor against all losses Trebor had suffered. ADT had provided a quotation to Trebor in August 2003, offering to supply the suppression system for £9,000. ADT's quotation stated that it was subject to ADT's standard terms and conditions, although a copy of these was not supplied. In September 2003, Trebor issued a Purchase Order accepting ADT's quotation. The Purchase Order stated that the contract was subject to Trebor's standard T&Cs which were "already supplied" and that additional copies were available "on request". These T&Cs were not included with the Purchase Order because Trebor assumed they had already been supplied to ADT in the past. However, the Court found no evidence that ADT had previously seen or agreed to Trebor's T&Cs.

The Court confirmed that the traditional offer and acceptance analysis must always be used to identify the winner of the battle of the forms, unless there is very clear evidence to show that the parties had agreed that other terms would prevail. The formation of a contract is grounded in the concepts of offer and acceptance, so applying this analysis to all battle of the forms cases provides clarity and certainty.

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