Construction Case Law Updates 2018

Presented By:

Mohammed Haque

Liability and Quantum Claim Expert

SILVER SHEMMINGS ASH

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Mohammad Haque
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Mohammed is a dual qualified legal and quantum professional. Construction Claims and Dispute Resolution is not only his profession it's his passion too

He completed his second degree BSC in Construction. Subsequently, he practiced as a PQS and has run a Claims and Dispute Resolution unit as a Partner. A Fellow of both the Institute of Construction Claim Practitioners and the Institute of Prime Dispute (where he is a Panel Arbitrator and Adjudicator too), Mohammed is a full Member of the Chartered Institute of Civil Engineering Surveyors

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Agenda

- **Delay Analysis Techniques**
- **Payment Notices**
- **Hybrid Contracts & Adjudication**
- **Service Of Notice**
- **Bonds**
- **Limitations Of Liability**
- **Contract Forms**
- **Statute**

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Delay Analysis Techniques: Prospective Or Retrospective

Fluor Ltd -v- Shanghai Zhenhua Heavy Industries Ltd [2018] EWHC 1 (TCC)

Making an Extension Of Time (EOT) application, or assessing one, needs **analysis** of the impact of a delaying event.

This may be done when a delaying event occurs and the impact is yet to be known. Alternatively, the analysis may be done as part of a claim or as an assessment after completion of the project or relevant section of it.

If the analysis is done in anticipation both the maker and the assessor of the application need to rely on ***prospective technique*** of analysis. This involves predicting the possible impact the delaying event may have.

The alternative is the **retrospective technique** of analysis, which is only available if the impact of an event has already occurred.

While retrospective is not available when the impact hasn't run out completely, the prospective method can still be adopted at a time the impact ceases to affect the progress any more.

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Payment Notices

Adam Architecture Ltd -v- Halsbury Homes Ltd, [2017] EWCA Civ 1735 CA reconfirms the requirements of a Pay Less Notice.

The case involves the Appeal by a firm of architects in litigation concerning its entitlement to recover fees following termination of its engagement.

The principal issue in this case was whether Section 111 of the 1996 Act applies only to interim payments or whether it also applies to payments due following completion of the works or termination of the contract. CA reconfirms that the same principle applies for all payments under the contract.

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Payment Notices

Systems Pipework Ltd -v- Rotary Building Services Ltd, [2017] EWHC 3235 (TCC)TCC considers the requirements of a valid Final Account notice

Coulson J interpreting the contractual provisions regarding the requirements of a payment notice observed (the same principle applies under statute) that the attempt to rely on a communication which includes an assessment of the final account is not a ‘’Notice” because:

i. It didn’t state that it was a notice

ii. It didn’t state the amount the Notifying Party considers as due

Coulson J stated that a notice must claim on its face that it is so, or at least be understood to be a notice

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Payment Notices

HSM Offshore BV -v- Aker Offshore Partner Ltd [2017] EWHC 2979 (TCC) (28 November 2017)

LAD provisions varied by agreement to change completion date (despite not being expressly amended)

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Hybrid Contracts & Adjudication - 3rd Time Lucky

Severfield (UK) Ltd -v- Duro Felguera UK Ltd.(No.2) [2017] EWHC 3066 (TCC) revisited and reaffirmed the position as to applications under a hybrid contract

The Court decided that in a hybrid contract an Adjudication can proceed only in respect of the part, which relates to construction operations as provided for in the HGCRA

A contracting party must make two separate applications to take advantage of the payment provisions of the HGCRA

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Service Of Notices Via Email - Arbitration / Adjudication

Glencore Agriculture BV -v- Conqueror Holdings Ltd, [2017] EWHC 2893 (Comm)

In the context of the Arbitration Act 1996 the court considered the effect of sending the Arbitration Claim and subsequent documents by email to an employee who the Claiming Party had been dealing with.

The Court decided that this was not effective service and remarked that a copy to the general email of the body corporate such as “info@” would have been sufficient.

However, **absent actual or apparent authority** of an employee, it is not effective service.

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Danger Of Amending The ABI Bond

Ziggurat (Claremont Place) LLP -v- HCC International Insurance Company plc [2017] EWHC 3286 (TCC)

A normal ABI bond can only be called upon in case of a breach by the Party whose performance is guaranteed.

In this case, an amended ABI bond included a new clause: “The damages payable under this Guarantee Bond shall include (without limitation) any debt or other sum payable to the Employer under the Contract following the insolvency (as defined in the Schedule) of the Contractor”.

The guarantor unsuccessfully argued that the debt certified by the CA upon the contractor’s insolvency was not recoverable.

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Limitation Of Liability Clause In A Construction Contract

Royal Devon And Exeter NHS Foundation Trust -v- ATOS IT Services UK Ltd [2017] EWCA Civ 2196

This dispute concerned the proper interpretation of a limitation of liability clause and the HC decided on the basis of a commercial sense that the following clause has only set one limit.

The defendant's case was that any damages being claimed were subject to the liability cap in the contract being valid and enforceable.

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The relevant provisions were as follows:

Clause 8.1.2 contained a limitation of liability provision:

"… the liability of either party for Defaults shall be limited as stated below:

(a) the liability of either party under the Contract for any one Default resulting in direct loss of or damage to tangible property of the other party or any series of connected Defaults resulting in or contributing to the loss of or damage to the tangible property of the other party shall not exceed the figure set out in schedule G

(b) the aggregate liability of either party under the Contract for all Defaults, other than those governed by sub-clause 8.1.2 (a) above, shall not exceed the amount stated in schedule G to be the limit of such liability"

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The aggregate cap was drafted as follows:

"Schedule G, Paragraph 9.2 The aggregate liability of the Contractor in accordance with sub-clause 8.1.2 paragraph (b) shall not exceed:

> 9.2.1 for any claim arising in the first 12 months of the term of the Contract, the Total Contract Price as set out in section 1.1; or
>
> 9.2.2 for claims arising after the first 12 months of the Contract, the total Contract Charges paid in the 12 months prior to the date of that claim."

At first instance it was decided that the clause 9.2 imposes a single cap on liability.

On appeal the CA reversed the judgment and preferred the view that business sense as opposed to commercial sense demands that the above clause be interpreted to include two different caps based upon which circumstances apply.

CONCLUSION

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QUESTIONS?

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