

In Site

Repudiation - lessons from Wembley

This summer's trial between Multiplex Construction (UK) Limited ("Multiplex") and Cleveland Bridge (UK) Limited ("CBUG") over the Wembley Stadium project was widely perceived as a success for the Australian contractor and a defeat for its steelworks sub-contractor. This was in no small part because it vindicated Multiplex's claim that CBUG was in repudiatory breach of contract when it walked off site.

The dispute

CBUG complained about problems with the flow of information even before it commenced work on site and relations between the parties deteriorated during the course of the project. Multiplex claimed that CBUG was late in lifting the famous steel arch and also complained of faulty workmanship. CBUG for its part claimed that Multiplex was undervaluing works, failing to pay agreed sums and refusing to pay for work done in lifting the arch. Matters reached a head when CBUG alleged that Multiplex's actions amounted to a repudiatory breach of contract, stopped work and left the site.

Repudiation

Repudiatory breach occurs where one party's conduct indicates that it no longer intends to accept its contractual obligations. If the innocent party "accepts" this conduct, then both are released from their contractual obligations. Not every breach of contract is serious enough to justify repudiation. A repudiatory breach must be a fundamental breach, i.e. it must deprive the aggrieved party of substantially the whole of the benefit it was meant to receive under the contract.

CBUG argued that Multiplex was in repudiatory breach because it had valued CBUG's interim certificates downwards, withheld payments that had been agreed between the parties and failed to consult with CBUG before issuing interim certificates. In return, Multiplex argued that CBUG was in repudiatory breach by stopping work and leaving the site.

In his judgment, Mr Justice Jackson agreed with Multiplex. He did not accept that Multiplex's actions amounted to a repudiatory breach, even

Welcome to the Winter edition of In Site.

In this edition, we consider repudiation in the context of a recent case on the Wembley Stadium project. We also look at forthcoming developments in relation to the Construction Industry Scheme, the CDM Regulations and the law on corporate killing

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though he acknowledged that Multiplex's strategy had been ruthless. Although Multiplex's actions constituted a breach of contract, they were not sufficiently serious to amount to a repudiatory breach. Also, contrary to CBUK's contention that Multiplex's conduct indicated that it no longer accepted the contract, Multiplex had continued to participate in contractual adjudications against CBUK. Such conduct actually indicated a general intention to be bound by the contract. Worse for CBUK, if Multiplex was not in repudiatory breach, then it could not justify walking off site. This meant that *it* was in repudiatory breach.

Conclusion

Multiplex's victory underlines the dangers inherent in a claim for repudiatory breach. A party which alleges repudiatory breach and stops work must be absolutely certain of its position. Otherwise, its own actions in stopping work may be considered a repudiatory breach and it might incur liability accordingly.

The judgment was followed in October by news that Multiplex had reached a settlement with Wembley National Stadium Ltd. It now seems that there is finally light at the end of the players' tunnel as Multiplex remains hopeful that the stadium will be ready for next year's FA Cup Final.

CIS - are you ready?

In previous editions of *In Site* we have reported on the new Construction Industry Scheme ("CIS"), which will take effect from April 2007. The aims of Her Majesty's Revenue & Customs ("HMRC") when introducing the new scheme were:

- to reduce the regulatory burden;
- to improve the level of compliance; and
- to help construction businesses to get the employment status of their workers right.

The new CIS will inevitably be judged against these criteria. As the date for implementation draws near, many remain concerned about how it will operate.

Under the new CIS, returns are required to be filed by the contractor within 14 days after the end of each tax month, stipulating what payments have been made to each subcontractor. Nil returns are also required. Each month, the contractor must confirm that the employment status of each of the subcontractors has been considered and that each subcontractor has been verified. The penalty for a late return

(even a nil return) will be £100 per month and organisations could find themselves facing fines of up to £3,000 for false declarations about employment status. However, it is not only the potential penalties that have alarmed the industry; the hidden costs of ensuring compliance, such as staff training and software modifications, have made some question the new CIS.

In addition, despite the fact that the CIS' implementation has already been delayed by a year, there is widespread concern that HMRC has done too little to explain how it works, so that even those who want to prepare themselves are unable to do so. There is also concern about HMRC's own readiness to operate the CIS, in terms of the adequacy of both its IT systems and its telephone help-line (0845 366 7899).

In the face of such concerns, HMRC has made further concessions by announcing a six month period (until 19 October 2007) during which organisations will not incur penalties if they can show that a failure to comply with the new CIS arose from "innocent errors". However, this concession is limited, as late or incorrect returns will still count towards companies' compliance records and, therefore, be taken into account when renewing CIS gross certification.

Clearly, it is safest for all those who will be affected by the new CIS regime to take immediate steps to ensure that they understand the new rules and will be able to implement them reliably from the outset. The unprepared will have to put their faith in HMRC.



Murder Incorporated

The government's Corporate Manslaughter and Corporate Homicide Bill seems almost certain to become law in the coming year, having been included in the Queen's Speech on 15 November 2006. Although it may be subject to amendment during the parliamentary process, it will represent the culmination of years of debate about the reform of our corporate killing laws.

The current state of the law has been subject to widespread criticism. It has been notoriously difficult for the authorities to obtain convictions, particularly against large organisations where it is difficult to identify a "controlling mind" of the company. In fact, there have only been seven successful prosecutions of corporate defendants in the last twelve years.

The new law will apply to corporations, i.e. bodies corporate, whether incorporated in the UK or elsewhere. This includes companies, LLPs, local authorities, NHS Trusts and voluntary

organisations (where they are corporations). The Bill does not apply to unincorporated bodies such as partnerships, trade unions or friendly societies. Also, it does not apply to individuals, but this does not affect an individual's potential liability for other health and safety offences such as under the Health and Safety at Work etc Act 1974.

An organisation will be guilty of an offence if the jury answers "yes" to the following questions:

- Did the body corporate owe a *duty of care* to the victim?
- Did the *failings in management* breach that duty of care?
- Were those failings attributable to *senior management*?
- Did that breach *cause* the victim's death?
- Was the breach a *gross breach*?

Under the proposed legislation, companies convicted of an offence will be subject to an unlimited fine. In addition, the court will have the power to impose remedial orders requiring the organisation to remedy the cause of the fatal injury. The Bill has not been universally welcomed, however, even by critics of the current law, and there have been protests in Westminster against the Bill. Many representatives of employee organisations and victim support groups regard the fact that company directors will not be individually liable to criminal conviction under the new law as an unacceptable concession to the corporate lobby.

It remains to be seen whether the new legislation will have a dramatic effect on British industry if and when it comes into force. Even by the government's own predictions, it only expects a handful of extra prosecutions every year and this is unlikely to satisfy campaigners for reform.

Revising the Construction (Design and Management) Regulations 1994

On 17 October 2006, the Health and Safety Commission approved proposed revisions to the CDM Regulations 1994 and an Approved Code of Practice for formal submission to government ministers. The revised regulations will combine provisions from the CDM Regulations 1994 and the Construction (Health Safety and Welfare) Regulations 1996 in a single regulatory package that will be supported by the

Approved Code of Practice and industry-approved guidance.

The decision to revise the Regulations follows an industry-wide consultation in 2002, which highlighted long-standing concerns over their complexity. Provided ministers agree to the proposals, it is intended that the new, simplified, regulations and Approved Code of Practice will be

implemented in April 2007. However, the Approved Code of Practice is to be made available in January 2007, so as to give construction and design professionals the opportunity to plan and prepare for the regulatory changes involved.

Adjudication update

Withdrawals from adjudication

In *Midland Expressway Ltd v Carillion Construction Ltd and Others (No. 3)* (TCC, 13 June 2006) Mr Justice Jackson confirmed that there was nothing prohibiting a party from withdrawing a claim during the course of an adjudication.

Midland Expressway issued these proceedings to challenge the decision of an adjudicator. Mr Justice Jackson held that the Carillion consortium was entitled to withdraw its claim from the adjudication as there was nothing in the contract prohibiting it from doing so and that neither the Construction Act 1996 nor the Scheme could be read as imposing any restriction prohibiting a party from withdrawing a disputed claim which had been referred to adjudication.

Mr Justice Jackson commented that “adjudication should not become a game of chess in which the tactical skill of the players determines the outcome”. A party could not, therefore, be restricted from withdrawing a claim from adjudication. If such a restriction were in place, parties would be compelled to continue to pursue or defend bad claims against their will.

Contracts in writing

In *Redworth Construction Limited v Brookdale Healthcare Limited* (TCC, 31 July 2006) Judge Havery QC declined to enforce the decision of an adjudicator as he found that there was not a contract in place with sufficient terms recorded in writing; the adjudicator therefore had no jurisdiction to decide the dispute.

By way of background, the parties had agreed a document in April 2003, which was revised in December 2003 to include a date for completion. Redworth requested an extension of time, which Brookdale declined. Redworth then referred its claim to adjudication, relying on the April 2003 document. On this basis, the adjudicator awarded Redworth £210,576.67. Brookdale resisted the claim for enforcement, claiming that the adjudicator had no jurisdiction because the contract was not in writing.

Redworth argued in the TCC that the contract was set out in writing in the December 2003 document and in the April 2003 document, having said in the adjudication that the contract was fully set out in the April 2003 document. The Judge held that Redworth was “blowing hot and cold” and was not entitled to resile from its original position.

Redworth could not therefore rely on the December 2003 document to show that the material terms were set out in writing.

The Judge referred to *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002], where the Court of Appeal held that all the agreement had to be in writing. The completion date was only put in the December 2003 document and, because Redworth was not entitled to argue that this document formed part of the contract, the Judge held that the terms were not sufficiently set out in writing. Accordingly, the adjudicator had no jurisdiction and the claim for enforcement of his decision failed.

Stop Press

Contract update

The latest addition to the JCT suite of contracts - the Constructing Excellence Contract - is scheduled for publication in December. This contract is intended for use throughout the supply chain on projects, with a focus on collaborative working. We will bring you further details in a future edition of *In Site*.

Who to Contact

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