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PART OF TSA MANAGEMENT

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MESSAGE FROM THE MANAGING DIRECTOR

JIM BOURKE

Welcome to the pre-festive period edition of our EBrief publication, which is the fourth such publication this calendar year. I do hope you get the chance to read it while juggling the season's festivities with end of year deadlines. Thank you to Scott Milner and Amy Telling, who are both instrumental in pulling together and presenting the content, ensuring a professional publication every time.

Once again, we have a guest article from the legal profession and, on this occasion, from the jurisdiction of Singapore. Danna Er and Ace Yuan provide some useful insights into the developments in construction law seen in Singapore during 2023.

A further article from Singapore is provided by DGA's Ellen Wong (Associate Director), who, using her own delay analysis knowledge, looks at the importance of facts in any formal dispute and the sources from which they can come.

The DGA UK team provides two articles. Alex Edwards (Senior Consultant) looks at how Adjudicators are viewing the application of limitation on issues presented before them. While Simon Edney provides Part 2 of his look into how Change should be valued under the JCT SBC 2016 (without quantities).

Lastly, the newest member of our Melbourne team down in Australia, Lorine Liu (Senior Consultant), bravely steps forward to present a review on the effectiveness of adjudication across three of the five states.

Industry analysts in the UK are forecasting a recession in the construction industry lasting through to 2025 with a contraction in output due to the continued weak economy. Such news is not good reading for Tier One Contractors and their supply chain members, who have been reporting much-reduced performance figures in recent months for their last year's accounts.

Despite the predictable association of a slowdown in the house building sector over the last 6 months plus, and the UK government scaling back on major infrastructure expenditure, such as HS2 northern leg, skill shortages for contractors remains a real issue, only partly being addressed by the recently updated Shortage Occupation List (SOL) where sponsorship becomes available under the Skilled Worker Route. However, in recent days, the government has announced that the 20% discount applied to minimum salaries for applicants under the SOL

will be axed, thereby reducing the number of eligible occupations on the SOL. Furthermore, the skilled worker minimum salary threshold is to rise by nearly 50%. Both of these changes are to be introduced in Spring 2024. Time will tell as to how much these measures, as part of the government's drive to reduce net migration will further affect the construction industry.

In Australia, industry analysts predict that the output of the construction industry is expected to decline by 2.5% in 2024, owing to subdued investor and consumer confidence amid elevated inflation, interest rates, high construction costs, falling building permits, labour shortages and the continued downturn in the residential construction sector.

There is more positive news from the Singapore region where, looking ahead to 2024, there are reported signs of a boost to construction associated with manufacturing, transportation infrastructure, and clean energy infrastructure, as funds arising from some key pieces of legislation passed in 2021 and 2022 are likely to flow through.

As always, the worldwide construction industry faces its cyclical challenges, despite which we all continue to enjoy our respective involvement in an exciting and ever-developing industry. This is something to remember as we move into the New Year.

If you would like to discuss any of the featured topics, the wider DGA training services detailed at the end of the E-Brief, or indeed, any related matter, please feel free to contact any of our office representatives.

I hope you enjoy reading our latest E-Brief and the forthcoming festive period.

EVERYONE IS ENTITLED TO HIS OWN OPINION, BUT NOT HIS OWN FACTS.

ELLEN ALEXANDRA WONG
ASSOCIATE DIRECTOR, DGA SINGAPORE

"Everyone is entitled to his own opinion, but not his own facts".

This frequently cited quote usually is attributed to the late Senator Daniel Patrick Moynihan, who first expressed it in 1975 and later on, by other notable speakers.[i] Though not originally used in a construction context, fast forward almost fifty years later, these words have a haunting quality in dispute proceedings surrounding delay and dispute claims.

In the recent case of *Pro-Active Engineering Pte Ltd v Prime Structures Engineering Pte Ltd* [2023] SGHC 205, the court held that in making its judgment, it relied on facts that corroborated with the documentary evidence and discarded any testimony that appeared inconsistent with the clear evidence presented.

> *79 The court notes that Kuon [Yee Yen] [ii] consistently disagreed with counsel…despite the clear evidence presented to the court…*
>
> *111 At this juncture, the court would point out that it does not believe or- accept Kuon's version of events nor his interpretation of the reduced scope of the contracted works. It is reprehensible the extent to which Kuon would go, to deny or dispute facts despite overwhelming evidence.*
>
> *112 Another instance of Kuon's refusal to admit the obvious was his disavowal of the Variation Order…even though the document contained the additional steel works at the trellis area that Pro-Active requested to, and did, take over from Yabo.*
>
> *113 The court prefers the testimony of Frankie and Andrew as they were more credible witnesses. Their evidence was consistent with the documentary evidence that was before the court.*

i Quoted in proceedings of a Senate Intelligence Committee in 1980; Quoted in Timothy J. Penny, National Review September 4, 2003; Quoted in Michael Pence's line from 2020 Vice Presential debate against Democrat Vice-presidential nominee Kamala Harris.

ii Kuon Yee Yen, also referred to as Kuon in the judgement, refers to the person in charge and project manager of the contracted works for Pro-Active Engineering Pte Ltd

117 Contrary to Pro-Active's closing submissions, Kuon's version of when he was notified of Pro-Active's termination is ***neither credible nor corroborated by documentary evidence****.*

It is not unusual for the contractors to issue unsubstantiated delay and disruption claims without providing enough evidence in relation to the causes. Selected facts may also be creatively adapted into a narrative that is favourable to one party. In the absence of contemporaneous evidence, the process descends into a case of "he says, she says". Courts have stressed the importance of contemporaneous records in proving delay and disruption claims, and the outcome often hinges on such documentation.

THE IMPORTANCE OF CONTEMPORANEOUS RECORDS

The evidential burden in establishing entitlement is on the party who claims. Having reliable and contemporaneous records can increase the likelihood in winning a claim while poor records can risk losing a claim. The general rule of thumb is that records should be sufficiently detailed to enable a third party with no project knowledge to reconstruct events.

We first consider what is defined to be contemporaneous. In short, at the time of, as opposed to, after the event. According to the Society of Construction Law ("SCL") Delay and Disruption Protocol (2017), ***'Written communications should be uniquely numbered, contain a descriptive subject line, be dated and be issued to the agreed distribution list. Any important oral communication ought to be confirmed in writing'***. Factors affecting the credibility of the records include the extent to which they are: contemporaneous, dated, first hand, neutral and objective, with corroborative and supporting evidence.

In the case of *Attorney General of Falkland Islands v Gordon Forbes Construction Ltd (2003)* 6 BLR 280, Judge Sanders defined contemporaneous records to be ***"original or primary***

documents, or copies thereof, produced or prepared at or about the time giving rise to a claim, whether by or for the contractor or the employer." The emphasis is on the keeping records which document the events and circumstances at the time of, or very close to the time of, the claim.

Keeping reliable and consistent records throughout the project is necessary for the proper management of the works. A record keeping system that is mutually agreed between the employer and contractor may be beneficial in the event that a time dispute arises. Agreeing on the factual matrix of the project and how progress should be measured could also save time, cost, and simplify the dispute process.

The case of *AG of Falkland Islands* also addresses what happens when a party who is bringing a claim fails to provide contemporary records but produces records at a later date. On this issue, Judge Sanders determined that ***"Where there is no contemporary record to support a claim, then the claim fails."*** Furthermore, he held that it was not possible to avoid the contractual requirement of contemporary records by simply producing witness statements at some point after the event. Although witness statements may record the recollections of project personnel who were involved, these are not substitutes for the proper keeping of contemporary records at the time of the claim. It is clear that verbal evidence is not considered to be contemporaneous records.

DELAY CLAIMS

The type of records required depends on the claim. Delay and disruption claims depend on establishing cause and effect: what was done, when it was done, and what was the effect. In *Van Oord and another v Allseas UK Ltd* (2015) EWHC 2074 (TCC), Justice Coulson noted that ***"contemporaneous documents are a useful starting point when trying to work out what was happening on site at any given time, and what the relevant individuals thought were the important events on site during the works."***

The records that are of particular importance in delay and disruption claims are site diaries, progress reports, meeting minutes, programme updates and revisions, and letters. Such documents enable the continuing effect of problems to be communicated to all parties involved. However it is worth noting that if these records not related to specific delaying events, then they are unlikely to provide the required clarity of evidence needed to substantiate a claim effectively.

The reliance on contemporaneous records is illustrated in *White Construction Pty Limited v PBS Holding Pty Limited* (2019) NSWSC 1996. The contractor brought a delay claim against its sub-contractors. In deciding against the claimant, the Supreme Court analysed the alleged delay claim using an ***"open-textured approach"***, by paying close attention to the contemporaneous records during the works rather than relying on the results of a specific delay analysis methodology.

The court examined the evidence presented to understand if the modified sewage design and approval had delayed the project and, if so, by how much. To determine the extent of delay, the main evidence relied upon by the court were the daily site diaries, which included information such the personnel on site each day, the planned work for that day, and if there were any obstructions to the planned work.

The court found that an analysis unbounded by any specific methodology was the most appropriate way to analyse the delay, as it was consistent with a broad common-sense approach to causation that examined key facts and contemporaneous evidence. It considered that contemporaneous records such as progress records, minutes, emails, timesheets, and site diaries, were the best evidence.

In the case of *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Ptd Ltd* (2022) SGHC 257, Judge Lee Seiu Kin was of opinion that "***the parties and experts have missed the wood for the trees"*** and instead, relied on the contemporaneous records to determine the critical delay preventing the pipe-jacking works from commencing on site. He explained that ***"causal arguments are notoriously fluid and can be formulated in a variety of different ways, to reach opposite conclusions"***.

As such, while the ***"but for"***[iii] cause was trite law, this form of causal reasoning tends to be necessary only in cases where the effect of competing causes of delay was either unknown or unclear. In the event that the evidence clearly demonstrate what the critical delay was, it was ***"causally irrelevant"*** to determine if, and the extent to which the employer's delay bore on the contractor's progress.

This judgement is a reminder that the opinion of a delay expert alone will not substitute the requirement for evidence of the actual cause and impact of an alleged delay. The use of expert evidence must be connected to the factual evidence from the project. The decision in Pro-Active Engineering v Prime Structures Engineering reinforces that the narrative of the claim and witness statements must be consistent with the factual evidence presented.

DISRUPTION CLAIMS

Hudson's Building and Engineering Construction Contracts distinguishes between delay and disruption, stating that:

> *The distinction between delay and disruption is important, but rarely articulated, and is to an extent a matter of definition. Delay is usually used to mean a delay to the completion date, which presupposes that the activity which was delayed was on the critical path.* ***Disruption to progress may or may not cause a delay to overall completion, depending on whether the activity delayed is on the critical path as explained above, but will result in additional cost where labour or plant is under-utilised as a consequence of the event.***

Similarly, in disruption claims, regardless of the method of analysis used, the outcome rely upon the facts that are established by reference to the contemporaneous records. How important it is for a contractor to keep contemporaneous records is illustrated in *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2865 (TCC).

In this case, Honour Judge Stephen Davies noted that:

> *…what is referred to as the 'measured mile' approach…****ought to have been verified by being able to demonstrate that the planned outputs had actually been achieved in some cases where the disrupting events did not occur****…it ought to have been relatively easy,* ***by reference to the contemporaneous records which were produced, to have conducted a cross check on a suitable sample basis****…*

iii To apply "but for" causation to delay claims, one would assess whether the project would have been completed on time but for the occurrence of the specific event in question. If the delay would not have occurred without the event or action, then that event or action can be seen as the cause-in-fact of the delay.

While the SCL Protocol describes several productivity-based and cost-based methods to measure disruption, the most well-known method is the ***"measured mile"***, which is described to be one of the ***"most reliable and accurate project-specific studies"*** although, only if ***"properly implemented".***[iv] Again, it has been demonstrated that regardless of the methods of analysis used, whether the events in question caused disruption and a loss of productivity would depend on the quality of the records. Ultimately, the results must be sense checked.

Given the cross-checks required between the results of an analysis to the contemporaneous records, a distinct lack of concern or reporting of the events would be unhelpful. Justice Coulson noted that ***"there is little indication in the contemporaneous documents, that, at any time, OSR put any great emphasis on these matters...To the extent that the contents of the contemporaneous documents comprise a credibility test to be applied to the OSR***[v] ***claims, then I consider that . . . they comprehensively fail the test".***[vi]

CONCLUSION

Most contractors tend to approach each new job optimistically and assume that it can be completed in a timely manner without dispute. Instead of relying on blind optimism, the prudent contractor should implement a project documentation system that serves two purposes: first, to ensure adequate control and monitoring of the project; and second, to build an accurate and comprehensive record of the job conditions, problems encountered, and their impact on the project.

When it comes to time related disputes, good record keeping is insurance. With the progression of time, memories may become hazy, verbal agreements are not always clearly recalled, and disputes may become more probable. Poor documentation can destroy the credibility of otherwise meritorious claims while ready access to factual data can prevent confusion and subsequent disagreements. Most importantly, good record keeping ensures that all parties in a project understand the same facts and do not indulge in fabricating its own version of reality.

iv Paragraph 18.25 of the SCL Protocol.

v OSR refers Van Oord UK and Sicim Roadbridge, the joint-venture contractors for the project.

vi Van Oord and another v Allseas UK Ltd (2015) EWHC 2074 (TCC).

LIMITATION IN ADJUDICATION – DOES ADJUDICATION AMOUNT TO AN ACTION?

ALEX EDWARDS

SENIOR CONSULTANT, DGA UK

The Judge in *LJR Interiors Ltd v Cooper Construction Ltd [2023] EWHC 3339 (TCC)* explored the issue of the limitation defence in adjudication. Although the judgement was given with a word of caution from the Judge, HHJ Russen KC grappled with the application of s5 of the Limitation Act 1980, and how the Adjudicator approached the limitation defence in the preceding Adjudication.

THE FACTS

The Parties entered into a (simple) construction contract on 26 August 2014 whereby LJR were to carry out and complete dry lining, plastering and screed works for Cooper. The contract sum was £18,675 with monthly invoices for work undertaken to be paid within 28 days.

The works completed on 19 October 2014, which was shortly followed by LJR's Application for Payment ("AFP") No.3 on 31 October 2014. Cooper dealt with AFP No.3 in the normal fashion and notified the sum it considered due in its Payment Notice.

Almost 8 years later LJR submitted its AFP No.4 on 31 July 2022 which was largely based on its AFP No.3.

Cooper did not respond with a payment and/or pay less notice against AFP No.4, nor did it pay the sum claimed. LJR subsequently served its Notice of Adjudication on 9 September 2022.

THE ADJUDICATION

LJR stated in its Notice that the dispute arose around 22 August 2022 when Cooper failed

to pay the sums claimed in LJR's AFP No.4 by the final date for payment. The Referral was a simple payment dispute claiming the sum not paid by the final date for payment.

LJR considered was due to it.

Cooper's response was that, pursuant to s5 of the Limitation Act, LJR's claim was outside of the limitation period of six years for a simple contract.

The Adjudicator dealt with the issue of limitation stating that the cause of action accrued when the breach took place. That being when the sum claimed in AFP No.4 was

The Adjudicator went on to state that the Limitation Act seeks to bar a remedy, not a right, and that the Scheme does not impose a limit as to when a claim for payment can be made. Therefore, the Adjudicator decided that LJR's AFP No.4 was a valid application from which the payment obligations flow.

Accordingly, the Adjudicator found that the limitation period had not expired because the cause of action did not occur until the final date for payment when the breach occurred.

LJR were successful in the Adjudication, to which Cooper continued to resist. LJR sought to enforce the Adjudicator's decision in the Court and Cooper sought a Part 8 declaration regarding the enforceability of the Decision in consideration of the claim being barred by limitation.

THE JUDGEMENT

It is well settled that adjudicator's decisions will often be enforced despite that the decision may be considered as wrong. However, aggrieved parties often seek a Part 8 declaration from the Court on specific points that may overturn an adjudicator's decision.

The Judge in this case recognised that the limitation issue needed to be considered because this claim was not a typical payment dispute that is often before the Court. The Judge stated that LJR's claim was:

"perhaps better viewed as a return to

an otherwise cold contractual scene long after the time when any appropriate investigations into it might be expected the have concluded."

With that in mind, the Judge was faced with determining whether LJR's claim was statute barred, or whether the decision should be enforced, with the primary issue being, *is adjudication captured by the Limitation Act*?

THE LIMITATION ACT

S.5 of the Limitation Act requires an 'action' to be brought prior to the expiry of the limitation period; in this case, for a simple contract that was 6 years from performance. S.5 provides as follows:

'an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued'.

S.38 defines an 'action' as follows:

"action" includes any proceeding in a court of law, including an ecclesiastical court."

The term 'action' is further extended to include arbitral proceedings. However, there is no mention of adjudication and whether adjudication constitutes an 'action' for the purposes of the Limitation Act.

The terminology of the Construction Act has been the subject of much judicial focus, one part of which is that a dispute can be referred to adjudication 'at any time'. This complicates matters when seeking to apply the Limitation Act as a defence.

THE AUTHORITIES

To address this issue the Judge first turned to the authorities. In *Connex South Eastern Limited v M J Building Services Group PLC [2005] EWCA Civ 193,* Lord Dyson stated:

"There is, therefore, no time limit. There may be circumstances as a result of which a party loses the right to refer a dispute to adjudication: the right may have been waived or the subject of an estoppel. But subject to considerations of this kind, there is nothing to prevent a party from referring a dispute to adjudication at any time, even after the expiry of the relevant limitation period. Similarly, there is nothing to stop a party from issuing court proceedings after the expiry of the relevant limitation period. Just as a party who takes that course in court proceedings runs the risk that, if the limitation defence is pleaded, the claim will fail (and indeed may be struck out), so a party who takes that course in an adjudication runs the risk that, if the limitation defence is taken, the adjudicator will make an award in favour of the respondent."

The point made by Lord Dyson being that, although there appears to be no express limitation on a dispute being referred to adjudication with regard to the Limitation Act, the referring party runs the risk of the limitation defence being pleaded by the respondent.

The Judge at this point recognised that that in consideration of *Connex*, it is difficult to identify good reason why the limitation defence should not form part of a dispute referred to adjudication. Particularly so because, despite adjudication not expressly amounting to an action for the purposes of the Limitation Act, the decision which comes out of an adjudication may lead to court proceedings which plainly do.

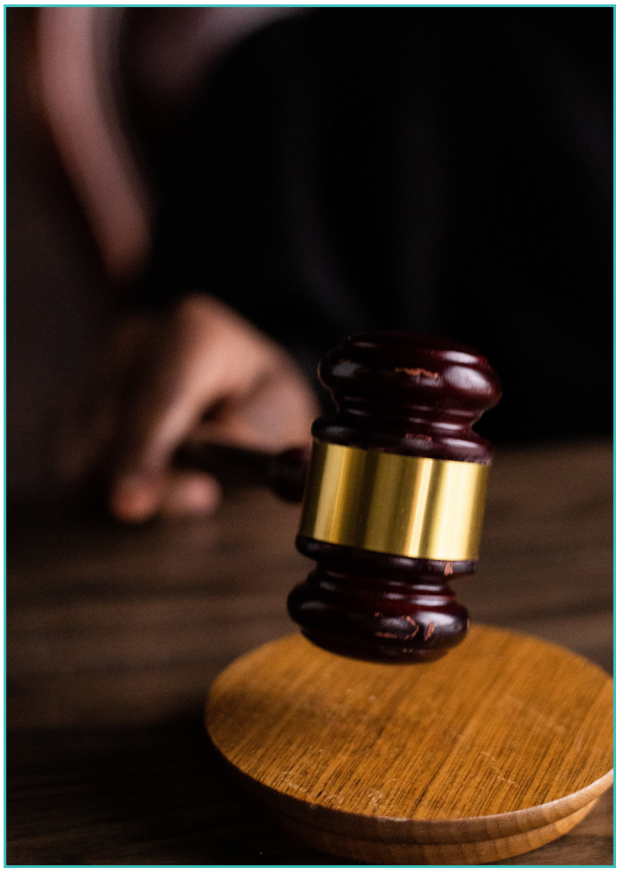
The Judge went on to consider *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc [2015] UKSC 38*, where Lord Mance observed that:

> ***"…. If there is an adjudication award within 6 years of performance, without any further proceedings being commenced, both sides are after the six-year period time-barred in respect of any claim to any balance which they originally contended to be due to them. Any further proceedings would be limited to a claim for repayment by the party required to pay a net balance to the other. "***

Lord Mance made it clear that only court proceedings that relate to the enforcement of the adjudicator's decision (as in the obligation to comply with the decision rather than the substantive issue) may be brought after the limitation period and to which attract their own limitation period in line with the contract.

The authorities therefore do not help to answer the question of whether adjudication amounts to an 'action' under the Limitation Act, only that the succeeding court proceedings, by way of a Part 8 claim that may follow the adjudicator's decision, are caught by the Limitation Act.

However, the Judge noted that since there is a contractual and statutory backed obligation to comply with an adjudicator's decision, which for the purposes of the Limitation



Act is distinguished from court and arbitral proceedings, yet is enforceable by the court or arbitration, leads to the conclusion that the limitation period should be applicable to contract claims at both levels of the dispute resolution process.

The Judge further considered Keating on Construction Contracts, which at para 16-047 states that:

> ***The Limitation Act 1980 and other enactments apply equally to adjudication in the sense that an adjudicator must treat the law of limitation as a substantive defence just as any other defence.***

The Judge stated that the statement in Keating appears to be a statement of the obvious, in that the true nature of the limitation defence does not extinguish the right but in certain types of legal proceedings operates to bar the remedy. Further, the fact that an adjudicator is required to reach his decision in accordance with the applicable law in relation to the contract, the adjudicator as the decision maker himself would recognise that the decision is effective subject to final determination before a tribunal where there is no question as to the limitation defence being effective in the same dispute.

THE JUDGE'S CONCLUSIONS

The conclusion that HHJ Russen KC reached was that:

> ***'… in my judgement, the context does require the term 'action' in the non-exhaustive definition provided by s38 of the [Limitation Act] to be read as including adjudication proceedings. On that basis, such proceedings are not expressly excluded […] from the meaning of 'action' by s38 of the [Limitation Act]. Further adopting what Dyson LJ said in Connex, s108(2) of the [Construction Act] cannot be read as prescribing any limitation period, so neither can it be suggested that s39 of the [Limitation Act] operates to disapply its s5.***
>
> ***However, should the point still be regarded as uncertain, because the Contract might be embraced by the language of section 5 [of the Limitation Act] but not the dispute resolution process of adjudication (the "non-action") implied into it, then I would nevertheless come to the alternative conclusion that it is enough that the court is required to consider it in the "action" which is plainly before it on the Part 8 Claim.'***

The Judge concluded that, in context, the term 'action' was not exhaustive and should include adjudication proceedings on the basis that they are not expressly excluded, as are some other 'non-court' methods of payment recovery.

Alternatively, the Judge concluded that it is enough that because the contract is embraced by the Limitation Act but not the dispute resolution process, that the court is required to consider the limitation defence in the action before it.

COMMENTARY

Although the outcome in this judgement is generally supported because adjudication should not be able to circumvent the concept of limitation, it has been the subject of some discussion.

One point of discussion is that the Court's objective in cases where the answer is not expressly identified in statute, is to interpret the Parliament's intentions from the language used. In this case, the statute appears clear in its intentions, in that the Limitation Act is

clear what was intended to constitute as an 'action'. Further, the Limitation Act predates the Construction Act, therefore, the issue here is that the argument is circular. If the Limitation Act is 'applicable law' of which an adjudicator must consider in the making of his decision, then when faced with the question of whether adjudication is considered an 'action', the answer is that it is not by definition of s38 of the Limitation Act, which is what the respondent will be relying upon in the adjudication.

It follows that when the Court is seeking to interpret the intentions of Parliament with regard to adjudication amounting to an 'action' within the definition of s38 of the Limitation Act, one must ask how that interpretation can include adjudication, which is a product of statute that postdates the very definition being interpreted.

In contrast, HHJ Russen KC's judgement does prevent an adjudicator ruling on his own jurisdiction to decide the substantive dispute if adjudication is considered as an 'action' and the limitation defence is raised. It is commonly understood that an adjudicator is prohibited from ruling on his own jurisdiction, and prior to this case, an adjudicator could in effect rule on his jurisdiction to decide the substantive dispute if adjudication was not considered an 'action' under the Limitation Act. However, following this judgement, an adjudicator must bring an end to the substantive dispute should the limitation defence be raised and succeed, and the parties will not be subjected to unnecessary expense.

Key points of consideration following the ruling in *LJR v Cooper* include:

1. If you are considering referring a dispute to adjudication:

a) Are you vulnerable to the limitation defence?

b) Check the contract, is it a simple contract or signed as a Deed?

2. If you are the responding party in a dispute:

a) Are you able to raise the limitation defence to dismiss the claim entirely?

b) Evaluate when the cause of action began to accrue and consider limitation under both a simple contract and a contract signed as a Deed.

c) If you are pleading the limitation defence, be sure to reserve your position should the adjudicator consider it does not apply in the circumstances.

This case demonstrates that if a contractor's application for payment is met with a payment notice containing an amount lower than applied for, the contractors should not leave it took late to refer the dispute concerning the value to the works, other amounts, and the notified sum. This principle could equally apply to any submitted claims which are then reduced or rejected outright by the other party. Resurrecting and pursuing the same disputed claim after the limitation period has expired is likely to be fertile ground to have the resurrected disputed claim struck out and jurisdictional challenge.

DGA can can provide you with advice regarding your position under the contract and represent you in adjudication proceedings accordingly.

PART 2: VALUING CHANGE UNDER JCT SBC WITHOUT QUANTITIES 2016

SIMON EDNEY

ASSOCIATE DIRECTOR, DGA UK

BACKGROUND

In our last article we looked at how the JCT Standard Building Contract without Quantities (the "*JCT Contract*") deals with the valuation of Variations and asked; "Why use Loss and Expense" when, under the Valuation Rules, any Variation can be valued in accordance with the rates and measures included within the Contract, or on a fair and reasonable basis, and can include preliminaries and overheads and profit ("*Oh&p*")?

The advantages of pricing and agreeing traditional loss and expense type costs within a Variation, as opposed to a separate loss and expense account, can be numerous for both the Contractor and Employer. *But what does the JCT Contract actually tell us about how we should price loss and expense?*

In this article we ask; *'What is Loss and Expense'? We explore the events which entitle the Contractor to recovery of loss and expense, and examine the potential cross-over between the loss and expense provisions and Valuation Rules within the JCT Contract.*

Within the JCT Contract, loss and expense is the term given to the additional costs incurred by the Contractor as a result of an act, omission or default of the Employer. The RICS provides the following useful definition:

> ***"Loss and expense in terms of a construction contract are the direct loss and expense which would not be reimbursed by a payment under other contract provisions. These are additional costs or losses the contractor suffers as a result of an employer-driven event, act, omission or default. The contractor is entitled to recover that loss and expense in order to put him or herself back in the financial position that he or she would otherwise have been in."*** [i]

i Paragraph 1.1, page 3 of the RICS' Practice Standards 'Ascertaining loss and expense'. Note that this document is currently 'out of print' and is withdrawn from the RICS QS & Construction Practice Information (Black Book).

According to the RICS then, loss and expense essentially amounts to compensation for an ***employer-driven event*** which is ***not recovered under any other contract provisions***.

Ok. But, in what circumstances would loss and expense be used? Well, within the JCT Contract, the ***employer-driven events*** which entitle the Contractor to loss and expense are known as ***Relevant Matters***. These Relevant Matters are described within clause 4.20.1 as matters which "materially affect" the "regular progress of the Works".

Put into other words, loss and expense will include the cost of delay and/or disruption to the Works. But must ***all*** delay and disruption cost be ascertained by reference to the loss and expense provisions of the JCT Contract?

Before we address this question, let's take a look at the Relevant Matters which trigger entitlement to loss and expense:

The JCT Contract provides four types of Relevant Matter, which are briefly noted below:

(i) Variations[i] ,

(ii) Architect/Contract Administrator's instructions[ii]

(iii) Dealing with fossils, antiquities and other objects of interest or value[iii] ,

And my personal favorite;

(iv) "any impediment, prevention or default… by the Employer, the Architect/Contract Administrator, the Quantity Surveyor or any Employer's Person…"[iv]

Putting to one side Global Claims, which could be the subject of an article all of their own, the Relevant Matters noted above consist of specific and discrete events which have, or will have, a measurable effect on the regular progress of the Works in some way.

i Clause 4.22.1
ii Clause 4.22.2
iii Clause 4.22.3
iv Clause 4.22.4

Similarly to clause 5.10.2, clause 4.20 of the JCT Contract deals with the potential duplication of recovery:

> ***"No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.20 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions"***

This raises the question; ***under what other provisions might the Contractor be entitled to time related, loss and expense?***

Well, as we saw in Part 1 of this article, clause 5.2.1 enables the Employer and the Contractor (the "***Parties***") to simply agree amounts in respect of Variations. So, it's entirely conceivable that the Parties may have included some level of time related, and / or disruption cost, within the Valuation of an agreed Variation. In which case, any loss and expense assessment should be adjusted in order to account for the potential duplication.

And Schedule 2 of the JCT Contract permits the inclusion of loss and expense costs within a *Variation Quotation*, requested by the Contract Administrator under clause 5.3.1.[v]

This covers situations where the Parties have agreed their Variations amicably as the Works progress. But, what about when the Parties don't agree and the Quantity Surveyor needs to value a Variation under the Valuation Rules? If a Variation affects the regular progress of the works, ***should all of the time related costs be recovered under loss and expense provisions?***

Take disruption, which could be time related or non-time related, depending on how you see it. It's possible that the disruption is experienced due to, say, an instructed change in circumstances which dictates that the works have to be carried out during winter months, meaning shorter daylight working hours and lower temperatures, all of which may inhibit the production rates experienced on site. This impact on production rates may not ***critically*** delay completion but it could increase the cost of some ***non-critical*** activities and therefore should arguably be included under clauses 5.6.1.1 and 5.9 which both permit the inclusion of costs incurred due a change of conditions or a "significant change in the quantity of work" being undertaken.

This change in conditions or quantity of work could also result in the thickening of preliminaries resources. For example the combined magnitude and frequency of Variations may lead to a requirement for additional site management during the original contract period. Should these

v Schedule 2 Clause 1.2.3

additional resources be included within the valuation of each individual Variation or, should thickening be included within the loss and expense account?

Having been there, I'm aware that this is a subject which attracts considerable debate on site. Take the example of a Variation which will, undoubtedly, use up some of the incumbent site manager's time. Assuming the site manager's costs are already included within the Contractor's preliminaries, should the Employer be entitled to consume the 'spare capacity' of something it is already paying for? But, what happens when, at Variation number 101, our hard-working site manager suddenly cannot cope with the additional scope any more and needs to recruit additional site management to support him or her? Is it then too late to apply for the loss and expense associated with the additional staff member?

Taking this example of the poor, overworked site manager, by including small amounts within the valuation of each Variation, the Parties would effectively be including a forecast for additional resource which may be required in the future, as opposed to demonstrating the actual cost within the loss and expense account at the end of the project. Clause 5.6.3 of the JCT Contract appears to support this approach by providing that "any addition to or reduction of preliminary items" can be included within the valuation of a Variation.

So, we've looked at ***Disruption*** and ***Thickening***, which are both arguably addressed within the JCT Contract Valuation Rules, but what about other time related costs which, as noted above, are seemingly not permitted according to clause 5.10.2 of the Valuation Rules?

Let's apply some of this theory to some tangible scenarios:

Consider a change in sequence as a result of an instructed change in the Employer's access requirements...

Let's say, before construction has even commenced on a new school, an additional access road is added to a development and therefore the main building has to be built from left to right, rather than the Contractor's accepted sequence of right to left. And let's also assume that this change in sequence will demonstrably slow the regular progress of the works for some reason, resulting in an extended contract period of, say, a month. With reference to the JCT Contract, would all costs flowing from the instruction be recoverable under the Valuation Rules or would a proportion (i.e. the delay and disruption to the regular progress of the Works) be subject to the loss and expense provisions?

Clause 5.1.1.1 recognises the addition of any work as a Variation. Clause 5.2.4 also confirms the imposition by the Employer for the ***"execution or completion of the work in any specific order"*** as a Variation.

So, being a Variation, should we use the Valuation Rules ***or*** the loss and expense provisions?

Assuming the Contractor's contractual obligations, such as the issuing of relevant notices, have been discharged and that the Contract Administrator has not requested a Variation Quotation in accordance with Schedule 2, the Contractor is entitled to ***claim*** for an extension of time under clause 2.27 for any impact on the regular progress of the works, and is also entitled to ***apply*** for prolongation and disruption costs, incurred as a result of the Variation, under clause 4.20 and 4.21.

But, from the Contractor's perspective (and, arguably, the Employer's too), it would be beneficial if an amicable agreement to any additional costs for the works, along with any delay and disruption, could be agreed prospectively, and as early as possible, without the need for retrospective demonstration and ascertainment of the actual costs incurred. After all, it would seem absurd to have to wait several months, or even years, for the actual costs to have been realized before the parties can agree the additional costs.

SO, WHAT DO THE VALUATION RULES SAY?

Clause 5.2.1 says that the value of a Variation ***"shall be such amount as is agreed by the Employer and the Contractor…"***. It's therefore entirely feasible that the parties could agree a figure and move on. But, if not, should the Contractor be held to demonstrate its ***actual costs***?

Clause 5.6.3 states that ***"…any valuation of work under clauses 5.6.1 and 5.6.2, allowance, where appropriate, shall be made for any addition to or reduction of preliminary items…"***. Could this include the costs associated with ***prolonged management*** of the Works? What about extended hire of ***plant and equipment*** or ***hutting and welfare***?

Clause 5.9 also says that, if as a result of a Variation, there is a substantial change in the conditions under which any other work is executed (i.e. constructing building back to front) that ***"any other work shall be treated as a Variation and shall be valued in accordance with the provisions of clause 5"***.

Conversely, clause 5.10.2 says that ***"[n]o allowance shall be made under the Valuation Rules for any effect upon the regular progress of the Works or of any part of them…"***.

CONFUSED?

Using our school example again but, this time, let's say that another identical building, mirroring the building which is currently six months into construction, is instructed as a Variation.

As well as the obvious increases in quantities (which are all recoverable at the ***contract rates and prices, including Oh&p***), the additional building will probably necessitate increases in the levels of preliminaries, such as:

- Senior Management Team
- Design Team
- Quantity Surveyors
- Welfare and Offices
- Office running costs and Consumables
- Other Site Preliminaries such as road cleaning
- Health & Safety
- Insurance

These preliminaries would not necessarily double in cost but it is highly likely that they will be significantly increased. According to clause 5.6.3, an allowance should be made for any additional preliminaries items required. This deals with the thickening of resources and any additional site costs required ***during the original contract period***.

However, a proportion of the ***existing*** site management and resources would also be prolonged to account for the additional work. Would it be necessary to separate out these costs for recovery under loss and expense? Should the Contractor be allowed to profit from the additional work?

Recognized theorems exist, such as the ***Hudson*** or ***Eichleay formulas,*** for working out the loss of head office overheads due to an extended contract period caused by an Employer culpable event, albeit subject to the Contractor satisfying specific criteria surrounding actual loss of other profitable projects. Although these types of formula are now supported in the

dispute resolution arena as being a "legitimate" and "helpful" way of ascertaining loss and expense[vi], would it not be fairer, quicker and simpler to simply agree a price for the prolonged resource within the Variation?

The orthodox position, I would suggest, is that ***all*** delay and disruption costs should be submitted as part of the separate claim for loss and expense, demonstrable through the actual cost incurred. Commercially this can prove costly for the Contractor given the standard of proof and evidence required to demonstrate entitlement. Loss and expense is also often the last element of the account to be agreed creating uncertainty for both Parties.

As we noted previously, the RICS tells us:

> ***"There are many tools on the quantity surveyor's work bench for valuing all sorts of changes to work... If these tools are used properly, and to their full extent, there are likely to be limited occasions where the contractor needs to seek ascertainment of Loss & Expense." vii***

However, the potentially contradictory wording of the JCT Contract leaves those valuing Variations unclear as to which cost elements can and can't be included.

Many will interpret clause 5.10.2 as expressly excluding "time related" costs from the valuation of Variations:

"No allowance shall be made under the Valuation Rules for any effect upon the regular progress of the Works or of any part of them or for any other direct loss and/or expense for which the Contractor would be reimbursed by payment under any other provision in these Conditions."

But what if you add a comma or two into this sentence. Could this change the meaning of the clause to something else...? Could it be that the drafting of the JCT Contract was never meant to preclude time related costs from the Valuation Rules, only duplication? I will leave this with you to contemplate.

In the meantime, my advice to Employers and Contractors is simple; if you can value something within a Variation, you should. It may save you time and money in the long run and will avoid unnecessary disputes at the end of the project.

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vi Paragraph 543 of Walter Lilly & Company Ltd v Mackay & Anor [2012] EWHC 1773 (TCC)

vii Page 14 of RICS' Practice Standards Valuing Change 1st Edition

REVIEW OF ADJUDICATION OUTCOMES ACROSS AUSTRALIAN STATES (NSW, VIC, AND QLD): ARE THE REGIMES EFFECTIVE?

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INTRODUCTION

A common question in the construction industry is whether adjudication remains a successful forum for dispute resolution – and whether it benefits claimants as the fast and relatively inexpensive process it was intended to be. For every dollar claimed, what are adjudicators likely to award?

Adjudication in Australia has a shorter history compared to the UK . It generates comparable debates on public policy objectives and the health of the construction industry. Adjudication in Australia has proven no less popular in construction disputes which are confined to claims for payment as governed by the adjudication regime in the Australian States.

The focus of this article is the financial outcomes from the Security of Payment legislation in the eastern seaboard States: Victoria ("VIC"), NSW and Queensland ("QLD"). For example, in Victoria the Building and Construction Industry Security of Payment Act (Vic) 2002 ("SOPA") applies to any construction contracts entered after 30 March 2007. SOPA aims to ensure that any person who carries out construction work or supplies related goods and services under a construction contract will be paid; and further, that if disputes arise over payment, a claimant may rely on a relatively quick and inexpensive adjudication process to recover payments due.

PUBLISHED STATISTICS FOR ADJUDICATION OUTCOMES IN AUSTRALIA

Authorities in the three States above publish adjudication activity statistics which provide insights as to the functioning of the adjudication regimes in each State.

Table A below summarises the overall financial outcomes in VIC, NSW, and QLD over the period 2018 to 2023 (as at 30 June being the end of each financial year). It presents data on: the number of adjudication applications; amounts claimed; and amounts determined by adjudicators.

The published statistics highlight the wide use of adjudication in Australia:

- Around 400 adjudication applications per year in VIC and QLD between 2018 and 2023.
- Well ahead was NSW, with an average 886 application per year, no doubt partly related to the significant government spending on transport infrastructure projects.
- Over the five years between 2018 and 2023, NSW reported the highest total claim amount among the three States, at $5.5 billion. This figure represents around 74% of amounts claimed in adjudications across NSW, VIC and QLD.
- The average claimed amount in NSW is almost seven times higher than that in VIC.
- Interestingly across the States the proportion of applications reaching adjudication determinations is around 60% (in VIC 1303 determinations for 2122 applications).

Victoria Historic Adjudication Activity Statistics 2018 - 2022							
Period ending	Applications	Determinations	Amount claimed ($)	Average claimed amount ($)	Amount determined ($)	Average determined amount ($)	Success Ratio
Annual Averages	424	261	$ 175,015,242	$ 398,601	$ 61,073,256	$ 226,036	
Total 2018 to 2022	2122	1303	$ 875,076,211		$ 305,366,281		35%

New South Wales Historic Adjudication Activity Statistics 2018 - 2023							
Period ending	Applications	Determinations	Amount claimed ($)	Average claimed amount ($)	Amount determined ($)	Average determined amount ($)	Success Ratio
Annual Averages	886	497	$ 1,045,889,249	$ 1,188,869	$ 128,763,398	$ 291,748	
Total 2018 to 2023	5313	2984	$ 6,275,335,495		$ 772,580,390		12%

Queensland Historic Adjudication Activity Statistics 2018 - 2023							
Period ending	Applications	Determinations	Amount claimed ($)	Average claimed amount ($)	Amount determined ($)	Average determined amount ($)	Success Ratio
Annual Averages	392	228	$ 225,729,912	$ 609,563	$ 39,846,106	$ 167,325	
Total 2018 to 2023	2349	1370	$ 1,354,379,470		$ 239,076,636		18%

Table A: Adjudication Financial Outcomes Comparison between VIC, NSW, and QLD from 2018 to 2023

THE SUCCESS RATIO FOR ADJUDICATION IN AUSTRALIA

While there are many insights into the workings of adjudication regimes across the States, the variability and the trends over time, the overall picture is clear from the the ratio of the amount determined through adjudication compared to the claimed amount (what could be termed the "Success Ratio").

In NSW and QLD, the Success Ratios are 12% and 18%. By contrast, the Success Ratio for VIC is notably higher at 35%. In practical terms, this means that a claimant in an adjudication process could expect to recover approximately 12 to 18 cents in the dollar on average in NSW or in QLD, whereas a claimant in VIC could expect approximately double, or 35 cents in the dollar.

Skewed another way, a claimant in Victorian adjudications over the past five years claiming the average claim amount of $398,601 could expect to receive the average amount determined at $226,036.

Part of the explanation for the higher Success Ratio in VIC would be the nuances of the SOPA regime in that State. It is distinct from the other States, as SOPA does not permit claims for "excluded amounts". This is an exclusion of numerous potential claims within a contractor's payment claims, particularly relevant to claims for delay and disruption costs or a principal's claims for liquidated damages.

SUMMARY

If the central paradigm on adjudication is truly "pay now, argue later", then are claimants receiving a justifiable Success Ratio of what they consider their financial entitlements? Particularly in NSW, where the overall statistics indicate that more applications and larger claim amounts by claimants did not lead to a meaningful improvement in the award by adjudicators, lagging relative to the other States.

Taking the statistics at face value, a prospective claimant in adjudication in Australia may play the odds: around 60% of applications actually reach an adjudicator's determination, and the financial recovery may be as low as 12 cents on the dollar claimed as evidenced by the Success Ratio in NSW.

What the published statistics cannot reflect is what happens to around 40% of applications which do not reach a determination. Claimants may achieve successful resolution of claims through negotiation as a result of the ratcheting-up a dispute over payment to an adjudication application, without proceeding to an adjudicator's determination.

And then on the other side, even where a claimant achieves a determination recovering between approximately 12% to 35% of the amounts claimed, it is all too common for claimants to find themselves in Court dealing with a challenge to an adjudicator's determination on the grounds of jurisdictional error and/or failures in the necessary procedural steps.

The drivers of these overall financial outcomes from adjudications are diverse and complex, to say nothing of the trends over recent history spanning over the COVID-19 pandemic.

SINGAPORE: A REVIEW OF 2023's DEVELOPMENTS IN CONSTRUCTION LAW

DANNA ER & ACE YUAN

ELDAN LAW

OVERVIEW

In 2023, Singapore saw three judicial decisions which provided much needed guidance on the interpretation of the amended Building and Construction Industry Security of Payment Act (the "SOPA") and the law on damages in construction disputes.

CASE 1: CRESCENDAS BIONICS PTE LTD V JURONG PRIMEWIDE PTE LTD AND OTHER APPEALS [2023] SGHC(A) 9

Brief Background

Crescendas Bionics Pte Ltd ("**CB**"), a property developer, engaged Jurong Primewide Pte Ltd ("**JPPL**") as the main contractor to build Biopolis 3, a multi-tenanted business park development for biomedical science by 22 January 2010. However, this completion date was not met. CB therefore brought an action against JPPL for the delay in completion.

The laws relating to liquidated damages and award of damages

As a preliminary point, the Court agreed with the principles that where CB had committed acts of prevention and there was no extension of time clause, the contractor is not bound by the original contractual completion date and the time for project completion will be set at large. The contractor is then under an obligation to complete the project within a reasonable time, failing which it would render the contractor liable for general damages.

As a further preliminary point, the Court set out the difference between a claim for loss and a claim for loss of chance arising from CB's mischaracterisation of the claim. The distinction is that in cases where a favorable outcome depends on the actions of a third party, a claimant may be able to recover for the loss of chance of a favorable outcome rather than the actual loss of the favorable outcome. It is sufficient to demonstrate that there was a genuine and significant chance that the third party would have taken action to confer the desired outcome

in a loss of chance claim; the claimant does not need to demonstrate on the balance of probability that the third party would have taken such action. The Court also decided that issues faced by a claimant in precisely quantifying its loss does not transform a claim for loss to that of a loss of chance.

On causation, a loss is recoverable where the breach of contract was the effective or dominant cause of the loss. Relying on this basis, the Court agreed that both CB and JPPL's delay were independent and effective causes of CB's losses. Both CB and JPPL's delay were evenly balanced, and were interspersed throughout the period of construction.

On the related issue of remoteness, the Court found that post-completion net revenue rental loss was ordinary damage.

In terms of quantifying the loss, the Court decided that the Multi-Year Model [i] instead of the Single-Year Model [ii] should be used to determine the loss of net rental revenue due to the fact that Biopolis 3 was a multi-tenanted development which would take multiple years to fill up its rental capacity and the income stream arose from multi-year leases with tenants.

Key takeaways

It would be helpful for employers to share with their main contractors at the contract negotiation stage on the nature of the project and consequences of delay. In a dispute situation, it would then be easier for the innocent party to establish that such losses are not too remote.

In construction claims, it is vital that the innocent party keep records and engage experts early to prove damages. The employer in this case had submitted a significant amount of evidence to support its claim for damages and had multiple expert witnesses to support its multi-year modelling.

CASE 2: ASIA GRAND PTE LTD V A I ASSOCIATES PTE LTD [2023] SGHC 175

In *Asia Grand Pte Ltd v A I Associates Pte Ltd* [2023] SGHC 175 ("**Asia Grand**"), the High Court addressed the issue on when a payment claim would be deemed to be served under s10 SOPA when the contract is silent on when a payment claim is to be served.

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i "Multi-Year Model", is used to compute the difference between the projected net rental revenue Crescendas would have earned had there been no Combined Delay and the actual net rental revenue it had earned over the span of multiple years stretching from the period of the Combined Delay to the years thereafter.

ii "Single-Year Model", is used only to calculate Crescendas' loss of net rental revenue in one particular year.

Brief Background

The employer, Asia Grand Pte Ltd ("**AGPL**"), engaged the contractor, A I Associates Pte Ltd ("**AI**"), to carry out works for a project at Bras Basah Road (the "**Project**"). The contract did not contain provisions specifying when payment claims and payment responses were to be served. On 16 November 2022, AI served a payment claim on AGPL, claiming S$133,529.08.

On 13 December 2022, AI submitted an adjudication application in relation to the payment claim. AGPL then served a payment response in relation to the payment claim on 14 December 2022, claiming it was timely served under the SOPA.

AGPL argued that while the payment claim was actually served on 16 November 2022, s 10(2)(a)(ii) and 10(3)(b) of the SOPA applied such that the payment claim was deemed to be served on the last day of the month, i.e., 30 November 2022. The adjudication application lodged on 13 December 2022 was premature.

The Adjudicator determined that the date of service of the payment claim was 16 November 2022.

AGPL applied to set aside the Adjudication Determination.

The issue was whether the payment claim was served on 16 November 2022, or on 30 November 2022.

Statutory Timelines under SOPA

The High Court decided that the payment claim should have been deemed to be served on 30 November 2022, rejecting the Adjudicator's Determination. The Court held that if a contract does not contain any terms specifying when a payment claim is to be served, any payment claim would be deemed to be served on the last day of the calendar month in which it was served, regardless of when, the payment claim was actually served. This was due to the effect of s10(2)(a)(ii) and 10(3)(b) of the SOPA.

Since the contract did not stipulate the date for service, the payment claim was deemed to have been served on the last day of November 2022, i.e. 30 November 2022, even though it was actually served on 16 November 2022.

The payment response was due 14 days after the deemed date of service of the payment claim, i.e. 14 December 2022 as the contract did not prescribe a timeline for the provision of the payment response.

The date from which AI was entitled to lodge an adjudication application was 22 December 2022, which was after seven days from the date AGPL was required to provide the payment response i.e., 14 December 2022.

Therefore, AI's adjudication application lodged on 13 December 2022 was premature and the Adjudication Determination was set aside.

Key takeaways

This decision has put to rest some lingering doubts about how the deeming provision is to be applied where the service date of the payment claim is not specified in the contract.

CASE 3: H P CONSTRUCTION & ENGINEERING PTE LTD V MEGA TEAM ENGINEERING PTE LTD [2023] SGHC 298

In H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd [2023] SGHC 298 ("HP Construction"), the High Court addressed the issue on how to calculate the time for when a claimant's entitlement to make an adjudication application arises.

Brief Background

The Claimant engaged the Defendant to supply labour under a sub-contract for a building project. According to the subcontract, the Defendant submitted a payment claim to the Claimant on 30 May 2023, which the Claimant was required to respond to by 20 June 2023.

The Claimant failed to do so and the 7-day dispute settlement period ended on 27 June 2023. The Claimant failed to provide a payment response to the Defendant's payment claim during the dispute settlement period.

On 6 July 2023, the Defendant made an adjudication application under s 13 of SOPA. Thereafter, the Claimant argued that the Defendant's adjudication application was filed out of time.

The Claimant argued that Defendant's right to make an adjudication application arose on 28 June 2023 at 0000hrs, after which the Defendant is required to file its adjudication application by 5 July 2023 at 2359hrs (excluding 29 June 2023 because it was a public holiday). The Defendant's adjudication application was filed one day late i.e., 6 July 2023 and must be rejected as it was not made within the time period prescribed by s 13(3)(a) SOPA. The Claimant relied on a guide on the SOPA published by the Building and Construction Authority ("BCA") and a checklist issued by the Singapore Mediation Centre ("SMC").

The Defendant argued that 28 June 2023 should not be counted as part of the 7 days under s 13(3)(a) SOPA based on the plain interpretation of s 50(a) of the Interpretation Act ("IA"). Furthermore, the Defendant relied on YTL Construction Pte Ltd v Balanced Engineering and Construction Pte Ltd [2014] SGHC 142.

Statutory Timelines under the SOPA

The High Court disagreed with the Claimant's views and held that:

a) The SOPA regime operates in days, an ordinary interpretation of the time periods adopted in the SOPA will lead an ordinary reader to the conclusion that the entitlement arises on the day and not any particular time of the day. The 7-day period after the entitlement arises would commence on the day after;

b) The interpretation is supported by s 50(a) IA and the common law position; and

c) The BCA's infographics and SMC's checklist do not accurately reflect the correct position.

As a result, the Defendant's adjudication application lodged on 6 July 2023, was timely.

Key takeaways

While the decision may not have significant practical implications as claimants would generally avoid filing the adjudication application on the last day, this case has put to rest the long-standing debate on when the period for submitting an adjudication application arises particularly in situations where an additional day would be of importance to a claimant.

Extrapolating the reasoning behind this decision to another similarly worded provision of s 17 of the SOPA on when an adjudication determination is due would mean that an adjudicator would have an additional day to render a decision.

A point which remains of interest is the Claimant's argument that the adjudication applicant cannot make an adjudication application on the day the entitlement arises and such an interruption would be absurd. While the Court agreed that such an interruption would be absurd, the issue was not squarely before the Court. It remains to be seen how the Court would decide the issue in a scenario where an adjudication application is made on the day the entitlement arises.

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  Contract Data 1 and 2, Risk Register, Site Information, Works Information, Activity Schedule , Main Options, Secondary Options, Z Clauses, precedence of documents.

- Providing the Works

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  Defects, Defect correction, access given/ not given, assessment of cost of correction.

- Time obligations & Programming

  Start Date, Access Date, Key Dates, planned Completion, Completion Date, float, Accepted Programme, Revised programme, Acceleration.

- Payment

  Activity Schedule, Price for Work Done to Date, Applications for payment, Project Manager's assessment.

- Compensation events

  Significance of Early Warning notice, notification of compensation events, time barring late notification, an overview of the assessment of the change to the Prices and/or delay (calculation of Defined Cost, Shorter or Full Schedule of Cost Components), dividing date, quotations, rejection of quotations, Project Manager's assessment, implementation.

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- New terminology
- New clauses
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- Amendments to Schedules of Cost Components
- Questions

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DGA's next breakfast seminar hosted by Scott Milner is coming soon. Further details to be issued in the New Year.

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For more information about our training seminars, please email scott.milner@dga-group.com; or telephone 0113 337 2174.

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If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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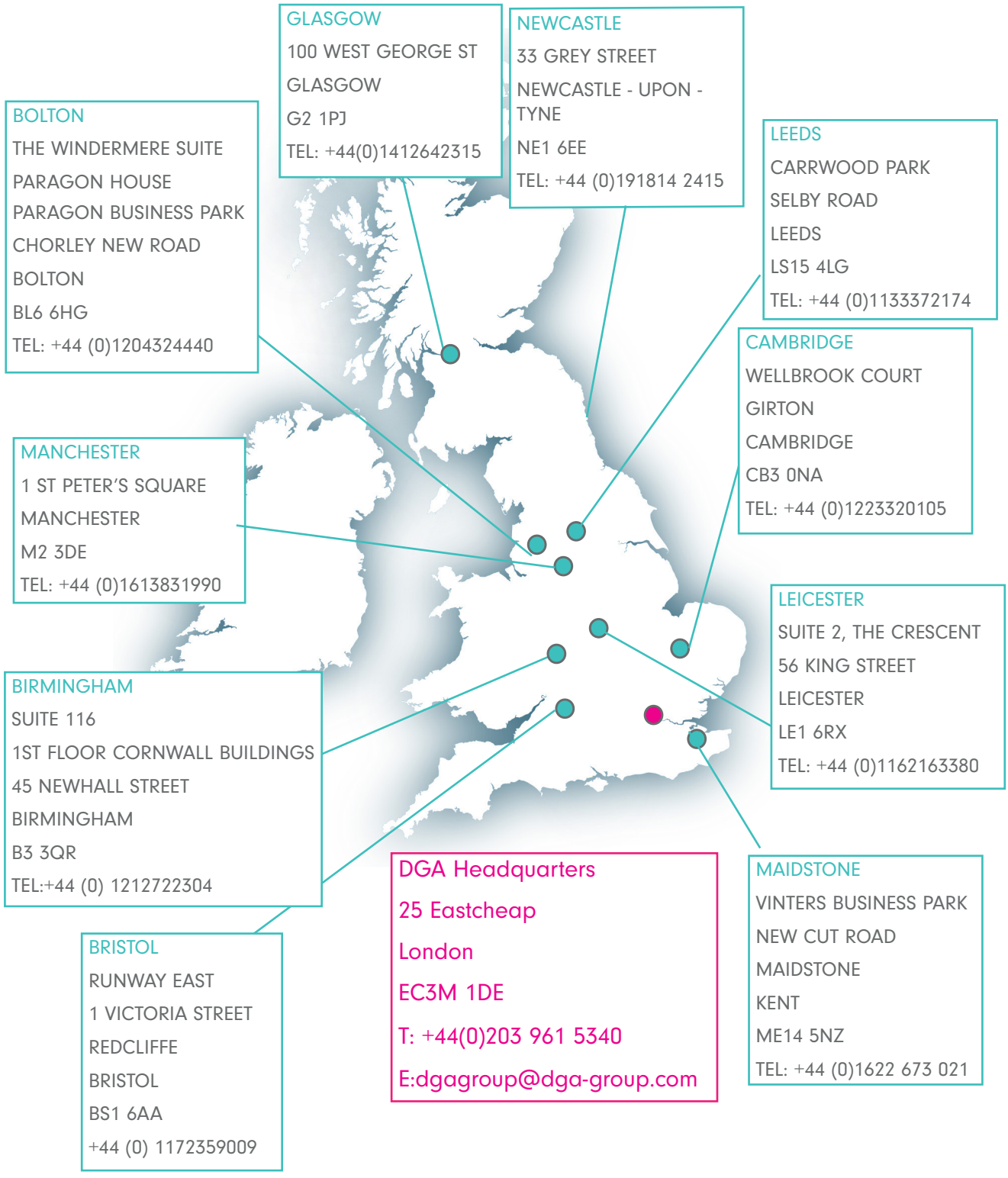

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