Construction law in 2017: a review of key legal and industry developments

By Mathias Cheung
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By Mathias Cheung

This commentary summarises some of the most important and interesting developments in construction law in 2017, both in the UK and abroad. The issues covered are of relevance to legal practitioners and construction professionals alike.

In the King’s College Construction Law Association Annual Lecture delivered on 11 May 2017, Professor John Uff QC observed that the “construction industry has suffered from perennial difficulties for many decades” but “dispute avoidance has never been a viable answer for the problems of the construction industry”. Indeed, one only has to consider the proliferation of construction law decisions from the Technology and Construction Court (TCC) in England and Wales and the courts of other common law jurisdictions to see that construction disputes are very much alive and kicking.

Like death and taxes, claims and disputes are a fact of life within the construction industry, and the legal and financial stakes are high. The recent collapse of Carillion Group in the UK is a cautionary tale (and a topic to which the author will return later in this review). It is therefore important for legal practitioners and industry stakeholders generally to have their fingers on the pulse of construction law, and this neatly encapsulates the primary purpose of this overview of the key legal and industry developments over the past year.

This review spans the common law jurisdictions of the UK, Australia, Singapore and Hong Kong, as well as the ever-growing international construction arbitration space in the Middle East. The analysis will end with a wider discussion of industry developments generally and topical issues to look out for in the year ahead.

“Smash and grab” adjudications

Validity of payment applications and pay less notices

The start of the year was kicked off by O’Farrell J’s judgment in *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC), where the employer sought to resist the enforcement of an adjudication decision by, inter alia, challenging the validity of the contractor’s payment application,
largely on the basis that the payment application was based on an arbitrary assessment with no breakdown or substantiation.

This followed a string of important decisions including *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] BLR 694, *Henia Investments Inc v Beck Interiors Ltd* [2015] BLR 704, and *Jawaby Property Investment Ltd v The Interiors Group Ltd and Another* [2016] BLR 328, in which the TCC emphasised that “an application for interim payment must be sufficiently clear and unambiguous in form and intent so that the parties have notice of the application made” and of the fact that the payment regime has been triggered. Those decisions are commonly cited by employers to illustrate the considerable hurdle which a party must overcome, in order to establish a “notified sum” which is payable under section 111(1) HGCRA.

In *Kersfield*, O’Farrell J adopted a sensible approach to the issue and held that the payment application was valid, given that it was clear in the context and “[t]here is no suggestion that Kersfield did not recognise it as such” (at para 38). This is a helpful reminder that the TCC is unlikely to be sympathetic to attempts by employers to sidestep the requirement of a payment or pay less notice by arguing that there was insufficient substantiation.

**Effect of an interim payment valuation**

This issue came before the courts in *Imperial Chemical Industries (ICI) Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC). There, it was argued by the contractor that an interim valuation (in the absence of a pay less notice) is “deemed to be the value of those works” by virtue of the ISG decision – it was of particular importance because the contract in ICI has been repudiated, and the contractor was seeking to freeze the value of the works at the amount previously paid (*ISG Construction Ltd v Seevic College* [2015] BLR 233, at para 25).

The *ICI* decision, which was part of a continuing trend in the TCC to row back from the effect of ISG, stopped short of saying that ISG was wrongly decided, and up to the end of 2017, it remained the law that a valuation of the works in an interim payment application cannot be challenged in the absence of a pay less notice. However, it would be remiss not to mention the recent decision of *Grove Developments Ltd v S&T (UK) Ltd* [2018] BLR 173, which was handed down whilst writing this review. In Grove, Coulson J undertook a detailed review of the line of authorities from ISG to Harding, and finally departed from ISG. Therefore, at the time of writing, the latest word is that an employer can now dispute the underlying valuation of an interim application despite the absence of a valid pay less notice. Many in the industry fear that this has sounded the death knell for “smash and grab” adjudications.

The recent cases culminating in the decision in Grove have certainly put the correct position under the HGCRA in the spotlight. Given that Coulson J’s decision in Grove is currently under appeal, the jury is still out on the final position. It seems unlikely that Coulson J’s decision would be reversed, but given the conflicting authorities at the TCC level, the Court of Appeal’s ruling would bring clarity by formally overruling ISG, and the industry should watch this space for the remainder of 2018. In the
meantime, Coulson J’s decision is likely to be considered authoritative, but “smash and grab” adjudications will probably continue to be an important recourse for contractors, especially during the currency of a project.

**Adjudication procedure and enforcement**

The TCC has also seen another prolific year in terms of decisions relating to adjudication procedure and adjudication enforcement, which provide helpful guidance to the industry on the court’s supervisory jurisdiction, particularly (1) Part 8 proceedings during adjudication; (2) Part 8 proceedings to resist enforcement; (3) challenges to enforcement; and (4) adjudicator’s fees and adjudication costs.

**Part 8 proceedings during adjudication**

There has been increasing use of Part 8 claims to obtain an injunction against a party which has commenced an adjudication. The threshold that has to be met, however, should not be underestimated, as was made clear by a number of decisions in 2017. The judgment in *Jacobs UK Ltd (Formerly known as Jacobs Engineering UK Ltd) v Skanska Construction UK Ltd* [2017] BLR 619 was one such example.

In *Jacobs*, the referring party withdrew its reference to adjudication and served a fresh notice of adjudication on substantially the same dispute, after it had failed to obtain an extension of time for its reply (because its counsel had a timetable clash – something which would resonate with many a legal practitioner). The responding party sought an injunction against the second adjudication, even though it was well established that there is no express or implied restriction that precludes a party from withdrawing a referral, and there is no general principle of abuse of process in adjudication. O’Farrell J gave short shrift to the application and refused to grant any injunctive relief.

It is clear that Part 8 proceedings often provide a battleground for serial adjudications, and this can lead to some rather difficult cases. One of the hardest in 2017 was arguably *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] BLR 443. Here, Coulson J had to consider whether a previous adjudication determining Mailbox’s entitlement to liquidated damages would preclude Galliford from commencing a subsequent adjudication regarding its entitlement to extensions of time.

After reviewing the relevant case law, Coulson J considered that the first adjudication decision on Mailbox’s entitlement to liquidated damages was binding and could not be disturbed in any subsequent adjudication (unless and until the first decision was overturned by the court) (at paras 57 to 58). It followed that Galliford could not cherry-pick on claims to put forward as a defence and then pursue further extensions of time in any subsequent adjudication.

Part 8 proceedings are not to be seen as a panacea for contentious issues arising from adjudications. Whilst serial adjudications would often give rise to arguments regarding the scope of the respective disputes and merit the courts’ intervention
(as in *Mailbox*), the position is different with attempts to short-circuit complex factual inquiries (as in *Merit*) or to argue some form of abuse of process (as in *Jacobs*), and parties should carefully consider the prospects before commencing Part 8 proceedings as a tactical manoeuvre in the middle of an adjudication.

**Interpretation and rectification of construction contracts**

Contractual interpretation and the implication of terms are perennial questions in construction disputes, be it adjudication, litigation or arbitration. Those within the industry would no doubt recall the landmark Supreme Court decision of *Arnold v Britton* [2015] UKSC 36, which is often considered to have reinforced a high threshold for the reliance on business common sense in interpretation. 2017 was particularly interesting in that a number of cases saw those exact principles in action.

**Contractual interpretation**

While the Supreme Court judgment in *Wood v Capita Insurance Services Ltd* [2018] Lloyd’s Rep Plus 14 did not concern a construction dispute and instead examined the interpretation of a poorly drafted indemnity clause in a sale and purchase of shares, it is most interesting for its discussion of the principles of interpretation. Conscious of the commonly held view that *Arnold* emasculated the role of business common sense in interpretation, Lord Hodge emphatically stated that “[o]n the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing”, and that the recent developments are “one of continuity rather than change” (*Wood*, at paras 14 to 15).

Whilst *Wood* was not technically laying down any new principles, it serves as a helpful reminder that interpretation is a “unitary exercise” which involves an “iterative process” balancing the different considerations (at para 12).

Although the dicta in *Wood* may have moderated the perceived effect of *Arnold*, it is not necessarily any easier to establish an interpretation largely based on business common sense and unsupported by the language used. As Lord Hodge observed, “[b]usiness common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended” (at para 28). The courts will be vigilant to any attempt by a party to escape what is effectively a bad bargain (as in *Wood*).

In contrast to the above, the Court of Appeal decision in *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2017] EWCA Civ 359 is an illuminating example of when business common sense could come to the rescue. Here, the question was whether the minimum acceptable performance levels (MAPs) or performance profit thresholds (PPTs) set out in an example table were in fact intended to be binding – an issue which the trial judge described as “finely balanced”. This is an extract of our in-depth expert report on developments in case law and legislation in 2017.

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