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Newsletter

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What's inside?

England's Court of Appeal rules on enforceability of contractual dispute resolution procedure

KK Cheung

Children's Ark Partnerships Ltd v (1) Kajima Construction Europe (UK) Ltd & (2) Kajima Europe Ltd [2022] EWHC 1595(TCC), concerned the enforceability and effect of a contractual dispute resolution procedure (DRP) and what the court should do in circumstances where one party has not activated that procedure and has commenced court proceedings instead. The 1st and 2nd Defendants (Kajima) had applied to strike out or set aside proceedings on the grounds of failure to comply with the DRP, said by Kajima to be a condition precedent to the commencement of proceedings. England's Technology and Construction Court (TCC) dismissed the application. Although it found that, properly interpreted, the DRP was a condition precedent to the commencement of court proceedings, it found it to be unenforceable, because it was not sufficiently clear and certain. The Court of Appeal ([2023] EWCA Civ 292) has dismissed Kajima's appeal against the TCC decision.

Background

For the background to this case and TCC decision, please refer to our previous article.

Court of Appeal Decision

Was the DRP enforceable?

The Court of Appeal referred to the general principles applicable to determining whether a DRP is enforceable, namely:

- Wherever possible, the court should endeavour to uphold the agreement reached by the parties and if the agreement is susceptible of an interpretation which will make it enforceable and effective, the court will prefer that interpretation to any interpretation which will result in it being void.

- However, in cases where there is a dispute about the enforceability of an alternative or bespoke dispute resolution provision, which is being relied on to defeat or delay court proceedings, the court will not shy away from concluding that such provision may not be enforceable.

- Clear words are needed to oust the court's jurisdiction, even if only on a temporary basis.

The Court of Appeal agreed with the TCC that the DRP was not sufficiently clear and certain and was therefore unenforceable, for the following reasons:

- The DRP provided that disputes were initially to be referred to a Liaison Committee for resolution and that any decision of the Committee was final and binding, unless the parties otherwise agreed. However, Kajima had no representative on the Committee and was not entitled to attend its meetings, make submissions or see its documents. Accordingly, the Committee was, for the purposes of the construction contract, a fundamentally flawed body, which could neither resolve a dispute involving Kajima "amicably", nor fairly provide a decision binding on Kajima in any event. That suggested an unenforceable process.

- There was no contractual commitment to engage in any particular procedure either covering the referral, or the process to be followed once the dispute had been referred.

- When there is a contractual DRP, one party cannot commence court proceedings until the process has been concluded. Here, it was unclear when the DRP could be said to have come to an end and it was not clear when the condition precedent might be satisfied and when court proceedings could therefore be commenced.

- The authorities talk about the need for a binding contractual process to contain a definable minimum duty of participation, but it was impossible to look at the DRP and see what, if any, minimum participation was required of either party, and Kajima did not even have the right to attend the Liaison Committee to make representations, so how could it participate?

Appropriate remedy – stay or strike out?

The court also considered what the appropriate remedy is where a party ignores a contractual dispute resolution procedure and commences court proceedings instead – should the court proceedings be struck out or stayed? Kajima had argued that a strike out was appropriate or else it would be deprived of a limitation defence if the action was stayed. The Court of Appeal acknowledged that deprivation of a limitation defence is an important element of the balancing exercise, but said that it cannot alone be decisive.

The Court of Appeal said that although a stay of proceedings is not the "default remedy" in the sense of it being automatic or inevitable relief which the court will grant to a party when the other party ignores a contractual dispute resolution procedure, it is the usual remedy, although the right remedy, it said, will always turn on the facts of the case.

In the present case, the Court of Appeal held that had the DRP been found enforceable, a stay of proceedings would have been the appropriate remedy, rather than a striking out of the proceedings.

Comment

In this case, the requirement in the contract that on one hand, the Liaison Committee had to resolve the parties' dispute amicably without the participation of one party and on the other hand, that its decision shall be final and binding on the parties was fatal to the enforceability of the DRP. In some standard forms of contracts, the decision of the architect/main contractor is final and binding and has to be sought before the main contractor/sub-contractor (as the case may be) can proceed to the next tier of dispute resolution procedure. Such provision is likely to be enforceable, since it does not require the architect/main contractor to resolve the dispute amicably.

Serial adjudications - is adjudicator in later adjudication bound by findings of adjudicator in earlier one?

Joseph Chung

In Sudlows Ltd v Global Switch Estates 1 Ltd [2023] EWCA Civ 813, the parties to a construction contract, fell into dispute and a number of adjudications took place between them. The issue that arose was whether the adjudicator in a later adjudication was bound by the findings of the adjudicator in an earlier adjudication. The Court of Appeal referred to the principle that an adjudicator cannot determine a dispute which has already been decided in an earlier adjudication, the test being whether the dispute in the second adjudication is the same or substantially the same as the dispute that was decided in the first, which is a matter of fact and degree. Here, the Court of Appeal found that the Adjudicator in Adjudication 6 was bound by the findings of the Adjudicator in Adjudication number 5.

The Court of Appeal referred to the principal purpose of construction adjudication (to improve cashflow in appropriate cases, by adopting the mantra of 'pay now, argue later') and said that here, Global clearly wished to argue about their contractual responsibility for the cabling and ductwork issues in question, and were quite entitled to do so, but must do so later, in court or arbitration. In the meantime, in accordance with the binding decision in Adjudication 5, and primary finding of the Adjudicator in Adjudication 6, they had to pay now.

Background

Global engaged Sudlows, under a JCT Design and Build Contract to carry out fit-out works, including cabling and ductwork. The provision of the ductwork was the contractual responsibility of Global, whilst the procurement and installation of the cables through the ductwork was Sudlow's responsibility. The ductwork should have been completed by February 2018 but was not completed until 28 May 2019. When Sudlows installed the HV-B cable on 21 June 2019, one of the cables was damaged. Sudlows claimed that this was due to defective ductwork. Global said it was due to the cable and/or installation being inadequate.

Subsequently, a different contractor pulled another set of cables through the ductwork. Global claimed that Sudlows then refused to connect and energise those new cables or facilitate others to do so, resulting in ongoing delay in the completion of the cabling work and thus the enablement of the power to be supplied to the site.

Adjudication 5

Adjudication 5 concerned Sudlows' disputed claim for an extension of time (EOT) of 509 days for delays caused by Global's defective ductwork. There was no dispute that the delay was caused by anything other than the cabling and ductwork issues and there were no other competing "Relevant Events". The only issue was which party was contractually responsible for the cabling and ductwork issues.

The Adjudicator, Mr Curtis, concluded, on balance, that Sudlow's cable-pulling methodology was adequate for the cable route based on the information provided to them by Global and that on the evidence, Sudlows had proved their allegation that the duct network was defective and not fit for purpose and that, accordingly,

Global were culpable for the resulting delays. Mr Curtis also concluded that Sudlows were correct and entitled to refuse to connect and energise the HV supply provided by Global and that Global were culpable for any delays that flowed from that issue.

Mr Curtis found that the delay flowing from the cabling and ductwork issues was all that mattered for the purposes of the EOT claim and awarded Sudlows a total EOT of 482 days. Sudlows was found responsible for the shortfall of about 5 weeks. Beyond that, Global were, in accordance with Mr Curtis' decision, responsible for the entirety of the remainder of the delay, because they were contractually responsible for the cabling and ductwork issues.

Adjudication 6

Following their loss of Adjudication 5, and in order to progress matters, Global omitted the testing and energisation of the new cables from Sudlows' scope of work and the contract administrator certified Practical Completion as achieved on 7 June 2021. Subsequently, the new cables were successfully tested and energised by others. Sudlows sought a further EOT from 19 January 2021 to the date of Practical Completion (an additional133 days), which Sudlows described as the continuation of the delay assessed in Adjudication 5, flowing from the cabling and ductwork issues. This further claim for an EOT was refused by Global and so Sudlows commenced Adjudication 6, relying on the same Relevant Event as that relied on in Adjudication 5, and upon Mr Curtis' finding that the defective ductwork had damaged the cables and caused the delay.

The Adjudicator in Adjudication 6 (Mr Molloy) decided that he was bound by Mr Curtis' findings and reasoning in Adjudication 5 and that therefore Sudlows were entitled to £996,898 by way of loss and expense. Mr Molloy's alternative finding, if he was wrong about being bound by Mr Curtis' findings and reasoning, was that, on the evidence before him, he would have concluded that the more probable cause of the failure of the cable installation was either the selection of the cable itself or cable installation method (which would have been Sudlow's responsibility) and not the duct installation or configuration. On that basis, he would not have granted the 133 days extension of time and would have allowed Global's claims for liquidated damages for that period, giving rise to his alternative calculation of £209,053.01 in Global's favour.

Judgment in the court below

Sudlows applied to court to enforce the award made in its favour in Adjudication 6, for £996,898. Global sought a declaration from the court that the Adjudicator in Adjudication 6 had acted in breach of nature justice, in taking too narrow a view of his own jurisdiction and in finding that he was bound by the decision in Adjudication 5.

The judge concluded that the two disputes were *not* the same or substantially the same and that Adjudicator 6 (Mr Molley) was not bound by the earlier decision of Adjudicator 5 (Mr Curtis) in relation to the availability of an EOT for the earlier period. He found that Global was entitled to the enforcement of Mr Molloy's alternative conclusion in its favour.

The Law

In the UK, provisions in the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) and Scheme for Construction Contracts have been taken together as providing that a second adjudicator cannot decide a dispute which is the same or substantially the same as a dispute that has already been decided in an earlier adjudication.

Relevant Legal Principles

The Court of Appeal referred to three over-arching principles to be applied by an adjudicator, or the court enforcing an adjudication decision, when deciding the effect of an earlier adjudication decision on a later one, namely:

(1) If the parties to a construction contract do engage in serial adjudication, and then inevitably get drawn into debates about whether a particular dispute has already been decided, the need for speed and the importance of at least temporary finality, mean that the adjudicator (and, if necessary, the court on

enforcement) should be encouraged to give a robust and common sense answer to the issue. It should not be a complex question of interpretation of documents and citation of authority.

(2) There is a need to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision. Although it can be relevant to consider the adjudication notice, referral notice etc, what matters is what it was, in reality, the adjudicator decided. It is *that* which cannot be re-adjudicated. The form and content of the documentation with which the adjudicator was provided is of lesser relevance and can be misleading.

(3) The need for flexibility. The purpose of the test of fact and degree is to prevent a party from re-adjudicating a claim (or defence) on which they have unequivocally lost, but to ensure that what is essentially a new claim or a new defence is not shut out. Common sense and fairness have to be applied.

Whilst accepting that it was not an invariable guide, the Court of Appeal said that one way of at least testing whether the correct approach has been adopted is to consider whether, if the second adjudication is allowed to continue, it would or might lead to a result which is fundamentally incompatible with the result in the first adjudication. If in that second adjudication, one or other of the parties is asking the adjudicator to do something that is diametrically opposed to that which the first adjudicator decided, then that may be an indication that what they are seeking to do is impermissible.

Court of Appeal decision

The Court of Appeal held that:

- The court should be slow to interfere with Mr Molley's decision, unless it was clearly wrong. Anything less runs the risk of undermining the adjudication process, by encouraging repeated challenges to the adjudicator's decision. Mr Molloy was not clearly wrong to say that he was bound by the earlier decision in Adjudication 5. As a matter of fact and degree, he was right to reach that conclusion.

- Mr Molloy properly explained how and why the parties were bound by Mr Curtis' decision. He looked at what Mr Curtis had actually decided, including the essential finding as to Global's contractual responsibility for the cabling and ductwork issues. As that was the same issue that had been referred to him, he concluded that this was sufficient to bind him in respect of the further extension period claimed in Adjudication 6. That was the result of the application of the right test, as articulated in the authorities i.e. whether the dispute in the second adjudication is the same or substantially the same as the dispute that was decided in the first.

- The fact that the decision in Adjudication 5 related to a different period of time was, on the particular facts of this case, of little weight.

- The dispute in Adjudication 5 was the same or substantially the same as that in Adjudication 6. In Adjudication 5, the only significant dispute was which of the parties was contractually responsible for the cabling and ductwork issues. That self-same issue was also at the heart of Adjudication 6.

- That made this a very unusual delay case. It is almost always the case that, in disputes of this kind, the arguments about delay range across different competing Relevant Events, the different alleged effects of those different Relevant Events, and consequences of different critical path analyses. However, here, in both adjudications, it was agreed that the cabling and ductwork issues were the only cause of the relevant delay and the period of delay was also agreed. The only substantive dispute was which party was contractually responsible for those issues, and therefore that delay. Mr Curtis decided that it was Global who were responsible and came to that conclusion on the basis of a huge volume of both factual and expert evidence.

- Mr Curtis' clear view as to Global's contractual responsibility for the cabling and ductwork issues was binding on the parties and on any subsequent adjudicator. Any other result – that contractual responsibility lay with Sudlows, not Global – would be fundamentally inconsistent with the binding

decision of Mr Curtis. If Global wanted to challenge his decision, they had every right to do so, but the challenge had to go to court or arbitration and not by way of another adjudication.

- The substantive dispute between the parties in the present case was and remained the contractual responsibility for the cabling and ductwork issues. That did not change between Adjudication 5 and Adjudication 6. That issue was decided by Mr Curtis and could not be re-adjudicated.

- As regards the fact that a different EOT was sought in Adjudication 6, in most cases, a claim for an EOT for period X will self-evidently be a different claim to a claim for an extension for period Y, in respect of which a second adjudicator will not be bound by a decision on the earlier claim. However, this case was different, and made such a distinction artificial. Here, although the period of the EOT claimed in Adjudication 6 was obviously different to that claimed in Adjudication 5, nothing else had changed and there were still no other competing Relevant Events. Importantly, during this second period, no further work was undertaken by Sudlows, just as no work had been done for much of the period that was the subject of Adjudication 5. During the period covered by the claim in Adjudication 6, Sudlows remained doing nothing, waiting for the relevant instructions from Global. There was no "new narrative" at all. Indeed, the only event of any relevance which occurred during this period was Adjudication 5 itself.

- Sudlows were quite right to say that the delay claim in Adjudication 6 was the logical extension of the decision in Adjudication 5. It was the remainder of the delay which had been triggered by the cabling and ductwork issues which Mr Curtis had decided were Global's contractual responsibility. "A logical extension" of a successful first claim will rarely be an accurate description of a second claimed extension of time for a different period, because of the almost inevitable factual differences between the two claims. That is what the authorities show. But here it was an accurate description of the claim in Adjudication 6

- It was only because of Sudlows' decision to commence Adjudication 5 that the deadlock was broken at all. The cessation of the second period at Practical Completion, which itself had only been certified as the result of the decision in Adjudication 5, logically brought down the curtain on the claim which Mr Curtis had first considered and decided. Therefore, on these unusual facts, there was nothing in the point that the two extensions of time claimed were different and had been the subject of two different claims by Sudlows.

Accordingly, the Court of Appeal concluded that Adjudicator 6 was bound by the decision in Adjudication 5. The appeal was therefore allowed and Adjudicator 5's decision in favour of Sudlows for £996,898.24 reinstated.

Although the result in this case turned on its own unusual facts, it is a useful judgment, as it sets out how an adjudicator (or an enforcing court) determines whether a dispute in a later adjudication is the same or substantially the same as the dispute in an earlier adjudication and also makes it clear that primarily the policing of a debate concerning such overlap is to be left to the adjudicators themselves and the court will be slow to intervene, unless something has gone clearly wrong in the later adjudication decision, which was not the case here.

Court rules no breach of natural justice for time constraints in adjudication

Justin Yuen

In Home Group Ltd v MPS Housing Ltd [2023] EWHC 1946 (TCC), England's Technology and Construction Court granted Home Group's application for summary enforcement of an adjudication decision (Decision), whereby MPS was ordered to pay it approximately £6.5 million. The court rejected MPS's argument that

there had been a breach of natural justice in the adjudication in that the Referral to adjudication included a large volume of quantum expert reports and witness statements, which it had inadequate time to digest and respond to. It said that both complexity and constraints of time to respond are inherent in the process of adjudication, and are no bar in themselves to adjudication enforcement. Whilst conceivable that a combination of the two might give rise to a valid challenge, in circumstances where the Adjudicator has given proper consideration at each stage to these issues and concluded that he or she can render a decision which delivers broad justice between the parties, the court will be extremely reticent to conclude otherwise.

Background

Home Group claimed termination losses said to have been caused by MPS's repudiatory breach of a JCT Measured Term Contract, under which MPS had been carrying out maintenance and repair works to Home Group's properties, comprising of a high volume of individual work items, each of which had a relatively low value. MPS purported to terminate the Contract. Home Group did not accept that MPS was entitled to terminate the Contract and asserted that MPS's purported termination was a repudiation of the Contract, which Home Group accepted. The validity of the termination was referred to the first adjudication, in which the adjudicator determined that MPS's purported termination was invalid, and that MPS had repudiated the Contract. The second adjudication was commenced in order to recover Home Group's losses. That second Referral to adjudication included a large volume of quantum expert reports and witness statements with hundreds of exhibits. MPS had 19 days (13 working days) to produce a response to the Referral, which MPS claimed was an inadequate amount of time. MPS contended that it was unable to properly digest and respond to the material served with the Referral and that this was a breach of natural justice which had led to a material difference in the outcome, and that as such, the Decision was unenforceable. MPS did not contend that the dispute was incapable of adjudication *per se*. Rather, it contended that Home Group should simply have provided MPS with a greater opportunity to understand the claim, whether in advance of the Notice of Adjudication or by agreeing to an extended timetable in the adjudication.

The Law

The court referred to the relevant law as derived from the case authorities as follows:

- Adjudication decisions must be enforced, even if they contain errors of procedure, fact or law.
- An adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material, in that it has led to a material difference in the outcome. However, the court should examine such defences with a degree of scepticism.
- The mere fact that an adjudication is concerned with a large or complex dispute does not itself make it unsuitable for adjudication. Size/complexity will not of itself be sufficient to found a complaint based on a breach of natural justice.
- What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator had: (i) sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (ii) was satisfied that he could do broad justice between the parties.
- If the adjudicator felt able to reach a decision within the time limit then a court, when considering whether or not that conclusion was outside the rules of natural justice, would consider the basis on which the adjudicator reached that conclusion.
- If the allegation is that the adjudicator failed to have sufficient regard to the material provided by one party, the court will consider that by reference to the nature of the material; the timing of the provision of that material; and the opportunities available to the parties, both before and during the adjudication, to address the subject matter of that material.

- The court must look to wider considerations when considering whether, on the facts of any particular case, a breach of natural justice may have occurred by reason of an ability of a party to fairly put its case.

- Arguments based upon time constraints impacting the ability to respond fairly have enjoyed little success. Merely pointing to a large quantity of material, some of which is seen for the first time in the adjudication itself (such as the expert reports) is not of itself sufficient.

- In cases involving significant amounts of data, an adjudicator driven by the contraints of time, is entitled to proceed by way of spot checks and/or sampling, even though this approach might not be adopted in due course by the court or arbitrator. The assessment of how this should be carried out is a matter of substantive determination by the adjudicator and an argument that the adjudicator has erred in his or her approach, absent some particular and material related transgression of natural justice, will not give rise to a valid basis to challenge enforcement. It would, even if correct, merely be an error like any other error, which will not ordinarily affect enforcement.

Court's decision

The court rejected MPS submission that, whether by reason of the volume of material, constraints of time, and access to material, and whether taken separately or in aggregate, there had been any, or any material, breach of natural justice

The court said that notwithstanding the significant number of low value items requiring determination, it was in reality a vanilla final account, which was only different from most in that the claim was brought by the employer against the contractor, following the latter's repudiatory breach, rather than the other way around and was, in many ways, significantly more straightforward than many "kitchen sink" final account adjudications involving not just a money claim, but complex disputes relating to extensions of time and requiring chronological investigation of the lifespan of a construction project and critical path analysis.

The court pointed out that there had been no delay on Home Group's part in bringing the claim. The Notice of Adjudication followed the service of the Contractor's Final Account which recorded the significant sums considered to be owed to Home Group, and was brought promptly after the first adjudication on the question of termination as a matter of principle. On the assumption that the Decision was broadly correct, Home Group had incurred considerable sums and was, until payment, considerably out of pocket.

The court concluded that the Adjudicator in this case had correctly kept under review the question of his ability to do broad justice between the parties, notwithstanding the substantial quantity of material he had been presented with. Having determined that he could, the court would be extremely slow to interfere with that conclusion.

Comments

It is understood that in the forthcoming Security of Payment Legislation (SOPL) in Hong Kong, the respondent will only have 20 working days for responding to the claimant's submission and the adjudicator will only have 55 working days to deliver his/her decision, unless it is extended by agreement of the parties. To maximize its chance of success in the adjudication, an unscrupulous claimant may spend a long time to prepare its claim in great detail before commencing the adjudication. In such case, the respondent will be disadvantaged, given that it is difficult to challenge an unfavourable decision, as explained in the above judgment of the Court in England. The respondent may only hope that the adjudicator will decline to make any decision due to the complexity of the case. How often the adjudicator will be willing to do that in practice, will have to be seen after the SOPL is implemented.

When does a cause of action in tort accrue in defective design cases?

KK Cheung

In URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772, England's Court of Appeal considered the issue of when the cause of action in tort arises for design defects.

Background

URS was engaged by a developer, BDW, to carry our structural engineering design work for a number of developments consisting of residential tower blocks, including the developments called "Capital East Blocks" and "Freeman's Meadow Blocks". Practical completion of the former development occurred between March 2007 to February 2008 and for the latter between February 2005 and October 2012. Following the Grenfell tower tragedy in June 2017, in which a blaze in a tower block was found to have been exacerbated by the type of cladding used, many developers, including BDW, carried out investigations of properties they had developed. BDW's investigation, led to the discovery in 2019 that there were dangerous structural inadequacies in both the Capital East and Freeman's Meadow Blocks. The defects were considered so serious that evacuation was necessary in some blocks. In other instances, temporary propping was utilised, followed by permanent works to remedy the structural defects.

Although by the time the defects were discovered in 2019, BDW no longer owned the Blocks, BDW maintained that it was, however, subject to liabilities to the occupants of the buildings in respect of them (including under contracts pursuant to which the individual units had been sold by BDW, as well as pursuant to the Defective Premises Act 1972 (DPA). It said that, given the seriousness of the defects, BDW did not, as a responsible developer, consider that it could simply ignore the problem once it had come to light. Rather, it was compelled to act to ensure that the Blocks were made safe and in doing so had incurred or would incur expenditure running to many millions of pounds, the recovery of which it now sought from URS for its negligent designs, which necessitated this expenditure.

URS maintained that BDW had never suffered any damage, and so had no accrued cause of action in tort against it. In the alternative, URS maintained that, in circumstances in which BDW no longer owned the relevant buildings and could have raised a defence of limitation in respect of claims that might have been brought against it, the losses suffered must be outside the scope of URS's duty of care in tort and/or be too remote to recover and/or have been caused by BDW itself as opposed to URS and/or represent a failure by BDW to mitigate.

Judgment of court below

Trial on Preliminary Issues

A trial of certain preliminary issues took place before the court below. In relation to which that court held:

- The majority of heads of loss pleaded by BDW were conventional heads of loss (costs of investigations and remedial work etc)
- Other than reputational damage, the scope of URS's duty extended to the claimed losses.
- BDW's cause of action in tort against URS accrued no later than the date of practical completion of the Blocks and not (as contended by URS) the time the defects were discovered in 2019.

Building Safety Act 2022

Subsequent to the preliminary issues judgment referred to above, the Building Safety Act 2022 (BSA) came into effect, which retrospectively extended the limitation period for claims brought under s.1 of the Defective Premises Act 1972 (DPA) from six years to 30 years. BDW sought and obtained the court's leave to amend

its claim to include claims under s.1 of the DPA and for contribution under the Civil Liability (Contribution) Act 1978.

Court of Appeal Decision

URS appealed against the judgment on preliminary issues and that granting BDW permission to amend its claim, referred to above.

The scope of URS's duty

The Court of Appeal held that the common law duty of care owed by URS was co-existent with its duties owed under the contract, to the effect that the structural design would be produced using reasonable skill and care. The risk which URS had to guard against was the risk that their negligent structural design would lead to structural defects and an unsound building. This was a standard duty, the court said, imposed on a design professional which was co-existent with that professional's contractual obligations. The risk of harm was that, in breach of the professional's duty, the design of the buildings would contain structural defects which would have to be subsequently remedied. For the purposes of the Preliminary Issues, it was assumed that the design was not only defective but dangerous, requiring multi-million pound remedial works and, in one Block, the evacuation of the residents. In such circumstances, it was impossible to conclude that the losses were somehow outside the scope of URS's duty.

What losses were recoverable?

The court held that although BDW could not claim for reputational damage, it could claim for conventional losses - costs of investigation, temporary works, evacuation of the residents and the carrying out of permanent remedial works. As a matter of law, the possible absence in 2019 of an obligation on the part of BDW to carry out such works was irrelevant to BDW's ability to recover those costs as damages, the court said. The court said that it has long been the case that a builder who goes back to rectify defective work can recover the relevant cost, even if he was under no obligation to carry out such remedial works. It added that, common law generally seeks to encourage a builder or developer to act in accordance with its underlying obligations and would, if possible, seek to avoid penalising them for acting responsibly. If the type of damage is recoverable in principle (as it was here, being the cost of investigations, remedial work etc), then BDW's precise motivation for carrying out those works was immaterial, the court said.

Limitation Issues

The court said that if there was an inherent design defect which did not cause physical damage, the cause of action accrued on completion of the building, which conclusion was entirely consistent with the DPA. The court held that BDW's cause of action against URS arose, at the latest, when the individual buildings that comprised Capital East and Freemens Meadow respectively, were practically completed. At that point, the defective and dangerous structural design had been irrevocably incorporated into the buildings as built. At that moment, BDW had suffered actionable damage because those buildings were structurally deficient. It was a damaged asset. Their cause of action in tort was complete. The court therefore rejected URS's submission that BDW's cause of action in tort against URS did not accrue until they discovered the defects in the structural design in 2019.

Comments

This judgment answered difficult questions which are recurring in construction cases, in particular, the question of when the cause of action accrues for design defects. It considered numerous judgments on this question and concluded that where there is physical damage, the cause of action in tort accrued on the date when physical damage occurred. Such conclusion is consistent with the Hong Kong Court of Final Appeal decision in *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd and Others* [2000] 1 HKLRD 268, which was also about the defective design of external wall cladding.

This judgment also decided that where there was no physical damage, the cause of action accrued on the practical completion of the building. This decision is important in that the same question was raised, but not answered, in *Bank of East Asia* since physical damage did occur there.

Court rules on limitation period in case involving defective design

KK Cheung

In Vinci Construction UK Ltd v Eastwood and Partners Ltd [2023] EWHC 1899 (TCC), England's Technology and Construction Court had to consider whether a claim in the tort of negligence for the defective design of a floor slab was time-barred. That depended on when the cause of action accrued. The court held that on the current state of the law, the date of accrual of the cause of action depended on how the loss was characterised. If characterised as a physical damage case, the cause of action would accrue at the date of damage. If characterised as an economic loss case, the cause of action would accrue by the date of completion. Here, the court found that physical damage occurred by March/April 2015, which was more than 6 years before the material date of 7 May 2021, when the claim in question was served. Therefore, regardless of whether the court adopted the date of completion or date of physical damage as the date of accrual of any cause of action in negligence, any such cause of action accrued prior to May 2015 and was statute barred, subject to whether s.14A of the Limitation Act (equivalent to s.31 of Hong Kong's Limitation Ordinance) applied and extended the limitation period, which was a matter to be determined at trial after scrutiny and testing of the evidence.

The Parties

Vinci was engaged by Princes Ltd as design and build contractor to carry out work at its Low Bay Warehouse. Vinci engaged the 1st Defendant (Eastwood) to provide civil and structural engineering services in respect of the works and the 2nd Defendant, Snowden, to carry out the design, supply and installation of the structural reinforced concrete slabs. Snowden, in turn, engaged GHW to carry out the design for the in situ reinforced concrete internal floor slabs. In around May 2013 Vinci issued a 'Compensation Event' notice to Snowden in respect of the design, supply and installation of the Low Bay Warehouse concrete slab works.

Installation of the overlay slab was completed by July 2013 and works at the Low Bay Warehouse completed in August 2013. Vinci's case was that by September 2013 the floor had developed damage and/or defects, including cracks. Various remedial schemes were carried out but ultimately, Princes removed and replaced in its entirety the Low Bay Warehouse floor.

Adjudications

In an adjudication commenced by Princes Ltd in 2019, the adjudicator found that Vinci was liable for breach of contract in respect of defects caused by inadequate design of the Low Bay Warehouse floor. Vinci served a pre-action protocol letter of claim on Snowden, indicating its intention to make a claim against Snowden by way of compensation for the losses sustained by Princes and/or Vinci. Snowden in turn issued a preliminary notice of claim against GHW, indicating a potential claim arising out of GHW's appointment as specialist floor designer in connection with the design of the overlay slab.

By a further adjudication decision, the adjudicator awarded Princes Ltd damages, including a decision that Vinci was liable to pay Princes Ltd for the costs of removing the overlay slab, and for the construction of the new flooring to the Low Bay Warehouse.

Snowden and GHW entered into standstill agreements, suspending time running for the purpose of any limitation defence, until 21 April 2022.

Vinci's claim against Eastwood and Snowdon

Vinci commenced proceedings against Eastwood and Snowden, seeking damages of £2.5 million in respect of the sums paid pursuant to the adjudication decisions. The basis of Vinci's claim was that the defective design of the overlay slab placed Vinci in breach of its contract with Princes Ltd and it became liable for the adjudication awards, fees and costs.

Snowden's claim against GHW

Snowden denied liability to Vinci and served an Additional Claim on GHW, seeking an indemnity and/or contribution from GHW in respect of the claim by Vinci and/or Eastwood. Snowden's claim against GHW was that GHW was in breach of contract and/or duty in that it adopted the unsuitable design concept of an unbonded non-structural overlay slab.

GHW's limitation defence

GHW served its defence to Snowden's claim, denying liability and raising a limitation defence, namely that the claims against GHW were time barred under the Limitation Act 1980 (LA) in that GHW was engaged to develop the design of the overlay slab in May 2013. GHW carried out its design development in May to July 2013. The overlay slab was constructed by Snowden in July 2013 and pursuant to s.2 and/or s.5 of the LA, the claims against GHW were time-barred because Snowdon's Claim Form against GHW was issued on 8 April 2022, which was more than six years from the date on which the cause of action accrued.

GHW's current application to the court

GHW applied to court for summary judgment against Snowden in respect of the Additional Claim on the ground that Snowden had no real prospect of succeeding on the claim because it was time-barred.

It was agreed that the effect of the standstill agreements between Snowdon and GHW (referred to above) was that the Additional Claim Form, issued on 8 April 2022 before expiry of the cumulative standstill period, was to be treated for limitation purposes as if it were issued on 7 May 2021.

It was by this stage common ground that any contractual claims by Snowden against GHW were statute-barred by 7 May 2021. S.5 of the Limitation Act 1980 provides that 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. A cause of action for breach of contract accrues on the date of breach. Here, the contract of engagement was entered into on 12 April 2013, the design work carried out in May and June 2013, the installation of the overlay slab carried out in July 2013, and the works to the slab completed by about August 2013. Accordingly, any breach must have been more than six years prior to 7 May 2021. The dispute before the court therefore centred on whether any claims in tort by Snowden against GHW were statute-barred by 7 May 202,1 pursuant to sections 2 and/or 14A of the Limitation Act 1980.

S.2 of the Limitation Act 1980 provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. There was a sharp division between the parties as to the characterisation of the relevant damage necessary for the accrual of a cause of action in tort in this case. GHW's case was that the relevant damage for the purposes of the Additional Claim was the economic loss consisting of Snowden's exposure to a claim by Vinci in respect of defects in the overlay slab; it was not the physical damage caused to the overlay slab itself and there was no suggestion that the slab caused damage to other property. Snowden's case was that the relevant damage for the purpose of s. 2 of the Limitation Act was its liability to Vinci caused by cracking to the slab. The damage was financial loss but it was financial loss arising out of physical damage to the slab. It was different to the damage suffered in other non-construction, professional negligence cases.

When does a cause of action in tort accrue?

The Court referred to the Court of Appeal judgment in URS Corporation Ltd v BDW [2023] EWCA Civ 772 (please see our article above) and the Court of Appeal's thorough review of all material authorities, providing a clear and authoritative analysis of the law as to the date of accrual of a cause of action in tort. The court said that from that analysis, the legal principles applicable in this case could be summarised as follows:

- A claim in tort based on negligence is incomplete without proof of damage. There are two kinds of loss recognised as actionable damage for the tort of negligence - physical damage and economic loss.

- In a case where there is physical damage, the current state of the law is that the claimant's cause of action accrues when that physical damage occurs, regardless of the claimant's knowledge of the physical damage or its discoverability.

- In a case where there is economic loss, the claimant's cause of action accrues when the claimant relies on negligent advice or services to its detriment, including incurring a liability (unless such liability is purely contingent, in which case it is not actionable damage until there is measurable loss).

- In a case where the claimant relies on negligent advice or services and, as a result, the structure contains an inherent design defect which does not immediately cause physical damage, the claimant's cause of action accrues at the latest, on completion of the structure, at which point the claimant has a defective asset and suffers economic loss, regardless of its knowledge of the latent damage.

Accordingly, the court said that on the current state of the law, the date of accrual of a cause of action in this case turned on the proper characterisation of the loss; if characterised as a physical damage case, the cause of action would accrue on the date of damage; if characterised as an economic loss case, the cause of action would accrue by the date of completion. The court said that it was clear from the documents before it that physical damage occurred to the Low Bay Warehouse floor more than six years prior to the material date of 7 May 2021 i.e. the date on which the Additional Claim against GHW had been served. Accordingly, subject to s.14A of the Limitation Act, Snowdon's claim in tort against GHW was time-barred.

Possible extension of limitation period

Where s.14A of the Limitation Act applies, it provides for a potentially longer limitation period, namely, six years from the date on which the cause of action accrued, or if later, three years from (i) the date of the knowledge required for bringing an action for damages in respect of the relevant damage, together with (ii) a right to bring such action. The court said that for the purposes of this case, the relevant knowledge required was: (i) such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify instituting proceedings; and (ii) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.

Under s.14A the onus is on a claimant to plead and prove that it first had the knowledge required for bringing its action within a period of three years prior to the issue of its claim. When considering limitation for the purpose of s.2, the court found that the parties, including Snowden, were aware that sufficiently serious damage had occurred by March/April 2015. Therefore, the issue was whether Snowden had a real prospect of success on the question of attribution.

The court referred to the degree of knowledge of attribution required under s.14A, namely that (i) knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to issue a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence. Suspicion, particularly if it is vague and unsupported, will not be enough, but reasonable belief will normally suffice i.e. the claimant must know enough for it to be reasonable to begin to investigate further; (ii) It is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim. What is required is knowledge of the essence of the act or omission to which the injury was attributable; (iii) The statutory provisions do not require merely knowledge of the acts or omissions alleged to constitute negligence. They require knowledge that the damage was "attributable" in whole or in part to those acts or omissions. Consistent with the underlying statutory purpose, "attributable" has been interpreted by the courts to mean a real possibility, and not a fanciful one, a possible cause of the damage as opposed to a probable one. Thus, time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question.

Court's decision

The court, it said it should adopt a broad common sense approach when considering the date on which relevant knowledge was, or could have been, acquired. It was not sufficient, the court said, for GHW to show that material damage occurred more than three years prior to 7 May 2021; it had to show that Snowden was aware, or should have been aware, that the damage was attributable, in whole or in part, to defective design, the essence of the complaint now pleaded against it by Vinci and which Snowden sought to pass on to GHW. The court concluded that it was not in a position to reach a concluded view on this matter without conducting a mini trial on the documents and that the proper time for scrutiny and testing of such evidence was at trial. Accordingly, without determining the matter, the court held that Snowden had a real (as opposed to fanciful) prospect of succeeding on the claim in negligence and rejected GHW's application for summary judgment.

Partner Joseph Chung added to panel of Arbitrators of Borneo International Centre for Arbitration and Mediation panel

Partner **Joseph Chung** has been added to the panel of arbitrators of the Borneo International Centre for Arbitration and Mediation (BICAM), with effect from August 2023. Established in 2023 in Sabah, Malaysia, BICAM is a distinguished institution providing arbitration and mediation services for alternative dispute resolution users in the region.

Consultant Stanley Lo added to panel of Arbitrators and Mediators of Asian International Arbitration Centre

Consistent with Deacons Construction Practice's initiative in broadening involvement in international arbitration, particularly for serving infrastructure projects under the Belt and Road Initiatives and other civil engineering and railway projects in the region, Construction Consultant Stanley Lo is now on the panel of the Asian International Arbitration Centre (AIAC) as an arbitrator and mediator.

AIAC is a non-profit, non-governmental international arbitral institution. It is a neutral, independent organization for the conduct of domestic and international arbitrations. Established in 1978, AIAC provides world-class institutional support and maintains global reach by expanding its services in Alternative Dispute Resolution, dispute avoidance and holistic dispute resolution. Its panel of dispute resolution professionals is comprised of over 2,000 individuals from over 78 countries.

Consultant Stanley Lo admitted to the Government's List of Dispute Resolution Advisors

On 2 November 2023, the Government's Joint Management Committee (JMC) included Construction Consultant, Stanley Lo, on its list of Dispute Resolution Advisors (DRAd).

The DRAd system aims at minimizing claims, disputes and disruption to Public Works Contracts with a contract value exceeding HK$700M and to ensure the expeditious resolution of disputes, if they arise. It is also adopted in Contracts in which the nature of work is complicated and disputes are likely to arise during

the course of contract.

This system is administered by the JMC which consists of representatives from the Architectural Services Department, various government works departments and the Hong Kong Construction Association.

Deacons Construction team maintains ranking in Band 2 with Asia Pacific Legal 500

The Asia Pacific Legal 500 rankings were recently announced and we are pleased to have maintained our ranking in Band 2 for Construction and to have received very positive feedback, commending our team for providing “first class advice” and a “prompt, responsive and high-quality service”.

Want to know more?

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