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Important New Decision by Edwards-Stuart J: Adjudication, UCTA, and Interest

Yuanda (UK) Co. Ltd -v- WW Gear Construction Ltd [2010] EWHC 720 (TCC)

Mr Justice Edwards-Stuart has delivered an important new ruling, possibly one of the most significant decisions in construction law of 2010 so far. As the new broom in the TCC, Edwards-Stuart J has carried out some important spring cleaning relating to: (1) adjudication law, particularly compliance with s108 of the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") and the applicability of the Scheme; (2) the Unfair Contract Terms Act 1977 ("UCTA") and what constitutes standard written terms of business; and (3) the extent to which contractual interest rates in the construction industry comply with the Late Payment of Commercial Debts Act 1998 ("the 1998 Act"). **Alexander Hickey** appeared for the successful Claimant ("Yuanda").

The Facts

Yuanda was a trade contractor who fitted the curtain walling for the luxury Park Plaza Hotel on Westminster Bridge. In 2007, Yuanda, along with over 30 other trade contractors, contracted with the client WW Gear Construction Ltd ("Gear") on the basis of the JCT Trade Contract form with substantial amendments (drafted by Gear). At tender stage, Gear tabled a raft of self-styled "standard" amendments, including two provisions relating to interest and adjudication, which were very heavily weighted in its favour.

Gear amended clause 4.11.2 of the JCT Trade form to provide for a contractual interest rate of 0.5% above Base Rate. At the time of contract the Base Rate was 5.5% (making the total interest rate 6%).

The JCT Trade Contract form provisions for adjudication were deleted entirely. In their place was a new clause 9A, incorporating the TeCSA scheme. The first part of clause 9A (unusually) required joinder "*of the members of the professional team in a multi-party dispute situation*". This is something that had not previously been tested in the Courts. The second part of clause 9A contained a particularly virulent form of the "Tolent clause" (named after *Bridgeway Construction Ltd v Tolent Construction Limited* [2000] CILL 1662 per HHJ MacKay QC). In *Tolent* it was held that parties were entitled to make an agreement whereby the referring party would always be liable for the parties' costs and adjudicator's fees and expenses without offending the HGCRA. In the present case, the Tolent clause was not reciprocal because it would only be if Yuanda referred a dispute to adjudication that the referring party would bear both parties' legal and experts' costs. Yuanda signed up to new clause 9A, although it was not specifically discussed during negotiations.

Yuanda's Challenge

Yuanda sought declaratory relief in a CPR Part 8 action in the TCC against Gear. Yuanda argued that neither part of clause 9A complied with s108 of the HGCRA, consequently (if it was right on either count) the whole adjudication agreement was ousted and replaced wholesale by the adjudication provisions in Part I of the Scheme.

In respect of the first part of clause 9A, Yuanda argued that the joinder provision in a "*multi-party dispute situation*" infringed s108 because it provided that a dispute arising under the contract between Yuanda and Gear should be decided in an adjudication involving (a) more than one dispute in the same reference; and (b) other parties (i.e. members of the professional team) who were not parties to the relevant construction contract between Yuanda and Gear, but may be parties to contracts which may not even be relevant 'construction contracts' within the meaning of the HGCRA. Yuanda also argued that the joinder mechanism was uncertain, and prevented Yuanda from referring a dispute to adjudication at any time.

Yuanda attacked the second part of clause 9A as non-compliant with s108 because it acted as a punitive deterrent and a very real fetter on Yuanda's right to adjudicate at any time. It was notable that, unlike in *Tolent*, the costs provision was not reciprocal. Yuanda submitted that the decision in *Tolent*, which had stood unloved but unchallenged for 10 years, was wrong.

Yuanda also argued that the second part of clause 9A was void under UCTA, because it was an unreasonable restriction on its remedy (on the basis that the contract was formed on Gear's written standard terms of business). Gear countered that the contract was not on Gear's written standard terms of business and was, like the contract with the other trade contractors, a negotiated deal.

On the discrete interest point, Yuanda argued that the contractual interest rate it had agreed was not a "*substantial remedy*" and was therefore void under section 8 of the 1998 Act. Instead, the statutory rate of 8% above base rate should apply. Yuanda argued that the rate was insufficient to compensate Yuanda because (at the time the contract was made) it could not get a loan at a comparable rate of interest in the market, so the contractual rate was not a deterrent to late payment; and it would not be fair and reasonable to allow the contractual rate to oust the statutory rate (section 9(1)(a) and (b) of the 1998 Act).

Ruling on Adjudication: *Tolent* wrong, Scheme replaces Clause 9A

In a decision handed down on 13 April 2010, Mr Justice Edwards-Stuart ruled that a "Tolent clause", particularly a non-reciprocal clause, did not comply with s108 of the HGCRA. The Judge therefore found that *Tolent* was wrongly decided, on the basis that such clauses are a real fetter on a party's right to adjudicate at any time. The Judge ruled that this was sufficient to oust the whole of clause 9A. Having reviewed a long list of authorities which left the point in some doubt[1], he held that, where an adjudication clause fails to comply with s108, the whole of the contractual adjudication provisions are ousted and are replaced wholesale by the adjudication provisions in Part I of the Scheme; this point should now be regarded as settled. The Judge particularly drew a distinction between the provision in the HGCRA of wholesale replacement in respect of non-compliant

[1] *C&B Concept v Isobars* [2001] CILL 1781 (1st instance); [2002] 1 BLR 93; *Ballast plc v The Burrell Company* [2001] BLR 529 Court of Session; *John Mowlem v Hydratight* [2002] 17 Const LJ 358; *Hills Electrical & Mechanical v Dawn Construction Ltd* [2004] SLT 477; *Aveat Heating v Jerram Falkus Construction* [2007] EWHC 131; *Banner v Colchester* [2010] EWHC 139 (TCC).

adjudication clauses, on the one hand; and, on the other hand, the contrasting terminology used in the HGCRA in relation to non-compliant payment clauses (where only the "*relevant*" provisions of Part II of the Scheme were stated to apply). However, the Judge observed obiter that, in some payment cases, it might well be appropriate to replace the payment terms completely with the payment provisions of the Scheme.

Perhaps surprisingly, however, the Judge did not hold that the multi-joinder provision in this case infringed s108. The Judge reached that conclusion on the basis that the multi-party joinder provision had to be construed in a limited way so as to permit the joinder of other members of the team merely to bind them to the result, rather than allowing a separate dispute between Gear and the other party to be dealt with. The Judge suggested some amendments to the TeCSA scheme to make the joinder provision work. Nonetheless, it is respectfully suggested that it remains to be seen whether this is a workable solution.

Ruling on UCTA

The Judge concluded that Yuanda did not deal on Gear's standard terms, in short because Yuanda had successfully negotiated some material changes from those proposed terms when it made the final deal. In reaching that decision, the Judgment sets out useful, updated guidance on meeting the requirements of section 3 of UCTA following a review of *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654; *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 and *Hadley Design Associates v Westminster* [2003] EWHC 1617 (TCC).

The Judge concluded that the written conditions have to be standard in that they are terms which the company in question uses for all, or nearly all, of its contracts of a particular type without alteration (apart from blanks which have to be completed showing the price, name of the other contracting party etc). It is the essence of such terms that they are not varied from transaction to transaction. If they were, they would no longer be "standard".

The Judge reviewed the *Salvage Association* list of factors to take into account in determining whether terms were standard. He held that the relevant factors were the degree to which the "standard terms" are considered by the other party as part of the process of agreeing the terms of the contract; the degree to which the "standard terms" are imposed on the other party by the party putting them forward; and the degree to which the party putting forward the "standard terms" is prepared to entertain negotiations with regard to the terms of the contract generally and the "standard terms" in particular. He held that the existence of negotiations was itself not a relevant consideration, as held in *St Albans*. If there is any significant difference between the terms proffered and the terms of the contract actually made, then the contract will not have been made on one party's written standard terms of business.

The Judge observed that, in principle, some alterations to the proffered standard terms may be so insignificant as to make it possible to hold that the party has dealt on the other's written standard terms of business (as was the case in *Horace Holman Group Ltd v Sherwood International Group Ltd* (2000) WL491372), but that was not the position in the present case.

Late Payment of Commercial Debts (Interest) Act 1998

The Judge struck down the contractual rate of interest because it was not a substantial remedy; and he declared that the statutory rate (8% above base) applied. That decision is, in itself, of enormous significance

in these hard-pressed times where interest rates are so low. The Judge set out a useful analysis of the 1998 Act, which may provide pointers for other parties in challenging contractual rates in appropriate cases.

The Judge observed that, historically, in commercial cases the courts have awarded interest on damages at rates of between 1% and 3% over base, more commonly the former rather than the latter where there is no specific evidence as to the cost to the claimant of borrowing money. While there is a difference in principle between awarding interest on a sum that was disputed, usually both as to liability and as to amount, and awarding interest on a debt in respect of which there might often be no room for reasonable dispute, he held that it is legitimate to take note of what the courts have traditionally regarded as the fair remedy for being kept out of one's money.

The Judge held that it was not the intention of Parliament to treat a contractual rate of interest for late payment as not meeting the "*substantial remedy*" test simply because it is materially lower than the statutory rate. The imposition of the statutory rate is the penalty that a contracting party pays for failing to provide in its contract a fair remedy for late payment to suppliers.

The Judge observed that, in construction cases, he could not see any reason why interest at 5% (as provided in the JCT standard form) would not be a substantial remedy, and a case could even be made out for 3 to 4% above base. In the present case, Yuanda's rate of 0.5% above base was not a substantial remedy – particularly when that clause was not individually discussed, and there were no reason why it would be fair and reasonable to allow Gear to oust the statutory rate.

Conclusion

As the new TCC judge, Mr Justice Edwards-Stuart's decisions have been viewed with a great deal of interest for clues as to the way in which the court's thinking is headed. This is another decision in which Edwards-Stuart J has demonstrated his willingness to look anew at well-established principles of adjudication jurisprudence.

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