

# muckle<sup>LLP</sup>



## CIAT and CIOB – Yorkshire Legal Update 2016

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# Programme



- Themes:
  - powers of adjudicators extended
  - strict interpretation of contracts
  - payment issues continue to cause difficulty
  - new JCT 2016
  - comments and questions

# Adjudicators' powers

- Purton (t/a Richwood Interiors) v Kilker Projects Ltd (2015) BLR 754, TCC
  - Kilker Projects had a contract for refurbishment works and paid Mr Purton to carry out extensive joinery works
  - Kilker refused to acknowledge the existence of a contract and Mr Purton's right to the final account sum, arguing the arbitrator had no jurisdiction to award payment
  - Held: there was a contract, and the adjudicator had jurisdiction; jurisdiction depends simply on the existence of a dispute arising under a construction contract
  - Common scepticism regarding adjudicators' powers to find a contract bypassed

# Adjudicators' powers

- J Murphy & Sons Ltd v W Maher & Sons Ltd (2016) CILL 3839, TCC
  - Maher (sub-sub-contractor) had sought payment through adjudication from Murphy (sub-contractor) for a final account sum allegedly agreed post-completion by telephone
  - Murphy claimed the adjudicator had no jurisdiction as the settlement agreement was separate to the parties' original contract, had no adjudication clause and was not a 'construction operation' contract under statute
  - Held: the agreement was caught by the original contract adjudication clause which was read widely, widening jurisdiction of adjudicators in turn

# Payment issues and Strict interpretation of contract

- **Jawaby Property Investment v The Interiors Group Limited (2016) EWHC 557, TCC**
  - Jawaby employed TIG to carry out building work, payment to be made by TIG applying for funds from an escrow account
  - Jawaby refused to pay TIG, alleging TIG's application was invalid as sent by email and worded incorrectly
  - The contract said "Any notice, approval, request or other communication to be given by either Party under this Contract shall be sufficiently served if sent by hand, by fax or by post"
  - Held: sufficient service by other means does not exclude email; clauses to be drafted to express exclusions literally; a notice should be certain in itself showing clear intention

# Strict interpretation of contracts

- Persimmon Homes Ltd v Ove Arup & Partners Ltd (2016) BLR 112, TCC
  - Persimmon purchased a site for £53m, having employed Ove Arup to advise on contamination and pollution risks
  - After purchase, Persimmon discovered the land was contaminated with asbestos and sued Ove Arup for negligence and breach of contract
  - Ove Arup relied on a contract clause which, in clear wording, excluded any liability in relation to asbestos
  - Held: Persimmon's claim was rejected; the courts should be slow to find ambiguity where none exists. In any event, the experienced parties had agreed to apportion risk.

# What does an adequate payment structure demand after 2011

- Stage payments
- Identify application dates or milestones
- Identify “due date” for payment
- Identify “final date” for payment
- Payer or Payee Notice not later than 5 days after due date
- Payee Default Notice any time after Payer Notice was required

# Key factors in an adequate payment structure

- If contract permits / requires Payee to notify sum due before date of Payer Notice and Payee issues that notice it becomes, in effect, Payment Notice Default payment notice or certificate proceedings
- Combined affect of S110A and 110B
- Is the mechanism more complex?
- Clients / payers / contract administrators beware!

# Galliford Try v Estura

- Galliford Try Building Limited v Estura Limited
- contractor's interim application No. 60
- no payment notice or PLN issued
- adjudicator ordered payment of No. 60
- Estura resisted and sought to distinguish ISG v Seevic
- “unusual combination of factors”

# Leeds CC v Waco

- Leeds City Council v Waco UK Limited [2015]
- JCT D&B Contract
- Contractor applications not issued in accordance with dates in the contract: EA Ignored this and payments were made
- Post PC same pattern; application 6 days early; employer did not pay
- Contractor awarded the sum in adjudication
- Employer refused to pay

# Leeds CC v Waco

- Court Decision
- Application invalid as it failed to state financial position as at prescribed date
- Employer not bound by earlier conduct
- Strict approach

# Henia v Beck

- Henia Investments v Beck, 2015
- Henia appointed Beck to carry out construction and fit-out works. JCT Without Quantities
- Beck could issue interim applications – 29th of each month
- CA to issue interim certificates not later than 5 days after due date
- final date 28 days after due date
- if no valid interim certificate Henia to pay sum in interim application

# Henia v Beck

- pay less notice due not less than 5 days before final date
- mechanism was ignored by Henia and Beck:
- Application no. 18 (6 days late) – 28/4/15
- CA issued certificate 18 (1 day late) – 6/5/15
- CA issued certificate 19 (3 minutes late) – 4/6/15
- Henia issued PLN (on time) – 17/6/15
- was application 18 valid? Was PLN valid?

# Henia v Beck

- application was held to be invalid
- it applied a value to 30 April 2015
- contract allowed valuation at 29 April or 29 May – not 30 April
- strict interpretation – see also Leeds City Council v Waco
- PLN argument was rendered unnecessary

# Payment issues and Strict interpretation of contract

- Grove Developments Ltd v Balfour Beatty Regional Construction (2016) EWCA Civ 990
  - Grove employed Balfour Beatty under a contract which included 23 dates of valuation and payment up to a specified completion date
  - Work overran beyond the agreed completion date
  - Balfour Beatty argued entitlement to further interim payment
  - Held: Balfour Beatty could not claim further payments. The statutory Scheme for Construction Contracts only imposes an entitlement to instalment payments in the absence of an agreement. An agreed schedule stands; the Court cannot rescue a party from a “bad bargain”.

# The curious case of Aspect v Higgins



- Aspect v Higgins
  - Asbestos survey April 2004
  - Higgins adjudicated to recover additional costs
  - Adjudicator's award in their favour – Aspect part paid
  - Aspect raise action to recover sum paid out
  - TCC holds no implied term allowing recovery

# The curious case of Aspect v Higgins (cont)

- Court of Appeal reversed that
- Scheme implied recovery of an overpayment
- Final determination may be different from the adjudicator's decision
- Supreme Court agreed with CA and included basis of restitution as a ground to recover

# JCT 2016



- New suite of contracts
- Response to popularity of NEC3?
- Some key changes likely
- Design and Build

# JCT 2016 (cont)



- Change in structure and focus
- Change to section 4 – Payment
- Change to Section 7 – Assignment

# Summary



- Adjudicators' jurisdiction has been widened and their decisions protected
- Courts increasingly apply a literal rather than purposive approach to interpreting contracts
- Payment now more complex?
- Role of Contracts in construction industry

# Thank you!

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