Ian Pease reviews the latest judicial developments, including the importance of maintaining terms and conditions, the Pre-Action Protocols and definitions of delivery

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'Pay when paid' goes bust

William Hare Ltd v Shepherd Construction [2009]

This case, as the judge, Coulson J, remarked, involves an almost extinct type of clause: the 'pay when paid' clause. Formerly very common in construction contracts, this type of clause stipulated that a contractor was only obliged to pay a sub-contractor after it had itself been paid by the employer for the particular works. I say 'almost extinct' because s113(1) of the Housing Grants (Construction and Regeneration) Act 1996 outlaws them in construction contracts, unless the third party employer is shown to be insolvent. It is a sign of the times that this proviso is now coming into play.

William Hare v Shepherd Construction involved a contract clause that defined the employer's insolvency by reference to four possible situations:

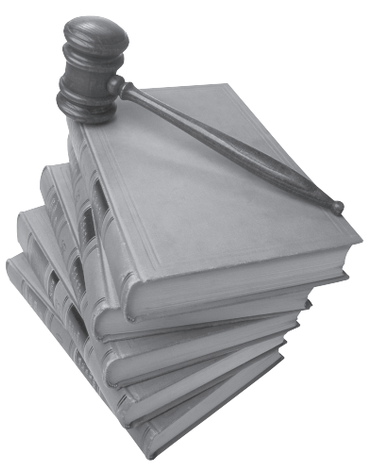
- an administration order made by the court;
- the appointment of an administrative receiver;
- insolvent liquidation; and
- the making of a winding-up order by the court.

The employer, however, did not become insolvent by one of the above methods. Instead it went into what is known as a 'self-certifying administration' under amendments to the Insolvency Act 1986 introduced by the Enterprise Act 2002. These changes meant that it was no longer necessary to obtain a court order to appoint an administrator.

The execution of the sub-contract, although taking place more than five years after the 2002 Act, did not pick up these changes in its drafting. The contractor's position was that the clause should not be so closely construed as to cover only those four defined kinds of insolvency.

As can be envisaged, the contractor was on a sticky wicket trying to argue that a clause that it had imposed on the sub-contractor, and which was for its sole benefit, should be re-worded to cover the new circumstances, particularly where those legislative changes had taken place five years before the execution of the contract. Coulson J found that:

- the 'plain meaning of the words' favoured the sub-contractor's interpretation, whereas the contractor's would involve 'a significant rewording of the clause';
- traditionally, pay when paid clauses were construed narrowly against those seeking to rely on them, in this case the contractor;
- the sub-contract was entered into over five years after the statutory changes took place and therefore the sub-contract could and should have been changed to take them on board; and
- in any case, as the clause was put forward by and for the sole



benefit of the contractor, the principle of *contra proferentem* applied.

As a result, Coulson J rejected William Hare's claim. For contractors the lessons of the case are obvious. Your standard terms and conditions need constant maintenance. The law changes from day to day and so must your standard forms.

A square peg in a *Roundstone*

Roundstone Nurseries v Stephenson Holdings [2009]

The Pre-Action Protocol for Construction and Engineering Disputes aims to encourage the exchange of early and full information about prospective legal claims; to enable parties to avoid litigation by agreeing a settlement before commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided. The problem is that on many occasions the process can become both extended and mixed up with separate attempts, via mediation or otherwise, to settle the disputes. So it was in *Roundstone Nurseries v Stephenson Holdings*.

What resulted was one frustrated party entering a judgment in default of defence against its opponent and difficult questions for the Court about whether it could or should deal with the costs of the abortive mediation.

After the issue of proceedings the parties applied for two stays, but the second stay eventually expired during the preparations for the mediation and was not renewed. When the defendant abruptly cancelled the mediation at the eleventh hour the opponent entered judgment in default of defence. On the application to set it aside the Court held that the claimant had acted unreasonably and that:

> If a claimant knows that, because of some technical glitch, he could enter judgment in default against the defendant, but that the defendant had a real prospect of successfully defending the claim (and therefore getting judgment set aside) then that claimant should not, at least as a general rule, enter judgment in default. If he does, it seems to me that he must face the costs consequences of that decision.

The Court also had to deal with the claimant's cross-application

that the defendant's abrupt cancelling of the mediation process should be punished with an indemnity costs order. However, was the mediation a separate ADR process, or was it part of the Pre-Action Protocol process agreed by the parties? If the mediation was a separate ADR process, did the Court have the necessary jurisdiction to make an order for any part of the costs of the mediation? What would be the position if the mediation was part of Pre-Action Protocol process?

The Court found that:

> The costs of a separate, standalone ADR process, particularly if it takes place before the proceedings are commenced, will not usually form part of 'the costs of or incidental to the litigation'. Often it is agreed by the parties that each party will bear their own costs of such a mediation, with the result that the costs cannot subsequently be sought by one or other party in the proceedings. In such circumstances, the costs of a pre-action mediation will not normally be recoverable: see *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008].

Also:

> ... as a matter of principle, it seems to me that costs incurred during the Pre-Action Protocol process may, in principle, be recoverable as costs incidental to the litigation: see *McGlinn v Waltham (No 1)* [2005].

And:

> I have concluded that this mediation was, and was treated by the solicitors as being, an integral part of the parties' agreed attempt to comply with the Pre-Action Protocol process.

One of the principal reasons for this conclusion was that:

> ... the Pre-Action Protocol for Construction and Engineering disputes is the only protocol which requires a without prejudice meeting between the parties. It is not uncommon, and often very sensible, for the parties to achieve this requirement by having the without prejudice meeting under the umbrella of a mediation. It seems to me that that is what happened here.

Having concluded that the claimant's solicitors were wrong to abruptly cancel the mediation as they did, the Court had to deal with the type of cost order that should be made against their client: was it to be an indemnity cost order? In the discretion of the Court it was not (for wider discussion of what would warrant such an order see *Reid Minty v Taylor* [2001] and *Kiam v MGN Ltd (No 2)* [2002]).

Coincidentally Coulson J heard another case on the Protocol just before *Roundstone*. *Bovis Homes v Kendrick Construction* [2009] again concerns the recovery of costs under the Protocol procedures, in that case after an alleged late stay application pursuant to s9 of the Arbitration Act 1996. There, Coulson J found that the defendants should have raised the prospect of arbitration in its response to the filing of the particulars of claim and, in default, they should be liable in costs.

Bovis Homes v Kendrick Construction [2009] EWHC 1359 (TCC)
Kiam v MGN Ltd (No 2) [2002] EWCA Civ 66
Lobster Group Ltd v Heidelberg Graphic Equipment Ltd [2008] EWHC 413 (TCC)
McGlinn v Waltham (No 1) [2005] EWHC 1419 (TCC)
Primus Build v Pompey Centre & anor [2009] EWHC 1487 (TCC)
Reid Minty v Taylor [2001] EWCA Civ 1723
Roundstone Nurseries v Stephenson Holdings [2009] EWHC 1431 (TCC)
William Hare v Shepherd Construction [2009] EWHC 1603 (TCC)

Personal services

Primus Build v Pompey Centre & anor [2009]

Quite obviously a notice of adjudication has to be validly served to be effective. The defendant in *Primus Build v Pompey Centre*, having lost the adjudication, sought to claim that the notice had not been validly served because the adjudication provisions stipulated for personal delivery or service by fax (in fact the notice was posted). An uphill struggle, I would have thought, but it did give Coulson J the chance to consider the differences between 'personal service' and 'delivered personally'. He found:

> [T]hat, by using... the unusual expression 'personal delivery' (or, more accurately, 'shall be delivered personally'), the parties must be taken to have meant something different from 'personal service', which is a well known concept requiring the handing over of the document in question in a personal exchange between two individuals. 'Delivery' seems to me to mean actual delivery, whether by post or by some other mechanism. 'Personal', as defined in the Oxford English Dictionary, means 'of, affecting or belonging to a particular person rather than anyone else, done or made by a particular person; involving the actual presence or action of a particular individual'.
>
> It seems to me, therefore, that 'delivered personally' means the actual delivery by an appropriate individual within Primus to a similarly appropriate individual within Pompey. The document in question must actually be delivered. The method of delivery does not matter, provided that the document is actually delivered to the named address in Schedule 1. Because clause 26.1 refers expressly to 'the address for service', that seems to me to be another reason to distinguish this procedure from personal service, which can happen anywhere.

Hence, as actual delivery to the named address and to an appropriate person at that address took place the service was good and the (rather speculative) point failed. ■