ON-SITE REVIEW: 2022 IN PERSPECTIVE

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INTRODUCTION

There were so many significant legal developments in construction law during 2022 it is hard to know where to begin. The year saw important strides to make the benefits of adjudication more widely available, whether from the UK's Court of Appeal decision in *Abbey v Simply*, in which WFW acted for the successful appellant, or new legislation in Thailand intended to promote fast-track dispute resolution for construction payment disputes.

This was a year when we continued to grapple with the consequences of the ongoing building safety crisis. The UK's Building Safety Act 2022 passed into law and there were a series of important decisions from the courts concerning liability for construction defects and the standards to be satisfied when bringing defects cases.

The year also saw key legal decisions in the areas of sustainability and arbitration among others. Finally, there continued to be good news for WFW's construction expertise. From a strong performance in legal directories to significant growth in our team, all serving to cement the strength and depth of our client offering.

In this edition of the *On-Site Review* we have gathered in one newsletter a selection of the most thought-provoking articles written by members of our team in 2022. If any of our articles raise questions or comments, please do reach out and share your thoughts with us. We are keen to continue to engage with our loyal readers.

Adjudication

We consider a number of judgments of the English courts that address vital aspects of the adjudication procedure and look at the impending arrival in Thailand of a fast-track adjudication process.

- **UK perspective** – In this edition we review a series of decisions which have been handed down recently in the English courts focussing on:
  - the statutory meaning of a "construction contract" for adjudication purposes;
  - the importance of valid service of notices before appointing an adjudicator;
  - when an adjudication decision can be set aside on natural justice grounds;
  - when it is appropriate to use Part 8 claims to resist adjudication enforcement hearings; and
  - the scope of dispute in adjudication together with breach of natural justice.
- **International perspective** – The Thai construction and engineering sector will soon introduce a significant new act which aims to promote project efficiency in relation to payments through a fast-track adjudication process.

Fire safety

We are seeing the first wave of cases coming before the courts in response to the Grenfell Tower fire and the long process of allocating liability for defective construction.

- **Building Safety Act** and the first enforcement action taken by the government against a building owner in relation to its failure to carry out fire safety remediation on a tower block.
- **Post-Grenfell** – A recent High Court decision ordered a contractor to pay damages for the installation of defective cladding and highlights some of the challenges the construction sector has been facing in the post-Grenfell landscape.
- **Defects claims under construction contracts and the court's approach to 'waking watch' schemes** – An article examining case law on the consequences of defects in projects. The cost of 'waking watch' schemes may not be covered under new home warranty insurance in the future.

Sustainability

Businesses and the UK Government are being confronted on their green credentials, both in and out of the courts. We look at those developments and how they are rising to the challenge.

- **Adverse weather** – An article explaining how construction contracts can deal with adverse weather such as heavy rain.
- **UK Government's Net Zero Strategy ("NZS")** hangs in the balance with a recent High Court ruling where the court held that the current NZS was unlawful.
- **Cutting carbon emissions** – Despite the UK Government's NZS being put on pause, the sector has been gearing towards going green.
- **Under reporting** – As the annual sustainability reports are being finalised, businesses need to be aware of some of the potential pitfalls of over or under reporting on the aims, progress, detail and implementation of their sustainability-related actions.

Arbitration

The articles here consider a number of key points for anyone involved in international arbitration.

- **Amendments to the ICSID Rules** came into effect on 1 July 2022.
- **Thai court costs decision** – A recent judgment shows the Thai courts' view on the importance of recovering legal costs through arbitration.
- **Pandemic** – Parties are discovering that the unprecedented emergency situation of the pandemic did not necessarily lead to the application of a different set of legal rules.
- **Right to appeal** – Valid incorporation of the ICC Rules into an arbitration agreement leads to waiving the right to appeal for the purposes of section 69 of the Arbitration Act 1996. If the parties truly wish to waive the effect of section 69, this needs to be made clear in the arbitration agreement. Otherwise they will be at risk of the courts deciding that the default position of a right to appeal prevails.

General

The decisions covered here provide useful guidance for contract drafters, as well as those managing projects on the ground.

- **Bribery Act 2010** triggered widespread reform of culture and behaviours in the sector. It has become unusual to come across overt instances of bribery. There have been few public accusations of bribery in the courts – until now.
- **The Technology and Construction Court ("TCC")** celebrates its 150th anniversary next year and we highlight some of the advantages of a dedicated court for international construction disputes.
- **Disproportionate disclosure requests** – The courts' desire is to avoid such requests and to uphold the parties' contractual bargains.
- **Recovery of loss of profit** – In a recent decision, the court ruled the contractor was entitled to damages for loss of profit and overheads due to the employer breaching its contractual obligation to include the contractor in a retender for the works.
- **The UK Infrastructure Bank** was set up as a government-owned policy bank to increase infrastructure investment across the UK, prioritising clean energy, transport, digital, waste and water sectors. The bank announces its first strategic plan.
- **Mitigating pandemic risk** – Businesses continue to face disruption from the public health measures used to fight COVID-19. Two recent cases from the English courts highlight the importance of mitigating the pandemic risk by careful drafting of relevant clauses and show how courts may reach different legal conclusions depending on the language of the contract.

Diversity

The construction industry has for a long time now looked inward to evaluate how it can improve itself. One such area of focus has been Diversity and Inclusion in the sector or its supposed lack thereof. This year, the theme for Black History Month in the UK is "*Time for Change: Actions not Words*" which has been deliberately chosen for us to take accountability for our progress.

Expanding the team

The WFW construction team grew considerably during 2022 with the arrival of Partner, Theresa Mohammed, Of Counsel Laura Lintott and Stephanie Geesink and Associates Emma Thompson and Dom Turner-Harriss. We also welcomed a new Associate, Maximilian O'Driscoll, who trained at WFW and joined the team on qualification.

"While there have been many court cases about adjudication … surprisingly very few of those cases have addressed the issue of what is a "construction contract" and how Section 104(1) of the Act ought to be interpreted."

ADJUDICATION

Adjudication Benefits extended by Court of Appeal in important decision

In June 2022, the UK Court of Appeal handed down an important decision that overturned a High Court judgment restricting the use of a quicker and cheaper means of resolving construction disputes.

The decision in *Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP*, in which Barry Hembling and Simon Jennings plus Sam Goodwill, all from WFW's construction team, acted for the successful appellant, will have significant implications for the construction and real estate industries as it confirms the benefits of adjudication as being widely available. It is also the first time that the Court of Appeal has considered the statutory meaning of a "construction contract" for adjudication purposes. Although the case concerned a collateral warranty, the principles could apply to other agreements such as third party rights schedules and forward funding agreements.

To read the full article click here.

Authors: Barry Hembling, Simon Jennings and Sam Goodwill.
This article was also published in Construction Law Magazine (subscription required).

Validly serve notices before appointing an adjudicator

This article by Stephanie Geesink considers how the courts will approach conflicting evidence as to whether a notice of adjudication was validly served and was published in Construction Law Magazine (subscription required).

Click here to access the article.

When a frolic becomes unfair: new cases create more questions than answers

This article in which Barry Hembling analyses two recent adjudication-related judgments with implications for when a decision can be set aside on the grounds of natural justice was published in Construction Law Magazine (subscription required).

Click here to access the article.

Breakshore Ltd v Red Key Concepts Ltd – Part 8 claims and adjudication enforcement

This article by Theresa Mohammed, Stephanie Geesink and Dominic Turner-Harriss discusses a judgment that reconfirms when it is appropriate to use a Part 8 claim to resist adjudication enforcement and was published in the Practical Law Construction Blog (subscription required).

Click here to access the article.

Scope of dispute in adjudication and breach of natural justice

This article by Laura Lintott discusses a judgment in *Manor Co-Living Ltd v RY Construction Ltd*, where Manor Co-Living Ltd ("MCL"), as employer under the construction contract, brought a Part 8 claim against RY Construction Ltd ("RYC"). MCL sought declarations: first, that the adjudicator failed to consider MCL's alternative defence and therefore acted in breach of natural justice – MCL's alternative defence was that it had a lawful entitlement to terminate the contract; second, that the adjudicator's decision was not valid as a result of the breach of natural justice. This article was published in Construction News (registration required).

Click here to access the article.

New construction adjudication bill in Thailand – prioritising payments

The Thai construction and engineering sector will soon introduce a significant new act which aims to promote project efficiency in relation to payments through a fast-track adjudication process. A draft bill, the Act on the Settlement of Disputes regarding Payment in Construction (the "Act"), is currently at the public hearing stage. Once passed, the Act is expected to tackle lengthy and complex payment disputes between contractors, subcontractors and employers and ultimately improve contractor cashflow and minimise project delays.

To read the full article click here.

Authors: Kay Kian Tan and Lyle Andrews

FIRE SAFETY

Will DLUHC legal action be the final nudge needed to fix fire safety defects?

This article by Theresa Mohammed was published by Housing Today (registration required). It discusses the new Building Safety Act and the first enforcement action taken by the government against a building owner in relation to its failure to carry out fire safety remediation on a tower block.

Click here to access the article.

A key costs ruling post Grenfell

This article by Theresa Mohammed considers a landmark decision that offers some firm judicial guidance for the hundreds of cases arising in the wake of the Grenfell fire. It was published by Building Magazine (subscription required).

Click here to access the article.

High Court ruling could see future cladding claims resolved quicker

In this article, Theresa Mohammed analyses a High Court decision ordering a contractor to pay damages for the installation of defective cladding. It was published by Building Magazine (registration required).

Click here to access the article.

Defects claims under construction contracts and the court's approach to 'waking watch' schemes

This article by Laura Lintott was published in Construction Law Magazine (subscription required) and examines case law on the consequences of defects in projects. The cost of 'waking watch' schemes may not be covered under new home warranty insurance in the future.

Click here to access the article.

SUSTAINABILITY

> "Any revamp to the NZS is likely to have a similar 'look' both in form and approach."

How do construction contracts deal with rain delays?

This article by Laura Lintott was published in Construction Management and explains if construction contracts need to make provisions for weather-related delays as heavy rainfall becomes more commonplace.

Click here to access the article.

Where are we with net zero? A look into decarbonising the construction sector

A possible U-turn on Net Zero? The UK Government's NZS hangs in the balance with the recent High Court ruling in *R (Friends of the Earth and others) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), where the court held that the current NZS was unlawful.

To read the full article click here.

Authors: Theresa Mohammed, Valentina Keys and Emma Thompson

Greening supply chain construction contracts

Cutting carbon emissions has been a hot topic for some time now within the construction industry. Despite the UK Government's Net Zero Strategy being put on pause, following the recent ruling from the High Court on its inadequacy, the sector has been gearing towards going green.

Most large construction developments rely on a supply chain of subcontractors to support and deliver a project from start to end. The level of involvement of a subcontractor will vary in scope and scale and may very well involve both the supply of materials and/or workmanship. Against the backdrop of any future net zero strategy/obligations, it is likely supply chains will be required to ensure greater shared responsibility amongst stakeholders on projects as climate conscious contractual obligations continue to be beefed up. There is already a large focus on the 'source to site' procurement of materials and this will only increase given that it remains one of the main driving factors for eliminating C02 emissions.

To read the full article click here.

Authors: Theresa Mohammed and Emma Thompson
This article was also published by the Chartered Institute of Civil Engineering Surveyors.

Mitigating legal risk in sustainability reporting

As the annual wave of sustainability reports are being finalised for publication, businesses need to be aware of some of the potential pitfalls of over or under reporting on the aims, progress, detail and implementation of their sustainability-related actions.

Sustainability reporting is coming under increasing scrutiny from academics, civil society organisations and claimant law firms, who may use the information for a number of purposes, including:

- to support academic reports which infer a connection between a business and suppliers with unhealthy health and safety, labour or environmental records;
- to allege "greenwashing" or "bluewashing" (in respect of social matters) of activities; or
- to allege a direct duty of care between the head office of a multinational company and those adversely affected by the operations of its subsidiaries or suppliers, with an associated responsibility for damages payouts.

All this is in addition to specific scrutiny of regulated activities, especially of sustainability-linked financial products.

To read the full article click here.

Author: Sarah Ellington

ARBITRATION

The 2022 ICSID Rules – what do they mean for Asia?

"The 2022 ICSID Rules try to modernise the investment arbitration process. They provide simple updates, capturing the state of play in investor-state arbitration by codifying common practices and illustrating others."

On 21 March 2022, the International Centre for Settlement of Investment Disputes ("ICSID") Convention Member States approved a new set of amendments to the ICSID Rules (the "Rules"), the flagship procedural guidelines for investor-state arbitrations (the news release is **here**). The 2022 ICSID Rules, which come into effect on 1 July of this year, contain some crucial changes. Asian states and investors should know what they mean and how to use them.

To read the full article click here.

Authors: Steven Burkill and Aaron Murphy

Thai Court approach to legal costs in arbitration

Arbitration has served as one of the most prevalent mechanisms for resolving commercial disputes for centuries. The development of arbitral procedural rules and advancement of arbitral regimes has given rise to complexity in arbitration proceedings. This requires disputing parties to invest considerable amounts in engaging special legal practitioners, in order to ensure that arbitration proceedings are properly conducted and consequential awards therefore recognised and enforceable.

Whether legal costs are recoverable, in particular lawyers' fees and expenses, has always been a concern for parties. In a recent judgment, the Thai court rendered an affirmative verdict that a disputing party can recover its legal costs as awarded by an arbitral tribunal.

To read the full article click here.

Author: Tossaporn Sumpiputtanadacha

Section 68 challenges: No lower hurdles for Covid-affected cases

Many of the legal repercussions of the Covid-19 pandemic are only now coming before the English courts. Parties are discovering that the unprecedented emergency situation of the pandemic did not necessarily lead to the application of a different set of legal rules. The decision in *Tenke Fungurume Mining v Katanga Contracting Services* is just one example, in which the claimant was unsuccessful in challenging the outcome of arbitration proceedings held during the pandemic.

To read the full article click here.

Authors: Rebecca Williams and Sergio de Aguiar

To appeal or not to appeal, that is the question!

This article by Laura Lintott and Sergio de Aguiar asks whether incorporating the ICC Rules into an arbitration agreement leads to waiving the right of appeal for the purposes of section 69 of the Arbitration Act 1996. It was published in Construction Law Magazine (subscription required).

Click here to access the article.

GENERAL

> "The nature of construction projects and claims is no doubt one of the key reasons why construction parties in particular seem to be lacking in the documents which would support their position."

We get sweeties for making it happen: Bribery and corruption – how sweeteners sour the procurement process

This article by Theresa Mohammed looks at a recent, rare instance of a successful allegation of bribery in the courts. It was published in Building Magazine (subscription required).

Click here to access the article.

Is the TCC ideal for International Construction Disputes?

The TCC celebrates its 150th anniversary next year and in this article, Laura Lintott considers the advantages of a dedicated court for international construction disputes. It was published in Construction News.

Click here to access the article.

Hand it over? A look at document disclosure in construction projects.

Construction disputes often commence with a request for disclosure of a raft of project documents by the prospective claimant, sometimes even before details of the claim have been provided. More often than not, the claimants invoke the contractual provisions with threats to resort to provisions of the Civil Procedure Rules relating to pre-action disclosure if the contract is not complied with.

The nature of construction projects and claims is no doubt one of the key reasons why construction parties in particular seem to be lacking in the documents which would support their position. Such projects last for years and defects often do not manifest themselves until some years after the works have finished. There can be millions of documents created that are not centrally stored or organised in a way that allows prompt retrieval. Even the most fundamental documents can be lost and despite parties having obligations to prepare and provide documents, sometimes they are reluctant to provide the same, particularly when a dispute is on the horizon.

When a dispute arises and parties seek legal advice the first questions are always requests for contemporaneous documents which may be in the possession of other parties or consultants. Consolidation of construction firms and novation or assignment of contracts can also lead to less than ideal documentation retention and storage. This leaves huge gaps in the available project documentation.

If asking the other parties and invoking the contract is unsuccessful, the claimant may then approach the court requesting pre-action disclosure. Such applications have a number of significant hurdles to overcome and many fail. The reasons include:

- The request being too wide and more akin to a 'fishing expedition'.

- The request was too early – before the pre-action protocol procedure had been followed.
- The request may impede or frustrate a contractually agreed expert determination mechanism.
- The court had no jurisdiction because the claim was governed by an arbitration agreement.
- The request was unlikely to assist resolution of the dispute or save costs.

All of the above reflect the court's desire to avoid disproportionate disclosure requests and to uphold the parties' contractual bargains. It also reflects the problems that particularly befall construction disputes, namely a significant lack of the basic documentation that the claimant needs to formulate a complex claim in the first place.

To read the full article click here.

Author: Theresa Mohammed
This article was also published by the Chartered Institute of Civil Engineering Surveyors and Property Investor Today.

Feeling left out? Are clients obliged to invite the original contractor to retender?

This article by Theresa Mohammed and Stephanie Geesink looks at the retendering dispute in the Bodmin Jail 'Dark Walk' contract. It was published in Construction Management (registration required).

Click here to access the article.

Infrastructure Insights: one year from inception, the UK Infrastructure Bank announces its first strategic plan.

Since its launch in June 2021 the UK Infrastructure Bank ("UKIB"), has closed seven deals worth £610m, mobilising over £4.2bn of private finance. It also opened two offices in Leeds and London within a year, onboarding 146 staff. The UKIB was set up as a government-owned policy bank to increase infrastructure investment across the United Kingdom, prioritising the clean energy, transport, digital, waste and water sectors.

To read the full article click here.

Authors: Ryan Ayrton and Gavin Jackson

How to score in force majeure – recent cases on Covid-19 related claims in England

Businesses continue to face disruption from the public health measures used to fight COVID-19 and many companies have suffered significant economic losses as a result. The English courts have consistently refused to relieve a contracting party from a bad bargain and the global pandemic has not changed that approach. Two recent cases from the English courts highlight the importance of mitigating the pandemic risk by careful drafting of relevant clauses and show how courts may reach different legal conclusions depending on the language of the contract.

To read the full article click here.

Author: Ryland Ash

This article was also published on the Law360 website.

> "A recent McKinsey study suggests that improved diversity in the workforce will lead to increased innovation and value creation."

DIVERSITY

Constructing a diverse workforce – how we can work together to plug the diversity gap in the construction sector

The construction industry has for a long time now looked inward to evaluate and discuss how it can improve itself. One such area of focus has been Diversity and Inclusion in the sector or its supposed lack thereof. This year, the theme for Black History Month in the UK is *"Time for Change: Actions not Words"* which has been deliberately chosen for us to take accountability for our progress. Making platitudes on our commitment to change will no longer cut it.

To read the full article click here.

Authors: Theresa Mohammed, Emma Thompson and Idil Yusuf

MEET THE TEAM

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