Reports from the courts

Our regular round up of the court decisions of most interest to construction from Andrew Croft and Will Buckby of Beale & Company includes an adjudication decision being upheld despite the adjudicator applying a clause in a way that neither party had argued; and one which highlights the importance of naming the correct legal entities in contracts.

CG Group Ltd v Breyer Group Plc
[2013] EWHC 2722 (TCC); TCC; Akenhead J

In April 2012, Breyer Group Plc (Breyer) entered into a subcontract with CG Group Ltd (CG) to carry out interior refurbishment works as part of an East London development (the subcontract). The subcontract comprised a number of documents, including Breyer’s subcontract terms and conditions (the subcontract conditions). During the project there were a number of payment and valuation disputes and, in December 2012, the parties agreed that CG would not continue the work into 2013. A dispute later arose as to the basis upon which this agreement was reached.

CG argued that the termination was mutually agreed and that it should therefore be paid for the work carried out to date and submitted its draft final account in January 2013, claiming a further £188,000. However, Breyer argued that CG had repudiated the contract and that this repudiation had been accepted by Breyer and therefore CG was not entitled to any further payment. Breyer claimed that CG had been overpaid by £184,000.

CG commenced adjudication in May 2013, seeking payment of the amount claimed in its draft final account. CG referred to the payment terms in cl 8 of the subcontract conditions and other documents comprising the subcontract. Accordingly, CG claimed that the payment provisions in the Scheme for Construction Contracts 1998 (the Scheme) applied in their entirety.

Breyer denied that there was any inconsistency and argued that, even if there was, the payment terms in the subcontract conditions prevailed.

The adjudicator awarded CG the sum claimed under its draft final account, finding that there was a supplemental agreement, rather than a repudiatory breach of contract, and by applying a combination of cl 8 of the subcontract and certain provisions of the Scheme. Breyer did not pay the sum awarded and CG commenced enforcement proceedings. Breyer resisted enforcement on the basis that the adjudicator had: (i) acted without jurisdiction by applying cl 8 in a manner for which neither party had argued; and (ii) committed a material breach of the rules of natural justice by not allowing the parties an opportunity to consider his approach to payment in relation to cl 8.

Decision
Akenhead J enforced the decision. Regarding jurisdiction, Akenhead J found that both parties considered the dispute to be a broad claim ‘for the net sum resulting from the Draft Final Account.’ Accordingly, the adjudicator had jurisdiction to determine what ‘was due for payment to CG in relation to its Draft Final Account.’ It followed that the adjudicator could not have exceeded his jurisdiction by determining that a combination of cl 8 of the subcontract and the Scheme applied in deciding what was due.

As regards natural justice, it was held that the court should not carry out a detailed examination of the parties’ arguments to determine whether the final permutation as applied by the adjudicator was advanced in its exact form. It is sufficient if the permutation adopted by the adjudicator falls within the remit of the parties’ arguments.

The parties’ submissions provided ‘a variety of permutations’, including Breyer’s argument that there were no inconsistencies in the subcontract payment terms and that, even if there were, the payment terms of the subcontract conditions prevailed (ie cl 8). It was not unfair for the adjudicator to conclude from this that cl 8 ‘pointed him in the direction to enable him
to determine the payment due date. Therefore the adjudicator had not committed a breach of natural justice.

Significance
This confirms that adjudicators’ decisions will generally be enforced unless there is a material reason not to do so. In particular, there will not be a breach of natural justice simply because the adjudicator has adopted a line of reasoning which was not specifically advanced by either of the parties. If one of the parties’ arguments or a permutation of the same is adopted by the adjudicator this will be sufficient.

This decision contrasts with *ABB Ltd v Bam Nuttall Ltd [2013] EWHC 1983 (TCC)*, where the adjudicator breached the rules of natural justice by taking into account a clause which neither party had relied upon, and not raising it with the parties before publishing his decision. In contrast to this case, in *ABB* the parties had not referred to the relevant clause at all, so it could not be said that the adjudicator’s reasoning stemmed from a permutation of the parties’ arguments.

**Liberty Mercian Ltd v Cuddy Civil Engineering Ltd**

* [2013] EWHC 2688 (TC); TCC; Ramsey J

In October 2009 Liberty Mercian Ltd (Liberty) issued tender documents to the Cuddy Group regarding the construction of a new retail plateau for the future construction of a supermarket.

The tender documents included an amended NEC3 contract, which referred to the contractor as ‘Cuddy Group’ (the contract). Before the contract was concluded, Liberty’s solicitor undertook a Companies House search in relation to the Cuddy Group and realised that no such company was registered. Liberty’s solicitor identified a company called Cuddy Civil Engineering Ltd (CCEL) and assumed that this would be the contracting party and therefore the contract was amended to refer to CCEL, rather than Cuddy Group. However, CCEL was a dormant company and ‘Cuddy Group’ was in fact the trading name of Cuddy Demolition and Dismantling Ltd (CDDL). After a number of defects arose on the project, Liberty purported to terminate the contract. Having realised its mistake, Liberty sought a declaration that the contract was entered into by CDDL and not CCEL, on grounds of misnomer. CCEL denied that Liberty was entitled to any such declaration because at the time the contract was formed Liberty had clearly intended that CCEL and not CDDL should be the contracting party.

**Decision**

Ramsey J refused to grant the declaration requested.

The court confirmed that the law applicable to misnomer is as laid down in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38*. Where there is a misnomer, the court will substitute the correct term for the incorrect one as a matter of construction if two conditions are satisfied.

First, there must be a clear mistake on the face of the instrument. In determining this, the background and context of the document must be considered. Liberty failed to satisfy this condition as there was no evidence that Liberty’s request for CCEL to be named in the contract was a mistake. CCEL remained a real and existing party, even though it was dormant.

Secondly, it must be clear what amendment should be made to correct the mistake. The court commented that, had a clear mistake been established, this second limb of the test would have been satisfied.

Significance

This demonstrates that it is essential that parties ensure that the correct legal entities are named in the contract and carry out due diligence on the relevant entities, particularly where there are several similarly named companies within a group.

This case follows the recent decision of *Derek Hodd v Climate Change Capital Ltd [2013] EWHC 1665 (TC)* where a dormant company had been named in the contract instead of the operating company and the mistake was corrected because, as a matter of construction, it was considered that the parties intended the operating company to be a party to the contract.

These cases suggest that in considering whether to correct a mistake regarding the name of one of the parties the court will consider the factual background. If this reveals that the parties clearly intended another party to be named then the mistake may be corrected: in this particular case, the fact that Liberty made a positive choice to change the contract to refer to CCEL suggested that, at the time, it intended CCEL to be the party and therefore the mistake was not corrected. CL