Reports from the courts

Our regular round up of the court cases of most interest to construction comes from **Andrew Croft, Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who report on a decision that serves as a useful reminder that the right to adjudication only extends to 'construction contracts' as defined in legislation; and one which, although not a construction dispute, reinforces the courts' approach to exclusion clauses.

Crystal Electronics Ltd v Digital Mobile Spectrum Ltd

[2023] EWHC 2656 (TCC); HHJ Keyser KC

Digital Mobile Spectrum Ltd (DMSL) was set up as a joint venture by the four UK mobile network operators to undertake remedial intervention services to address the detrimental effect of 4G mobile broadband services on digital terrestrial television. DMSL outsourced these services in respect of households whose television reception had been affected. DMSL engaged Crystal Electronics Ltd (Crystal) as a contractor for those services for several years pursuant to a contract dated 19 July 2023 (the Contract). DMSL terminated the Contract by notice with effect from 15 February 2023.

On 10 February 2023, Crystal raised an invoice for £553,336 plus VAT for unpaid charges for works undertaken under the Contract. DMSL disputed liability for the monies.

On 29 March 2023, Crystal commenced adjudication proceedings. DMSL challenged the adjudicator's jurisdiction on grounds that the Contract was not a construction contract as it did not concern "construction operations" as defined by the *Construction Act 1996* (the Act). The adjudicator decided that he did have jurisdiction and proceeded with the adjudication.

In his decision dated 10 May 2023 (the First Decision), the adjudicator held that Crystal had made a valid application for payment and that DMSL did not issue any valid payment/pay less notice and therefore awarded Crystal the sums claimed. DMSL did not make payment pursuant to the Award. Crystal commenced enforcement proceedings and issued an application for summary judgment.

In the meantime, Crystal referred a second adjudication to the same adjudicator. By a decision dated 15 August 2023 (the Second Decision), the adjudicator ordered DMSL to pay Crystal the further sum of £219,738 plus VAT and interest.

On 15 August 2023, HHJ Keyser KC refused Crystal's application for summary judgment in respect of the First Decision and ordered an expedited trial to determine the enforceability of the First Decision and the Second Decision (together the Decisions) in relation to the following issues:

1) Were the works in respect of which the Decisions were made construction operations for the purpose of section 105 of the *1996 Act?*
2) Did works which were not construction operations for the purposes of section 105 of the Act form more than a de minimis part of the works in respect of which the Decisions were made such that the Decisions were unenforceable?

Crystal relied on s105(1)(b) of the Act, which referenced "electronic communications apparatus", to support its submissions that all of the work done by Crystal was either construction operations or surveying work and/or engineering advice in relation to construction operations such that it was a "construction contract" within the meaning of s104 of the Act.

Decision

HHJ Keyser KC found that the Decisions were unenforceable as the Contract was not a construction contract under the Act.

Whilst HHJ Keyser KC accepted that "electronic communications apparatus" under s105(1)(b) of the Act could include work on a digital television network, the determinative factor was whether the structures on which the works were undertaken "form, or were to form, part of the land" as considered in ***Savoye v Spicers Ltd [2014] EWHC 4195 (TCC)***, which was ultimately a question of fact. HHJ Keyser KC found that the aerials on which Crystal will have worked pursuant to the Contract did not form part of the land: "They were pieces of replaceable equipment, easily installed and removed, which were usually attached to

the buildings by means of a secure form of strapping and were in no sense integrated into the buildings".

Comment

This judgment is a useful reminder that the statutory right to adjudication only arises if the contract between the parties is a "construction contract" as defined by s104 of the Act. Relevant to this is whether the works under the contract form part of the land. For the avoidance of doubt, where parties wish to retain the right to refer their disputes to adjudication, they should expressly provide for this in their contracts.

Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc

[2023] EWHC 2506 (TCC) – Mrs Justice Joanna Smith

Pinewood Technologies Plc (Pinewood) develops and supplies a dealer management system for the automotive system (the Pinewood DMS). Pursuant to a contract dated 28 July 2017, Pinewood appointed Pinewood Technologies Asia Pacific Ltd (PTAP), a Hong-Kong-registered reseller, as exclusive reseller of the Pinewood DMS in Hong Kong SAR, Guam, Thailand, Macau SAR, the Philippines, and Vietnam (the First Reseller Agreement). On 8 January 2019, Pinewood appointed PTAL as exclusive reseller of the Pinewood DMS in Japan pursuant to a second contract (the Second Reseller Agreement).

The Reseller Agreements were in materially identical terms. Clause 16 contained a general exclusion and limitation of Pinewood's liability, including:

> in relation to any liability it may have for breach of this Agreement, negligence under, in the course of or in connection with this Agreement, misrepresentation in connection with this Agreement, or otherwise howsoever arising in connection with this Agreement, any such liability for [...] (2) loss of profit, bargain, use, expectation, anticipated savings, data, production, business, revenue, contract or goodwill [...]

Both Reseller Agreements have been terminated.

PTAP commenced proceedings alleging that, in breach of the Reseller Agreements, Pinewood caused significant disruption of customer contracts under the First Reseller Agreement and a loss in user accounts, monthly fees, and lost profits in relation to the Second Reseller Agreement. PTAP's claim was calculated at c.$312.7m. Pinewood denied breach of the Reseller Agreements and denied that PTAL would be entitled to damages for lost profits "by virtue of the exclusion of Pinewood's liability for such losses in clause 16.2".

PTAP sought to amend its pleadings by inserting a new argument that the Reseller Agreements formed part of Pinewood's written standard terms of business within the meaning of s3(1) of the *Unfair Contract Terms Act 1977* (*UCTA 1977*) such that Pinewood was not entitled to seek to exclude or restrict its liability in respect of breaches of the Reseller Agreements pursuant to s3(2)(a) *UCTA 1977* on the basis that clause 16.2 did not meet the requirement of "reasonableness" under s11 *UCTA 1977*.

Pinewood issued a counterclaim for c.£425,000 which it alleged that PTAP owed since 26 April 2022 pursuant to outstanding invoices.

Pinewood applied to the High Court for reverse summary judgment of PTAP's claim, together with summary judgment on its counterclaim.

Decision

Smith J granted reverse summary judgment in relation to PTAP's claim and summary judgment on Pinewood's counterclaim.

Smith J found that the Reseller Agreements did not constitute Pinewood's standard written terms such that *UCTA 1977* did not apply. Smith J referenced evidence of negotiations undertaken via several email exchanges and calls during which both parties had access to legal advice which led to substantive changes to the terms of the Reseller Agreements such that "it cannot be said that the terms were 'effectively untouched' or that none of the changes was material". Smith J further noted that the fact that there was no negotiation in relation to clause 16 specifically did not alter this position.

Smith J therefore upheld clause 16.2, noting that the language of the clause was on its face clear and unambiguous and that there was no suggestion that the word "breach" was qualified or limited in scope.

Comment

This judgment reinforces the courts' approach to the interpretation of exclusion clauses – provided that exclusion clauses are clear and unambiguous and either: (i) meet the requirements of *UCTA 1977* where contracting on a party's standard terms; or (ii) are negotiated between the parties, in which case the parties will not be contracting on standard terms such that *UCTA 1977* will not apply, and parties have taken legal advice, parties will find them difficult to circumvent. **CL**