

# Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Meaning of expression “dispute is” - Courts (and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is - no need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is - cannot be concluded that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration - ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.**
- **Power of adjudicator to decide a case upon a factual or legal basis which had not been argued or put forward by either side - an adjudicator can reach a decision on a point of importance on the material before on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator.**

*[Bell Building Limited v. TClarke Contracting Limited - King's Bench Division (TCC) - Decided on 12.7.2024]*



- **Unenforceability of liquidated damages - early possession of section of the completed works - whether the liquidated damages provision is void and/or unenforceable - liquidated damages provisions did not contain a mechanism for reducing the level of liquidated damages to reflect early possession - necessary to construe the relevant provisions of the contract in question - there was one completion date for the whole of the works and liquidated damages were payable at the rate set out in the contract particulars for failure to complete the whole of the works by the completion date - if there is no reduction in the rate of liquidated damages where partial completion is achieved or the Employer takes over part of the works prior to practical completion the provisions are capable of being operated.**

*[Eco World – Ballymore Embassy Gardens Company Ltd v. Dobler UK Ltd. - Queen’s Bench Division (TCC) - Decided on 3.8.2021]*

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**Bell Building Limited v. TClarke Contracting Limited - King’s Bench Division (TCC) - Decided on 12.7.2024**

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The parties entered into a sub-contract incorporating the JCT Design and Build Sub-contract Conditions 2016. Pursuant to the sub-contract the Contractor was to carry out sub-contract works for the construction of a Data Centre at LCY-Ten (Echelon), Greenwich Point, London. The sub-contract works consisted of the supply and installation of the new substructure and superstructure consisting of the frame including enhancements, floor, roof, stairs, external walls, windows and external doors, internal walls and partitions, internal doors, internal finishes, walls, floors and ceilings, all builder's work in connection to the lifts installation and all builder's works including demolition and fire-stopping, all as further described within the sub-contract document. The disputes between the parties were referred to the adjudicator. It was contended by the Employer that the adjudicator purported to award more than the sum claimed. He considered the "calculation" of the claim which was outside his jurisdiction. He carried out a valuation exercise which was likewise outside his jurisdiction and purported to award more than the sum claimed. There was no prior suggestion from the Adjudicator that he was minded to award more than the sum claimed in the Notice / Referral. The Court held that the decision of the adjudicator was enforceable. The Contractor's claim included the common caveat giving adjudicator license to grant "such other relief as is necessary, just and equitable to resolve the dispute". Further, the Court observed that an adjudicator can reach a decision on a point of importance on the material before on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator.

## Eco World – Ballymore Embassy Gardens Company Ltd v. Dobler UK Ltd. - Queen’s Bench Division (TCC) - Decided on 3.8.2021

The Employer engaged the Contractor to carry out the design, supply and installation of the façade and glazing works for Building A04, part of a development of apartments known as Embassy Gardens Phase 2, Nine Elms, London. The clause in the contract provided that the Employer may “at any time or times prior to the date of issue by the Construction Manager of the certificate of practical completion for the Works or such works in a Section that the Employer wishes to take over any part or parts of the Works or such works in a Section” the Employer may take over such part or parts. The parties agreed to extend the original contractual completion date and agreed to a new completion date. The Deed of Variation provided that the liquidated damages at the rates stated in the Contract Particulars may only be levied by the Employer from the new completion date onwards where applicable. The Contractor contended that where an Employer under a construction contract has (and exercises) a contractual right to take early possession, but the liquidated damages provisions do not contain a mechanism for reducing the level of liquidated damages to reflect such early possession, the liquidated damages provisions are void and/or unenforceable. Where liquidated damages provisions are void and/or unenforceable, the Employer is entitled to recover general damages for delay in completion, and the void and/or unenforceable liquidated damages do not cap the damages recoverable. The Court observed that both parties benefitted from early take-over of part of the works. The Contractor was not entitled to any relief from liquidated damages to reflect such take-over. The full rate of liquidated damages continued to be applicable to the reduced scope of the outstanding works. The Court took note of passage from Hudson’s Building and Engineering Contracts (14th Edition) (2020) at paragraph 6-024 which states “... in the absence of a properly completed contractual mechanism for sectional completion and accompanying liquidated damages, it has been held the liquidated damages clauses are liable to be rendered inoperable or invalidated through the Employer taking possession of a section of the works. Unless there are effective provisions for dividing the single sum between the sections or reducing it in proportion to the part taken into possession, a claim for liquidated damages will fail”. The Court concluded that the said extract did not state that liquidated damages provisions will never be enforceable where sectional completion or partial possession is used without any related reduction in the liquidated damages payable; they identify the potential danger of failing to draft effective provisions to respond in such circumstances. In each case, it is necessary to construe the relevant provisions of the contract in question, adopting the established rules of contractual interpretation, to determine whether they give rise to a liquidated damages regime that is certain and enforceable. The liquidated damages clause would be inoperable where the contract provided for sectional completion and a pro-rata adjustment of liquidated damages to take account of partial possession, if the adjustment could not be calculated because the scope of works falling within each section was not adequately defined or capable of ascertainment from the contract documents.



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Successfully handled construction arbitrations relating to DBFOT projects, EPC Contracts and FIDIC based contracts in infrastructure projects.