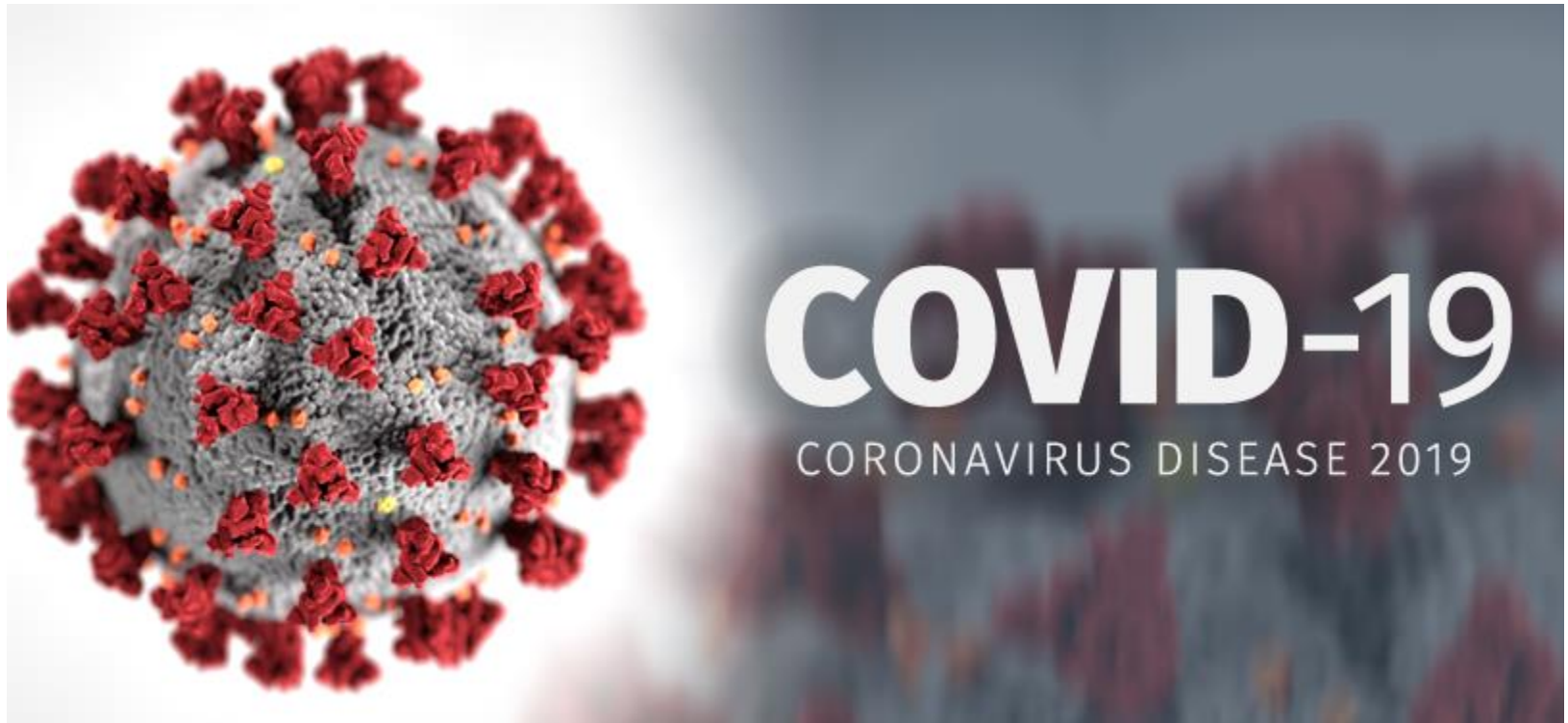


Adjudication update

Recent case law

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The message from the courts...

- ... business as usual





Hybrid contracts

- Contracts dealing with both construction and non-construction operations
- Section 104(5):
 - *“Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.”*

Hybrid contracts

- *C Spencer Limited v M W High Tech Projects UK Limited* [2020] EWCA Civ 331
 - Payment notices dealing with both construction and non-construction operations can be valid
 - No need to separately identify construction and non-construction elements
- *C Spencer Limited v M W High Tech Projects UK Limited* [2021] EWHC 1284 (TCC)
 - “look but don’t touch” non-construction counterclaims?
 - On the facts: adjudicator had jurisdiction

Costs

- Normal rule: Interpartes costs not recoverable in adjudication
- Section 108A of HGCRA 1996:

“(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

(2) The contractual provision referred to in subsection (1) is ineffective unless

(a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or

(b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.”

Costs

- **Late Payment of Commercial Debts (Interest) Act 1998?**
 - No – Enviroflow v Redhill [2017] EWHC 2159 (TCC)
 - 1998 Act takes effect as an implied term
 - But the implied term does not satisfy s.108A of the HGCRA 1996.
 - Therefore, adjudicator has no jurisdiction to award costs.
- *Aqua Leisure International Ltd v Benchmark Leisure Ltd* [2020] EWHC 3511 (TCC)
 - No waiver of a point that the responding party could not reasonably have been aware of.
 - The Enviroflow argument cannot be waived

Liquidated damages

- *Triple Point Technology Inc v PTT Public Company Ltd* [2017] EWHC 2178 (TCC)
- *Triple Point Technology Inc v PTT Public Company Ltd* [2019] EWCA Civ 230
 - It all depends...
 - Common law damages awarded
- *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29
 - Orthodoxy restored
 - General position: liquidated damages run to date of termination

The basics

- **Wimbledon v Vago**
 - Keep firmly in mind that decisions are intended to be enforced
 - Probable inability to repay at the end of substantive trial may constitute special circumstances so that it is appropriate to grant a stay.
 - If the claimant is in insolvent liquidation/ there is no dispute that it is insolvent, a stay will usually be granted.
 - Even if claimant probably could not repay when sum would fall due, it is usually not appropriate to grant a stay if (i) same financial position as when contract made; or (ii) impecuniosity wholly or in significant part due to non-payment.

Development of the principles

- **Total M&E Services v ABB Building**
 - Burden on party seeking stay
- **Farrelly v Byrne Brothers**
 - No obligation on C to disclose financials
- **Kersfield v Bray & Slaughter**
 - Court should lean in favour of enforcement
- **AWG Construction v Rockingham Motor**
 - Diligence of prosecuting cross claim
- **Gosvenor v Aygun Aluminium**
 - New element: real risk of dissipation

Broseley v PAML

- S&T v Grove
- Inability to repay – but when?
- Diligent pursuit of cross claim is important

The application for a stay

- Can PAML show that BLL unlikely to be able to repay?
- Evidence deployed
- COVID?
- WRW v DDD

Injuncting adjudications

- S.37 Senior Courts Act 1981 “in all cases where it appears to the court to be just and convenient to do so”
 - *Twintec Ltd v Volterfitzpatrick*
- Para 9.4.1 TCC Guide – declaratory relief
- No jurisdiction
- Unreasonable and oppressive
- Bresco

Milchris v Waters

- Did COVID mean that the Adjudication would necessarily be conducted in breach of natural justice, with the inevitable result that any adjudication will be unenforceable such that there was no useful purpose in allowing Adjudication to proceed?

Answer: no

- “It may be possible to conceive of circumstances”
- Might it mount a more conventional natural justice defence to enforcement?
 - Witness illness?
 - Evidential hurdles?

Thank you!

Any questions?

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