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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

The Importance of a team or project leader?

Fitzroy Robinson Ltd v Mentmore Towers Ltd & Others
[2009] EWHC 1552(TCC)

This dispute, which came before Mr Justice Coulson, arose out of a scheme to develop an exclusive private member's club in Piccadilly and an associated country house hotel. FRL were involved in putting together a scheme, including producing the design and obtaining planning permission. In March 2006, at about the time when FRL's work was to commence and before contracts had been finalised, Mr Blake who the defendants had been told would be the FRL team leader resigned. Although he had resigned, he was required to work out a notice period of one year. FRL did not inform the defendants of this until November 2006 just as FRL were completing the work on the design that was going to form the basis of the Piccadilly planning application. Mr Blake remained in the employment of FRL until March 2007. However there were at least two years of the project left to run.

Disputes arose between the parties including in relation to the obtaining of planning permission and non payment of consultants. FRL commenced proceedings for fees which were met by a variety of defences including allegations of professional negligence in relation to the planning application and allegations of misrepresentation arising in connection with the resignation of Mr Blake.

Mr Justice Coulson commented on the fact that the parties had not undertaken any form of ADR. He was in no doubt that ADR even if it had been unsuccessful, would have brought about a considerable narrowing of the issues between the parties. He gave an example of the defendants' case for rectification. At trial, following exploration of parts for the FRL case, this issue was effectively abandoned. The Judge felt that this would have become apparent to the defendants much earlier if they had undertaken ADR. Second, the events surrounding the resignation were, as the Judge with some care put it, one of those instances where a number of disputes between the witnesses could not be ascribed to differences of recollection or memory lapse. If the parties had been able to resolve their differences by way of ADR, findings on these issues would not have been made in a public judgment.

The Judge found that FRL repeatedly represented to the defendants during the pre-contract negotiations that Mr Blake would be involved throughout the duration of the project in the crucial role of team leader. The representation was made orally at meetings and in writing in the bid documents. This was a representation of fact, as to the services and personnel that would be provided to the defendants.

Further, the statements made about Mr Blake's continuous involvement as team leader were designed to induce the defendants to enter into the contract with FRL. The Judge did note in passing that this aspect of the factual background was atypical as in his experience it was relatively rare in the construction industry for the promised involvement of a particular member of a large professional team to be so clearly and obviously the major reason why the contract was placed. However that was what had happened here.

In March 2006, FRL knew that Mr Blake was not going to be the team leader for anything more than one year of the three years the project was estimated to take. The defendants should have been told of this. Further, in the weeks after Mr Blake's resignation, FRL knowingly and, in the view of the Judge, dishonestly failed to correct that false representation. At the time of the resignation, the contracts had not been formally entered into.

The consequences, namely the question of loss, flowing from this were left over to a quantum hearing. However the Judge noted that here, that losses (in the form of increased fees) may have been caused by disruption within FRL and there may also have been some duplication of their work. However, the defendants' claim that the loss of Mr Blake lead to delay failed, as they had not been able to demonstrate what delay had actually been caused.

Expert Evidence - a warning

Fitzroy Robinson Ltd v Mentmore Towers Ltd & Others
[2009] EWHC 1552 (TCC)

When the issue of expert evidence came to be considered, the Judge noted that the original expert joint statement was of no value at all. The Judge required the experts to meet again. It turned out that the difficulty was that the defendants' expert had not seen all the relevant documents, possibly due to the fact that he was stood down at various times by the defendants during the preparation for the trial. The expert had placed a caveat in his report that he had read:

"many but by no means all of the documents disclosed. To date, I have directed my reading so as to inform myself about the issues I have been asked to examine. It may be that on seeing further documents, or in discussing evidence seen by FRL's expert… that I shall revise my opinion."

The caveat was not expressed strongly enough for Mr Justice Coulson. He felt it was unacceptable for the expert to come to court having been seriously hampered in his preparations but without the problems being clearly stated in his report.

Pay when paid clauses

William Hare Ltd v Shepherd Construction Ltd
[2009] EWHC 1603 (TCC)

Shepherd engaged Hare to fabricate and erect steelwork for a new retail development. Hare's sub-contract contained a "pay when paid" clause, clause 32, drafted in similar language to s113 of the HGCRA. Accordingly, it included four alternate circumstances where the employer would be considered insolvent, making specific reference to the Insolvency Act 1986:

(i) on the making of an administration order against it;
(i) on the appointment of an administrative receiver or a receiver or manager of its property;
(ii) on the passing of a resolution for the voluntary winding up without a declaration of solvency; or
(iii) on the making of a winding-up order.

If the employer became insolvent in those circumstances then Shepherd would be entitled to withhold payment from Hare, until or unless Shepherd itself was paid. Hare issued two applications for payment for just under £1million. In response, Shepherd issued withholding notices under clause 32. Hare said that the withholding notices were invalid. The difficulty here was that the employer had become insolvent by a route not expressly identified in clause 32, namely self-certifying administration. This route to insolvency was introduced by amendments to the Insolvency Act 1986, which were brought in in 2003, five years before the sub-contract was entered into. Hare said that this meant that the withholding notices were not valid. Shepherd submitted that it would be absurd to interpret clause 32 so narrowly, and that any amendments to the Insolvency Act 1986 should also come under the scope of clause 32. Hare noted that whilst clause 32 made reference to the "… Insolvency Act 1986 …", this was to be contrasted with clause 29.3 of the sub-contract which provided for the insolvency of Hare. This clause referred to "… the Insolvency Act 1986 or any amendment or re-enactment thereof …", words missing from clause 32. Mr Justice Coulson held that Hare's submission was correct, for three reasons:

(i) that the plain meaning of the words in clause 32 produced a cogent and clear result. The four routes to administration identified in clause 32 were still possible routes. They had not been made redundant by the amendments to the Insolvency Act 1986, and the clause still operated;
(ii) that clause 32, a pay when paid clause, amounted to a form of exclusion clause:

"… the court is required to ensure that Shepherd are kept to the four corners of their bargain with Hare and that a clause of this nature is not rewritten to expand the circumstances in which Hare might find themselves (through no fault of their own) significantly out of pocket because of a financial failure up the contractual chain."

(iii) that the sub-contract was entered into five years after the amendments to the Insolvency Act 1986 were brought in. Both parties will have been deemed, at the least, to have known about the amendments to the Insolvency Act 1986.

The Judge thought that in such circumstances it should be seen as a deliberate decision on the part of Shepherd not to amend clause 32 to that effect. If the contract had been entered into before the amendments, then the result may have been different. Alternatively, the Judge went on to say that if he was wrong on the above, he would still find against Shepherd using the contra proferentem rule. As Shepherd had put forward the clause in the contract issued to Hare, and there was doubt as to its meaning, the Judge should interpret such an ambiguity against them.

Payment by instalments

Fitzroy Robinson Ltd v Mentmore Towers Ltd & Others
[2009] EWHC 1552 (TCC)

In relation to the payment of FRL, the point between the parties was whether they were entitled to be paid in monthly instalments as they fell due in accordance with the schedule to the contract, regardless of the precise services being undertaken during that period and/or regardless of the delays, if there were any, to the programme. Here, there was a specific link in the contract between the performance of FRL and the manner in which they were paid. For example, clause 10.1 said that "subject to the consultant performing these services in accordance with this agreement, the employer shall pay to the consultant the fee set out in the payment schedule…".

Therefore, the real question was when and how any adjustment to the monthly fee instalments should be made. In the view of the Judge, the contract provided for the ability to adjust instalments if as a result of delays to the project, the services being performed in any given month were not those which had been used for the purposes of arriving at the monthly instalment. There was an express link between the services performed and the fees due and between the services and the time in which they were to be performed. There was a further obligation on FRL to perform in accordance with the programme and their entitlement to the instalments was dependent upon such performance.

The Judge's view was that any such adjustments should reflect the services performed and should utilise the rates set out in the contract. However, at this stage in the proceedings, the Judge declined to make any specific adjustment itself, because the defendants had not set out their case in full in this regard.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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