Fenwick Elliott
The construction law specialists

Issue 116 February 2010

Dispatch

Dispatch highlights a selection of the important legal developments during the last month.

Adjudication, natural justice and the slip rule

ROK Building Ltd v Celtic Composting Systems Ltd
[2010] EWHC 66 TCC

Celtic resisted ROK's attempts to enforce an adjudicator's decision on the grounds that the adjudicator acted unfairly and contrary to the rules of natural justice. The basic issue between the parties related to whether or not ROK, as it claimed, should be treated as having completed its subcontract works on 8 June 2009. If ROK was right, Celtic was required to release half of the retention moneys. ROK issued its adjudication notice on 2 October 2009. Following various submissions, including on the part of ROK a response by way of Scott Schedule to the complaints about defects made by Celtic, the parties agreed to give the adjudicator until 1 December 2009 to make his decision. The parties had served 15 witness statements between them. There was also discussion about a meeting, which did not happen. No complaint was made about that at the time. The adjudicator duly issued his decision on time.

Upon receipt of this decision, Celtic asked the adjudicator to correct it. These were some typos which the adjudicator amended. However Celtic also invited the adjudicator to make more substantive changes. As noted in a letter sent "in the pursuit of natural justice", these included asking the adjudicator to clarify:

(i) why he had made no reference to incomplete work, such as the absence of isolation joints, highlighted by Celtic, in the Decision.
(ii) the relevance of ROK's own sub-contractors' work. If ROK, acknowledged that this was incomplete, did it accept that its own works were incomplete? What were the procedural requirements of rectifying defects retrospectively in accordance with the contract?

The adjudicator declined to consider these matters noting that under the slip rule he was only able to clarify any simple mistake or ambiguity. In the enforcement proceedings before Mr Justice Akenhead, Celtic argued that the adjudicator failed to apply the rules of natural justice on the basis that the weight of evidence was so overwhelming that no adjudicator acting fairly could reach a decision which he did. It said that as a matter of fact he simply got the maths wrong and must have ignored the clear evidence that ROK had in effect been paid almost all of that which was payable. This was compounded by the adjudicator's failure or unwillingness to use the contractual "slip rule" to put right the manifest errors in what he had done in the first version of his Decision. It was wrong, and unfair that he permitted ROK to serve its Scott Schedule and that he failed to call a meeting during the adjudication in effect to test the evidence.

The Judge noted that the TCC and the appellate courts will be very slow to characterise even glaringly obvious errors made by adjudicators acting within their jurisdiction as breaches or evidence of breaches of the rules of natural justice to which all adjudicators are subject. As for the slip rule, that relates to accidental errors or omissions. The Judge thought it was necessary to consider whether there had really been any mistakes, obvious or otherwise, made by the adjudicator. He noted that the payment and certification position was confused and unclear and that nothing simple was put before the adjudicator. In any event, the mere fact that there was an error, and the Judge was not saying that there was such an error, even if it was a glaring and serious error, should not affect the enforceability of the decision.

Further it was clear that the adjudicator had not acted contrary to the rules of natural justice. It was not a decision on the facts which no adjudicator acting fairly and reasonably could not have reached.

"He reviewed the evidence and arguments obviously with real care and attention. He, as many arbitrators and judges would do, applied significant weight to the contemporaneous documents and the inferences to be drawn about what the parties said and did or did not say and do at the time. Faced with witness evidence from each party which was diametrically opposed, no proper criticism can be made of him for doing so."

It is not necessary for adjudicators in their decisions to give reasons as to why they found some evidence compelling and other evidence not. The fact that no meeting was held is not obvious evidence that the adjudicator failed to comply with the rules of natural justice. He was not obliged under the agreed adjudication rules to have a meeting, although he had the power to do so. There was no objection taken when the idea of having a meeting was dropped. As for the Scott Schedule, all that ROK was doing was setting out in a schedule for each of the principal defects or incomplete works relied upon and put forward by Celtic itself and putting its comments against each item. It would have been a breach of natural justice if the adjudicator had refused to allow ROK to respond to these assertions by Celtic.

As for the slip rule, the Judge thought that it must be the adjudicator who is, and was here, best placed to determine whether there really is an "accidental" error or omission. The Judge noted that Celtic was not without remedies. If the adjudicator had made an error of the magnitude suggested. It could institute arbitration proceedings to produce a final correction on the state of account between the parties.

Causation

J Supershield Ltd v Siemens Building Technologies FE Ltd

[2010] EWCA Civ 7

On 9 October 2001 a nut and bolt connection on a float valve failed and water from a storage tank overflowed into the basement of a new office building for Slaughter and May in the City of London. The water caused a flood which led to extensive damage to the electrical equipment in the basement. A number of different parties were involved in the contractual chain. To cut a long story short, Siemens had entered into a sub-contract to supply and install the sprinkler system, a contract they had sub-let in part to Supershield to carry out the installation works. Following a mediation, Siemens settled the claims with the parties up the contractual chain but was left with its own claim against Supershield. At a hearing in the TCC, the judge found that the probable cause of failure of the nut and bolt connection between the lever arm and the ball valve was a lack of sufficient tightening when the ball valve was installed and that, under the Supershield subcontract, Supershield had an obligation both to install the ball valve and lever arm and to carry out any adjustments which were necessary to ensure that the ball valve was operating correctly. Those findings were sufficient to establish liability between Supershield and Siemens, but he also found on the balance of probability that Supershield had in fact installed the ball valve.

On the issue of damages, Supershield disputed Siemens' claim that the sum for which Siemens had settled the claims made against it reasonably reflected the strength of the defences available to it. The judge found that overall the settlement was reasonable. He therefore gave judgment for Siemens on its part 20 claim for the amount of the settlement (£2.8million plus interest.) Supershield appealed that decision on a number of grounds including that the judge was wrong to find that the figure for which Siemens agreed to settle the claims against it was reasonable. Supershield argued that Siemens had straightforward and complete defences to the claims made against it arising from the flood, and that its settlement of those claims for just under 50% did not represent a reasonable attempt to mitigate the potential loss resulting from its exposure to the claims. LJ Toulson noted that:

"Because of its uncertainty and expense, prudent parties usually try to avoid litigation where possible. It has to be borne in mind that the "settlement value" of a claim is not an objective fact (or something which can be assessed by reference to an available market) but a matter of subjective opinion, taking account of all relevant variables. Often parties may have widely different perceptions of what would be a fair settlement figure without either being unreasonable. The object of mediation or negotiation is then to close the gap to a point which each finds acceptable.

...The issue which the judge has to decide is not what assessment he would have made of the likely outcome of the settled litigation, but whether the settlement was within the range of what was reasonable. "

The reason Supershield argued, was that there were drains in the tank room, which had been designed to carry away overflowing water. These were blocked. Supershield thus said that the effective cause of water escaping from the tank room was the blockage of the drains or, if the overflow of the tank was a partial cause, that the escape was too remote a consequence for Siemens to have been liable.

Supershield did not suggest that Siemens' causation and remoteness defences were so strong that it should have refused to enter any settlement, but submitted that, bearing in mind the failure of the drains to reduce the damage, their strength was not reasonably reflected in the settlement which was reached.

Both the ball valve and the drains were designed to control the flow of water involved in the operation of the sprinkler system. There was a simultaneous failure of separate protection measures. As the CA noted it is not uncommon in the case of a sophisticated engineering project for the designer to incorporate multiple safety devices in the reasonable expectation that the risk of simultaneous failure of both or all the protection devices will be minimal. But the fulfillment of that expectation will depend on those responsible for the protection devices doing as they ought. If those responsible fail to do so, and the unlikely happens, it should be no answer for one of them to say that the occurrence was unlikely, when it was that party's responsibility to see that it did not occur. The reason for having a number of precautionary measures is for them to serve as a mutual back up, and it would be a perverse result if the greater the number of precautionary measures, the less the remedy available to the victim in the case of multiple failures.

Accordingly, whilst, it may have been right that a failure of the connection between the ball valve and lever arm was very unlikely to result in a flood, because the probability was that the water would escape through the drains, this did not make the loss resulting from the flood too remote to have been recoverable. Siemens was responsible for supplying and installing the sprinkler system in such a way that the water was properly contained, and it therefore assumed a contractual responsibility to prevent its escape. The ball valve was the first means of protection against water causing damage to other parts of the building and it failed. It was always possible that the second means of protection, the drains, might also fail. The flood which resulted from the escape of water from the sprinkler tank, even if it was unlikely, was therefore within the scope of Siemens' contractual duty to prevent and it was reasonable for Siemens to settle the claims made against it as it did.

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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