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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.

Failure to mediate

Newman v Framewood Manor Management Co Ltd

[2012] EWCA 3717 Civ

This was a case where the costs of the successful litigation far exceeded the amounts recovered by the claimant. There was no dispute that the appellant was substantively the overall winner in the litigation, although a reduction of 5% was made to take account of the one head of claim on which she lost. A deduction was also made in respect of the costs of the appellant's expert's report which was made in respect of a part of the claim that was not pursued as a realistic claim. Various points were put forward on behalf of the respondent as to why there should be a different order from the usual order that costs follow the event.

A large number of points were made about conduct, including the fact that following the commencement of the proceedings the appellant did not negotiate and did not engage in proposals for compromise in a reasonable way. However Etherton LJ noted that both parties put forward dates for meetings or mediation. It was also said that the appellant did not have a reasonable approach to negotiations in terms of both making offers to and responding to offers by the respondent to settle the proceedings.

The CA thought that the respondent's arguments missed the point. The question was not what offers, reasonable or unreasonable, were put forward by the appellant. What the respondent sought to establish in this case is that, notwithstanding that the appellant effectively succeeded in the claims, the appellant should be deprived of all or part of her costs for unreasonable conduct. Therefore it is necessary to consider the offers which the respondent said were reasonable and which the appellant failed to accept.

The CA considered these noting that the best, made on the eve of trial was effectively only that each party pay their own costs. There was no offer to pay any compensation of any kind to the appellant for the interference with her rights, which was a key part of this claim. Etherton LJ noted that:

"I do not consider in the circumstances that that offer can properly be described as anything like a "near miss", or as being the type of offer the refusal of which discloses such unreasonable conduct on the part of the appellant as to deprive her of what would ordinarily be her right to recover costs as the successful party."

Therefore the CA ordered that save for the expert costs, the respondent should pay 95% of the appellant's costs.

Adjudication - residential occupiers

Westfields Construction Ltd v Lewis

[2013] EWHC 376 (TCC)

Lewis resisted the enforcement of an adjudicator's decision on the grounds that the construction contract was in respect of a house which, at the time of the contract, Lewis contended he occupied as his residence and intended to occupy in the future. In other words, Lewis relied on the exception at section 106 of the HGCRA. Westfields said that Lewis did not occupy the property at the time the contract was made and/or that his intention was always that the property would be refurbished so that it could be let for commercial purposes. Therefore the residential occupier exception did not apply.

One issue for Mr. Justice Coulson was at what point should the court assess whether or not the employer occupies the property as his residence? Is it the date of the formation of the contract? Or is it, as was suggested, important to regard occupation as a continuing operation, and not to over-emphasise the snapshot position at the date of the contract? The Judge was of the view that "occupation" was an ongoing process which could not be tested by reference to a single snapshot in time. "Occupies" must carry with it some reflection of the future: it indicates that the employer occupies and will remain at (or intends to return to) the property. Therefore the evidence about the position at the date that the contract was made had to be considered in the context of all of the evidence of occupation and intention, both before and after the agreement of the contract.

Above all, section 106 needed to be approached with common-sense: it ought to be plain, on a brief consideration of the facts, whether the employer is or is not a residential occupier within the terms of the exception. Here, on the facts, the Judge considered that Lewis intended to rent out the property, which meant that he could show that he intended to occupy the property as his residence.

The case was interesting for the comments made by the Judge about the residential occupier exclusion. The Judge noted that section 106 was intended to protect ordinary householders, who were not otherwise concerned with property or construction work, and were without the resources of even relatively small contractors, from what was, in 1996, a new and untried system of dispute resolution. It was felt that what might be the swift and occasionally arbitrary process of construction adjudication should not apply to a domestic householder. Indeed, the Judge concluded his judgment by asking whether or not it was time for section 106 and indeed the other exceptions to statutory adjudication, to be done away with, so that all parties to a construction contract "*can enjoy the benefits of adjudication*".

Arbitration - NEC3 - compensation events

Atkins Ltd v Secretary of State for Transport

[2013] EWHC 139 (TCC)

Atkins sought to challenge an arbitrator's award under section 68 of the Arbitration Act 1996 on the grounds that there was a "serious irregularity", said to be a failure on the part of the arbitrator to determine the issue put to him. The dispute arose out of a management and construction contract for a number of trunk roads in East Anglia. Atkins came across a greater number of potholes (which it had to repair) than it had expected and claimed extra payment, on the basis that this constituted a compensation event under the contract. An adjudicator had agreed with Atkins, but the Authority successfully took the dispute to arbitration.

The Contract contained a version of the NEC3 Conditions, albeit somewhat modified. Mr Justice Akenhead noted that whilst the NEC3 terms are seen by many as providing material support to assist the parties in avoiding disputes and ultimately in resolving any disputes that do arise, there are also:

"some siren or other voices which criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise."

The contract was on a lump sum basis subject to Atkins' right to claim relief if a "compensation event" occurred. Sub-clause 60.1(11) stated that a compensation event arose where:

"The Provider encounters a defect in the physical condition of the Area Network which
• is not revealed by the Network Information or by any other publicly available information referred to in the Network Information,
• was not evident from a visual inspection or routine survey of the Area Network at the Contract Date,
• an experienced contractor or consultant acting with reasonable diligence could not reasonably have discovered prior to the Contract Date and
•an experienced contractor or consultant would have judged at the Contract Date to have such a small chance of being present that it would have been unreasonable for him to have allowed for it.
Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event."

Atkins placed some reliance on the fourth requirement of the sub-clause. However, the Judge noted that there was nothing in the language of the clause which expressly suggested that the number of defects was an important element in the compensation event equation. This meant that it was very difficult to conclude that an excess number of potholes over and above a reasonable maximum number which could be considered to have been allowed for can form the basis for establishing the encountering of one or more potholes above that number as one or more compensation events.

The Judge felt that one had to ask whether as a matter of an overall businesslike or commercial interpretation this bullet point requirement must be read as meaning in effect that, where the number of potholes (in this instance) has exceeded the number which might be determined as being a maximum that an experienced contractor/ consultant might reasonably have allowed for in its pricing, each and every pothole encountered above that number is a defect which such a contractor/consultant would not reasonably have allowed for. As a first point, the Judge commented on the practical difficulties of determining how many potholes would constitute an excessive number. It would be "an extremely difficult and probably artificial exercise" to try and establish this.

Further, the Judge did not consider that there is any commercial logic or common sense in defining the contract as enabling the volume of individual defects to be part of the equation. The concentration in the sub-clause was on "a defect in the physical condition" (a pothole in this instance) which would objectively be judged initially as having had such a small chance of being present that it would not reasonably have been allowed for within the pricing.

Taking a commercial view, the Judge noted that the contract was a lump sum as opposed to a re-measurement contract. This meant that the parties collectively take a risk that the defects to be addressed will be more or less in number and in terms of expense than the contract lump sums may allow for. Thus, the Authority may end up paying much more than it might have done through the lump sum if the defects turn out to be a lot less than the lump sum may have allowed for; Atkins would then make correspondingly additional and non-anticipated extra profit. Conversely, the Authority may end up paying less if the defects to be addressed turn out to be more in number with Atkins making less profit or incurring more cost than it had anticipated. The Judge concluded that:

"There is nothing commercially unfair or indeed unusual in the parties taking these sorts of risk."

The Authority also raised the issue of the number of compensation event notices that would be required if Atkins' interpretation was accepted - essentially a separate notice would be required for each pothole. Whilst the Judge felt that this was a "fair point", it was not one which could be said to be determinative of the issue.

In cases such as these, the Court can only intervene under s.68 in respect of any established irregularity "*as has caused or will cause substantial injustice*". The Judge did not consider that the arbitrator was wrong in his overall reasoning and conclusions. It therefore followed that there was no substantial injustice.

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