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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.

Signed timesheets: a condition precedent to payment?

J Browne Construction Company Ltd v Chapman Construction Services Ltd & Others

[2016] EWHC 152 (QB)

Here HHJ Taylor had to consider a claim that CCS was paid for work invoiced without timesheets, which were required under the contract, and that they deliberately and fraudulently overcharged JB in respect of both the standard work done and overtime. The contract was said to be on JB's standard labour subcontract terms, and provided that in the absence of any variation or waiver, provision of timesheets containing specified information was a condition precedent to payment under the contract. That information was the names, dates and shifts worked by each individual on the project to which the Sub-Contract Order related. The timesheets that were produced by CCS did not contain the name of any individual involved in the project.

It was also not disputed that timesheets were not attached to the invoices when they were submitted, which was generally by email. The evidence was that the invoices were compiled from information taken down by hand from workers over the phone, which was then used as the basis of timesheets. Alternatively they would be handed over on site to be signed. CCS said this meant that the timesheets that were in evidence were genuine and contemporaneous.

JB said that there never were any timesheets, and all of the CCS timesheets for the contract had been fabricated and backdated after the dispute between the parties arose. There were no records of them at JB or in any of the contemporaneous correspondence. JB further said that the timesheets were not "proper" timesheets in that they did not perform the function for which they were required and were not the standard form used in the construction industry. It was not possible to determine who worked at which site on which date. That information was necessary to identify who was on site and to calculate what to pay each man.

After consideration of discrepancies in sample invoices, the Judge concluded that the likelihood was that these invoices had been fabricated after the dispute arose. The lack of contemporaneous evidence as to their existence and the discrepancies with the contemporaneous emails that did exist were supportive of their being later documents.

The Judge then had to consider whether or not this had been a fraud or conspiracy or deceit. It was clear that the document-keeping was poor and in some respects non-existent. Certain health and safety documents were not completed for the first three months of the contract and had to be backdated. Witnesses suggested that on many occasions the attendance records were either not filled in, or were partially filled in, where workers had checked in, not out. Invoices were submitted without timesheets, and nobody asked for them. There was not, however, fraud.

The Judge noted that the control of documentation for a contract of this size was "dismal". The provision of timesheets was not insisted upon because there was a degree of trust that the invoices were accurate, even though the lack of timesheets amounted to a breach of contract. This was a contract where more work than anticipated was carried out. When the timesheets were prepared afterwards, they did not always overstate but rather understated the work in some respects when compared with the contemporaneous emails. That was not consistent with dishonesty. The Judge considered that the most likely explanation for the backdated invoices was a *"misguided and wrongful attempt to meet allegations of fraud which they considered to be wholly unjustified…"*

JB pleaded that as the provision of timesheets was a condition precedent to payment and that prior authorisation was needed for overtime, nothing was payable. However, it was accepted that if work was done, some remuneration was due. There was little evidence before the Judge on which to assess what any overpayment may be. She considered the documentation as a whole with the presumption that CSS were in the wrong and held that as there had been inaccuracy throughout, there was a margin of error of 15% of the invoice value.

Adjudication: no dispute & applicable interest rates

AMD Environmental Ltd v Cumberland Construction Company Ltd

[2016] EWHC 285 (TCC)

In this adjudication enforcement case, two issues arose. The first was the alleged absence of a crystallised dispute at the time of the notice of adjudication, the second the failure of the adjudicator to address the matters at issue. The adjudicator rejected the "no dispute" point, noting that there had been a five-month gap between the application for payment on 31 March 2015, and the notice of adjudication on 2 September 2015. Mr Justice Coulson agreed, noting that he had observed before that *"this argument is frequently advanced and almost as frequently rejected by the courts".*

Cumberland said that they had been asking for particulars of parts of AMD's claim which were not always forthcoming. Mr Justice Coulson said that he considered that it was "wrong in principle" to suggest that a dispute had not arisen until every last particular of every last element of the claim had been provided:

"When a contractor or a sub-contractor makes a claim, it is for the paying party to evaluate that claim promptly, and form a view as to its likely valuation, whatever points may arise as to particularisation.

Efforts to acquire further particularisation should proceed in tandem with that valuation process ... In an ordinary case, a paying party cannot put off paying up on a claim forever by repeatedly requesting further information … Any other conclusion would allow a paying party limitless time, either to avoid an adjudication altogether, or at least to avoid the enforcement of any adverse decision. It would deprive the payee of its statutory right to adjudicate."

The Judge also noted that Cumberland replied to the adjudicator's ruling on 17 September 2015, that there was a crystallised dispute, by requesting that same day an extension of time to serve its response. Cumberland wrote again, expressly acknowledging the adjudicator's decision "to overrule our barrister's objections to an adjudication". There was no reference in either letter to any reservation of the right to challenge the decision subsequently on this same ground. Cumberland had therefore accepted the adjudicator's ruling and were treating him as having the necessary jurisdiction to proceed.

Cumberland also suggested that the adjudicator's request for further information, and AMD's compliance with that request, constituted a breach of natural justice. The Judge rejected the submission that it was somehow unfair if the adjudicator was given information during the adjudication which had not previously been available (whether or not it had been previously requested). If an adjudicator asks for more information, it was "obviously wise" for the claiming party to provide that information, regardless of their own view as to its materiality. It would be contrary to the Scheme for Construction Contracts and the basic principles of adjudication not to allow the adjudicator a wide leeway to seek information that they believed to be important.

AMD sought interest at 8.5% pursuant to the Late Payment of Commercial Debts (Interest) Act 1998. Cumberland suggested 2.5%. The Judge decided that the right figure was 6%:

"That is because this adjudication decision should have been honoured some time ago, and the arguments in support of the defendant's position were properly categorised as hopeless. The TCC is concerned that too many adjudication decisions are not being complied with, and that there are too many disputed enforcements where the grounds of challenge are without merit. Thus a high interest rate under the Act will be awarded in such cases."

Adjudication: breach of natural justice

Manor Asset Ltd v Demolition Services Ltd

[2016] EWHC 222 (TCC)

In this adjudication enforcement case, Manor Asset asserted that the adjudicator's decision was "flawed and invalid" because the adjudicator did not take its evidence into account. That was a breach of natural justice. One of the issues in the adjudication was whether or not Demolition had achieved the first milestone on 23 October 2015. Manor Asset asserted that the adjudicator had failed to take into account, properly or at all, the evidence on this issue presented by them. This evidence, as set out in a witness statement, was that during a site visit on 27 October 2015 photographs of the work had been taken and that, although during the site visit Manor Asset had concluded that the first milestone had been achieved, subsequent analysis of the photographs taken during the site visit showed that the milestone had not in fact been achieved. The material before the adjudicator on this issue comprised three elements. First, Demolition's assertion that the milestone had been achieved (for example by submission of the invoice on 23 October 2015). Second, the statement in Manor Asset's payless notice that the demolition was 60% complete. This evidence suggested that the milestone had been achieved. Third was the witness evidence stating that Manor Asset's subsequent examination of the photographs showed that the first milestone had not been achieved. The adjudicator said this in his Decision:

"I am satisfied on the balance of probabilities that at 23 October 2015 Demolition Services had passed below the line shown on the photograph incorporated in the Parties' Contract and therefore the milestone had been achieved. Demolition Services was therefore entitled to raise its invoice."

The adjudicator then gave his reason for reaching this conclusion, namely that there was no suggestion in the payless notice that the milestone had not been achieved. What the adjudicator did not do was mention the evidence about the photographs. Mr Justice Edwards-Stuart said that "for the sake of clarity" the adjudicator should have done so.

However, the Judge considered that as there was no other evidence in support of the submission that the first milestone had not been achieved, the adjudicator must have taken it into account because if he had simply overlooked that evidence he would not have thought that there was anything to decide. You do not decide a point and then give a reason for that decision unless there is a point at issue that needs to be decided.

The Judge felt that he should mention the fact that the adjudicator listed all the written submissions that had been made to him which, he said, he had considered fully when making his decision. Whilst he could see that "to some extent" this statement was formulaic, he did not consider that it was appropriate simply to dismiss it outright. Given that the evidence of fact before the adjudicator was largely confined to the issue about the achievement of the milestone, the Judge thought that it was hard to see how the adjudicator could have overlooked that evidence when considering the question of about the state of the work. Accordingly, the natural justice challenge was dismissed.

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