Fenwick Elliott
Solicitors, Adjudicators and Mediators

DISPATCH

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" Constructive Law for the Construction Industry "

Cases From the TCC

The Royal Brompton Hospital case has perhaps taken a step towards final resolution with HHJ LLoyd QC releasing a lengthy judgment in which he found that the consultants retained by the Hospital Trust were liable to make a contribution to the sums paid out by the Trust to settle the claims made by the contractor. Quantum, however, apparently remains to be resolved.

At the beginning of the judgment, the Judge discussed his approach to expert evidence. The role of the expert, following the introduction of the CPR, is to assist the court. This duty overrides any obligation to the party who has instructed and paid that expert. The Judge also indicated those areas where expert evidence would assist the court.

Expert evidence might be needed to establish the body of professional practice prevalent at the relevant time. As a matter of policy, a professional person will not be liable unless the court was satisfied that a competent person would have acted otherwise and that as a consequence the alleged negligence would not have occurred. Expert evidence can also assist by indicating what technical factors might influence the judgement of a professional person in deciding what steps to take.

The Judge also set out the principles, which he tried to follow, in deciding whether or not the defendants acted negligently as contended for by the Trust:-

"It by no means follows that a professional… opinion was negligently given because it turns out to have been wholly wrong…Whether or not there has been negligence is…a pure question of fact depending on the particular circumstances of each case"
(Sutcliffe v Thackrah)

"No matter what profession…, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made."
(***Saif Ali v Sydney Mitchell & Co***)

Fenwick Elliott acted for the successful claimant in *OTV Birwelco v Technical & General Guarantee Co Ltd. T&G* resisted paying under a bond following the insolvency of one of OTVB's sub-contractors. T&G raised a number of technical defences relating to the bond formalities. These included a claim that issuing the final certificate under the main contract rendered the bond null and void. HHJ Thornton QC held that T&G's obligation under the bond crystallised when they were provided with the necessary details to establish liability under the bond. As this had happened before the issue of the final certificate, there was no question that the call was valid.

Given the size of the claim, a single joint expert, whose fees were capped, was appointed to consider quantum. The parties were confined to the expert's report and the answers to any reasonable questions asked of him. The expert met with representatives of both parties and was able to inspect all the documents material to quantum. The expert was not called to give evidence at the trial.

OTVB also claimed the costs of preparing information sought by T&G before legal proceedings commenced. The Judge agreed that this was a valid head of claim. None of the information requested was reasonably required on top of that already supplied by OTVB. T&G could and should have had the call adjusted on the basis of the information to hand. This would have involved a relatively short meeting between the parties. T&G could then have assessed the call and concluded that, subject to any legal grounds for rejection, the quantification and qualifying conditions of the call had been made out. The Judge said:-

"Given the work involved, I find that it was reasonable for OTV to engage claims surveyors … since it lacked the necessary personnel in house who could be spared...In an attempt to mitigate the resulting loss, OTV responded to [T&G's] unreasonable requests for further information …since it reasonably concluded that by doing so, [T&G] would be persuaded to honour its contractual commitments without recourse to litigation…OTV was entitled to take reasonable steps in an attempt to mitigate this breach and the costs of the steps that were taken can reasonably be claimed as damages directly and foreseeably flowing from that breach. In consequence, this claim is recoverable as damages for breach of contract"

Mediation

There has been yet another case which strongly demonstrates the ever increasing commitment of the courts to mediation.

In ***Cable & Wireless v IBM***, IBM sought a stay of the proceedings brought by C&W on the grounds of clause 41 of their contract which provided that the parties should attempt in good faith to resolve any dispute or claim promptly through negotiations between the respective senior executives of the parties. If the matter was not resolved through negotiation, then the parties should attempt in good faith to resolve the dispute or claim through an ADR procedure as recommended by CEDR. However an ADR procedure which was being followed would not prevent any party from issuing proceedings.

IBM suggested that the court give effect to this clause by ordering a stay in a similar way as with arbitration. C&W said that the clause was unenforceable because it was no more than an agreement to negotiate and that the reference to ADR could not have a binding effect because of the option, contained in the contract, to commence proceedings.

Colman J held that there was little doubt that the parties had intended for litigation to be a last resort. The mere issuing of proceedings was not inconsistent with the simultaneous conduct of an ADR or with a mutual intention to have the issue finally decided by the courts if that ADR failed. He further held that the agreement went beyond a mere agreement to negotiate or an attempt in good faith to resolve the dispute. This was because the agreement required not merely an attempt to achieve resolution of the dispute but also the participation of the parties in a procedure to be recommended by CEDR.

Further the Judge noted that the courts should "*nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references"*. ADR was *"a firmly established, significant and growing facet*" of civil procedure. Moreover the dispute resolution process was sophisticated and well developed.

Colman J continued that, whilst the wording of any reference to ADR would need to be carefully examined, for the courts to decline to enforce contractual references to ADR on the grounds of uncertainty would "*fly in the face of public policy as expressed in the CPR and…in the judgment…in Dunnett v Railtrack"*. That said, before deciding in favour of IBM, the Judge was careful first to consider whether there would be any material prejudice to C&W.

Adjudication Update

TeCSA have issued a revised version of their Adjudication Rules. These will apply from 1 October 2002. The changes are relatively minor. By rule 14, the adjudicator may still decide upon his own jurisdiction. The revised rule makes it clear that such a decision will be binding and so enforceable until subsequent proceedings or agreement (thereby following the case of *Farebrother v Frogmore* discussed in issue 12). A section on costs has been added which confirms that an adjudicator does have jurisdiction to award costs, provided the parties agree. A party can require an adjudicator to give reasons in his decision, provided such a request is made within seven days of the Referral. The fee for the appointment of an adjudicator remains at £100.

Partial Possession/Practical Completion Update

In our last issue we reported on *Impresa Castelli v Cola*. In *Skanska Construction (Regions) Ltd v Anglo-Amsterdam Corporation Ltd*, HHJ Thornton QC had again to consider partial possession. Skanska appealed against an arbitrator's decision entitling AA to deduct liquidated damages. The contract was a JCT 81 With Contractor's Design. Clause 16 had been amended to state that practical completion will not be certified unless the certifier was satisfied that any unfinished works were *"very minimal and of a minor nature and not fundamental to the beneficial occupation of the building"*. By clause 17, practical completion was deemed to have occurred on the date (if any) upon which the employer took possession of *"any part or parts of the works"*. Skanska claimed that AA had taken possession some 2½ months earlier than the date of practical completion. HHJ Thornton QC found that it was clear from the findings of fact of the arbitrator that AA had taken possession at this earlier date. Thus, although works remained outstanding, Skanska was entitled to recover the liquidated damages that had been withheld. The commencement of fitting out work constituted the taking of possession of the works, notwithstanding that Skanska was able to return to the building to complete its own contractual works.

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