Fenwick Elliott
Solicitors

Dispatch

Issue 46
April 2004

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

Adjudication

■ Ritchie Brothers (PWC) Ltd v David Philip (Commercials) Ltd

DPL resisted enforcement of an adjudicator's decision on the basis that the decision was reached after the expiry of the time set out in the Scheme for the adjudicator to reach that decision.

First, Lord Eassie had to consider when the adjudication commenced and the 28 days started to run. DPL submitted that the correct date for commencement should be the date of the Referral Notice, or where, as was the case here, the notice was undated, the date should be that of the covering letter which accompanied its dispatch. The Judge rejected the submission on behalf of RBL that the starting point for the adjudication was the date upon which the Referral Notice first came into the adjudicator's possession, which was in this case five days later.

The Judge confirmed that the starting date for the running of time for the purposes of paragraph 19(1) of the Scheme was when the Referring Party took action by sending off the Referral Notice.

As a consequence of this, DPL then argued that the 28-day period expired on 16 October 2003. The adjudicator had not sought any further time for his decision until 21 October 2003. Two days later he wrote confirming that he had made his decision and sought payment of his fee. On 27 October 2003, the decision was delivered.

Lord Eassie said that the day on which the adjudicator wrote to the parties saying that he had made his decision (and when he requested his fee prior to his decision being published) was the date upon which the adjudicator could be said to have reached his decision. Lord Eassie declined to comment on whether the terms of the Scheme precluded an adjudicator from requiring payment of his fee in exchange for the release of copies of his written decision.

DPL then went on to argue that the adjudicator's power had come to an end at the expiry of the 28-day period and therefore the adjudicator could not seek or receive consent from the Referring Party to reach a decision in the following 14 days. The argument advanced here was that the principles of the law of arbitration in Scotland applied to adjudication and under the law of arbitration, the rule was that where the date for the delivery of an arbitral decision passed without delivery of that decision, the arbiter's jurisdiction ceased.

The Judge bore in mind the provisional nature of an adjudicator's decision and the fact that it does not deprive the parties of access to the courts or to the conclusive determination of an arbitrator. Therefore, the rules of arbitration would not automatically transfer to adjudication. Accordingly, the Judge looked to the Scheme itself. He found that the Scheme had envisaged the event that an adjudicator may not be able to produce his decision within any stipulated time limit.

Paragraph 19(3) of the Scheme enables either party, where an adjudicator has not produced a decision in time, to require the adjudication to start anew with a different adjudicator. In such circumstances, either party may effectively dismiss that adjudicator and substitute another. However, the Judge said that underlying this provision was the intention that once started, the adjudication process should be carried through even if the adjudicator is slow. Thus, the expiry of the 28-day period is not enough to say that the adjudicator's jurisdiction has come to an end. Therefore, the provisions relating to the times within which an adjudicator should reach his decision are directory not mandatory. Delay by an adjudicator in producing his decision does not bring the process to an end but it enables that process to be continued with a fresh adjudicator should either party so wish.

In coming to this conclusion, Lord Eassie agreed with the TCC decisions in *Barnes & Elliot Ltd* v *Taylor Woodrow Holdings Ltd & Another* and *Simons Construction Ltd* v *Aardvark Developments Ltd* which we reported on in Issue 42.

Cases from the TCC - Mediation/Measure of Loss

■ Earls Terrace Properties Ltd v Nilsson Design Ltd & Charter Construction plc (as Part 20 Defendant)

Earls Terrace, a development company, wanted to restore and refurbish a number of houses in Kensington. Nilsson, the architect, prepared the Employer's Requirements. Charter were engaged, on a prime cost basis, to carry out the works. Prior to completion, water penetration to the basements of 11 of the 25 properties was discovered. This led to lengthy remedial works. Earls Terrace claimed this delayed the project by 15 months and took action against Nilsson claiming it had failed to provide Charter with appropriate design details and had failed to supervise Charter properly. Nilsson joined Charter into the proceedings on the basis that Charter had failed to implement the design correctly. Earls Terrace claimed damages for direct building and remedial costs, compensation and holding costs for the 15-month delay.

The parties attempted to settle their differences through mediation. The mediation failed. However, during the mediation process, the parties were able to identify the main differences between them preventing a commercial settlement. They therefore asked the court to decide them as preliminary issues. Whilst HHJ Thornton QC noted that these issues were fact sensitive and that it was unusual for the court to be asked to decide such questions at an early stage, he agreed to the joint request as it was made in accordance with the principles of the overriding objective of saving expense and dealing with the case proportionately and expeditiously.

Earls Terrace had funded the project through a construction credit agreement which provided that £20m of the funding would be provided interest free and that funding over the £20m limit would attract interest at 10% per annum. For the purposes of the court hearing, it was an assumed fact that Nilsson knew that Earls Terrace was a development company and that any delay to completion of the project would result in funds being held in the project for longer than they would otherwise be. The interest for the 15-month period was considerable, nearly £6m. Statutory interest was claimed on top.

One issue for the court was whether Earls Terrace was entitled to be compensated by applying the interest rate of LIBOR plus 2% to the funds that it had invested in the project for the period of the delay or by applying an interest rate which reflected the actual cost of borrowing the funds that it had invested in the project for that period of delay.

HHJ Thornton QC held that Earls Terrace had a valid claim for that part of the funding that it was able to establish at trial was locked into the development for any period as a result of the delays caused by the remedial works. This was a commercial loss either because the money was on loan for longer than it should have been or because Earls Terrace had been unable to use that money elsewhere.

In addition, the court had to consider whether Earls Terrace was obliged to give credit against the sum claimed for the corresponding benefit gained by the increase in the value of the houses during the period of delay? The Judge held that Earls Terrace did not have to do this. This was because the sales and any increased profit were not connected with the alleged breaches of contract, did not form part of the same transaction of those breaches and were not caused by them.

Court of Appeal Cases - Case Update

■ Hurst Stores & Interiors Ltd v ML Europe Property Ltd

We reported on this case in Issue 37. The case turned on whether a settlement document alleged to be in full and final settlement of all claims could be said to be binding. At first instance it had been held that the project manager, who signed the document, did not have authority to enter into such an agreement and secondly, the document was entered into on the basis of a unilateral mistake on the part of the project manager and the documents should be rectified so as to remove reference to full and final settlement of claims. The evidence had shown that the construction manager was aware that Hurst did not understand the true intention of the document. ML could not be allowed to place reliance on the document and therefore, the document did not have any binding effect in respect of any claims that Hurst intended to make. ML appealed. The CA upheld the decision of the trial judge at first instance.

Dispatch is produced monthly by Fenwick Elliott, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.

Dispatch is a newsletter and does not provide legal advice.

Fenwick Elliott
Solicitors

353 Strand
London WC2R 0HT

T +44 (0)20 7956 9354
F +44 (0)20 7956 9355
Editor Jeremy Glover
jglover@fenwickelliott.co.uk
www.fenwickelliott.co.uk