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Dispatch

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

Global Claims

John Doyle Construction Ltd v Laing Management (Scotland) Ltd

This decision of the Scottish Inner House of the Court of Session discusses the calculation of loss and/or expense following alleged delay and disruption of building work at the corporate headquarters of a leading insurance company. Doyle brought a claim for an extension of time of 22 weeks. Doyle alleged that they had to change their method of construction as a result of late provision of design and builderswork information, delayed access to the site, and disruption of work on site.

Although the claim was made on a global basis, both the court at first instance and the Inner House agreed that consideration of Doyle's claim should be left to the conclusion of a full trial on the facts. If Doyle could not sustain its global claim, it should still have the opportunity to demonstrate that matters which were Laing's responsibility were the dominant causes of their loss, or even to try and apportion its losses between causes which were Laing's responsibility and those which were not. The court did caution that a party's pleadings should disclose sufficient information to enable the other party to prepare its own case and to enable the parties and the court to determine the issues actually in dispute and so that there was little scope for one side to be taken by surprise.

It was common ground that a global claim could be made. However, for it to succeed, a contractor must prove the existence of one or more events for which an employer is responsible, the existence of loss and expense suffered by the contractor and a causal link between the event(s) and the loss and expense. The traditional downside is that all of the causative events must be matters for which the employer is responsible. A global claim is likely to fail if a material contributory factor to the alleged loss is one for which the employer is not legally responsible. At first instance, Lord MacFadyen had suggested that by adopting a common sense approach it might be possible in such circumstances to apportion part of the global loss to factors for which the employer was responsible. The Inner House agreed with Lord MacFadyen's approach. Thus, where there is a global claim, if some of the causes of the loss and expense are not the fault of the employer, then it is necessary to consider if it is possible to identify a causal link between particular events for which the employer is responsible and individual items of loss.

In determining what is a significant cause, Lord Drummond Young referred to the "dominant cause" approach. He agreed that the question of causation must be treated by the application of common sense to the logical principles of causation. Is it possible to say that an item of loss has been caused by a particular event even though other events might have played their part? In such cases, if an event or events for which the employer is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability, even if other causes exist that are to some extent concurrent. If an item of loss results from concurrent causes, and one of those causes can be identified as the dominant cause of the loss, it will be treated as the operative cause, and the person responsible for it will be responsible for any loss.

Even if it is not possible to establish the dominant cause of the loss, it may be possible to apportion the loss between the causes for which one party is responsible and other causes. In such a case it is necessary that the event(s) for which a party is responsible should be a material cause of the loss. Provided that condition is met the apportionment of loss between the different causes is possible, for example where the causes of the loss are truly concurrent, in that they operate together at the same time to produce a single consequence. This procedure was, as the court noted, not dissimilar from that used in relation to contributory negligence or contribution among joint wrongdoers. The court also noted that the alternative to such an approach is the strict (and unfair) view that, if a party sustains a loss caused partly by events for which another is responsible and partly by other events, he cannot recover anything because he cannot demonstrate that the whole of the loss is the responsibility of that party. That would deny him a remedy even if the conduct of that other party was at fault.

Adjudication

■ Connex South Eastern Ltd v MJ Building Services Group plc

In this case, which came before HHJ Seymour QC, Connex sought a declaration that the adjudication commenced by MJB should not proceed. Connex, as is increasingly typical, put forward a number of issues including:

(i) Is there an agreement in writing pursuant to s107 of the HGCRA?; and

(ii) Did MJB have the right to refer the dispute to adjudication even if the agreement has been discharged by the acceptance of Connex' repudiation;

MJB had entered into a contract with Connex to provide CCTV systems for Connex stations. Problems arose because shortly after MJB started work Connex wrote to them and said that all works were to be suspended until further notice. Meetings were held between the parties, but no agreement was reached and the works did not restart. One year later, MJB received instructions that no further works were to be undertaken. Ultimately MJB wrote to Connex to say that Connex had repudiated the contract and that MJB accepted that repudiation. A further year and a half later, MJB commenced adjudication proceedings - a step resisted by Connex.

There was no signed contract and not even a written order from Connex who argued that there had been no written acceptance of MJB' s tender. The Judge held that this was irrelevant. MJB had been instructed to commence work by Connex. Predictably, Connex relied on *RJT v DM Engineering* to claim that the whole agreement was not evidenced in writing.

However, significantly, there was a reference to Connex giving an instruction to MJB to commence the project immediately in one set of meeting minutes. The minutes were written with the authority of both of the parties and therefore constituted evidence of the acceptance of the tender - and thus sufficient evidence in writing of the contract between those parties.

As an adjudication can take place after the contract works have been completed, the repudiation argument did not succeed. As the repudiation was accepted in November 2002, but the adjudication was not brought until February 2004, Connex suggested that this was an abuse of process.

Following *Herschel v Breen* by virtue of s108 of the HGCRA, an adjudication could be commenced "at any time" even if other proceedings were extant. Connex suggested that this right could only exist during the currency of a contract and certainly could not be held to exist so long after the contract had, on MJB's own case, come to an end. However, the Judge did not agree. Indeed, following *A & D Maintenance and Construction Ltd v Pagehurst* it is well established that an adjudication could take place after a contract has come to an end.

Although it was suggested that the purpose of adjudication was really to relieve cash flow problems which might arise during the currency of a contract, the Judge held that it was necessary to consider whether or not any dispute which may have arisen has done so under the contract in question.

That said, the Judge did recognise that there had to be some limits. Thus whilst no limitation period was laid down for commencing an adjudication, any limitation defence which may be available to a party would have to be taken into account by an adjudicator. If he failed to do so, then any payment pursuant to his award might well give rise to a claim for restitution.

Case Update - Health & Safety

■ Fytche v Wincanton Logistics plc

In Issue 37 we reported on this CA decision which discussed whether or not the Personal Protective Equipment at Work Regulations 1992 imposed obligations to supply and maintain protective equipment which relates solely to identified risks. The case has now gone to the House of Lords which by a 3:2 majority endorsed the CA's original decision. Although an employer did have a duty to maintain personal protective equipment which it provided, that duty did not extend to carrying out repairs or maintenance which had nothing to do with an individual's ordinary conditions of work.

***Dispatch* is produced monthly by Fenwick Elliott LLP, 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.**

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