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Dispatch

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

Adjudication

William Verry Ltd v North West London Communal Mikvah

Following an adjudicator's decision that NW was to pay Verry £67k plus interest, NW declined to pay on a number of jurisdictional grounds including:

(i) That the appointment was invalid because the referral notice was issued one day too late; and

(ii) That the adjudicator wrongly, unfairly and without justification failed to consider a critical issue that had been referred to him.

In accordance with clause 41A of the contract, the referral notice must be provided within seven days of the adjudication notice. However, clause 41A.5.5 said that an adjudicator, in reaching his decision, shall set his own procedure. Here, the adjudication notice was issued on 3 December 2003, and the adjudicator, who was appointed on 5 December 2003, held that Verry should provide him with its referral notice on 11 December 2003. Verry duly did this. NW, in enforcement hearings, claimed that this should have been done by 10 December.

HHJ Thornton QC said that s108(1)(b) of the HGCRA requires that the contractual adjudication procedure should have the object of securing the referral to the duly appointed adjudicator within seven days of the date of the adjudication notice. This is a minimum requirement. However, there is nothing in the wording of that section to prevent a contract from being drafted in such a way so as to provide a machinery that enables an adjudicator to extend that timescale. This is what happened here. Accordingly, Verry had complied with the adjudicator's procedural direction.

Finally, the adjudicator had decided that he could not revalue the works to take into account any defects or snagging items because in a previous adjudication on the same project, he had determined the gross value of the work and no further work had been carried out since that decision. Here, however, there had been a subsequent interim valuation certificate which indicated that the state of the work had changed by virtue of the discovery of alleged defects showing that previously valued work had not been properly executed. The adjudicator was not precluded from revaluing the work because of this. This particular adjudication was seeking a further valuation of the work taking into account and giving appropriate effect to the list of defects and snagging items. On top of this, the adjudicator had made a further error in relation to abatement and he had shown an inconsistency of approach when compared with the previous adjudication. The effect of these errors was that the adjudicator had failed to consider the existence or value of alleged defects in the work. This was even though the dispute referred to him had involved a consideration of these matters as part of his determination as to whether the interim certificate should be opened up, reviewed and revised.

Accordingly, following cases such as *Joinery Plus* v *Laing*, the question for the court was whether the errors were so fundamental that they went to jurisdiction. HHJ Thornton QC decided that the errors here were ones which had been made as part of the adjudicator answering the right question wrongly rather than in answering the wrong question. However, ultimately the Judge decided that the errors were "just, but only just" ones which fell within the adjudicator's jurisdiction.

This left the Judge with three options: enforcing the decision, giving leave to defend the application and giving directions or dismissing the application. Here he was mindful of procedural realities. It was open to NW to start a fresh adjudication by promptly serving an adjudication notice and have the dispute about the defects resolved within about six weeks. Indeed, if NW did not take such a course, it would suggest that some of the claims put forward in the enforcement hearing (namely the claimed abatement) were in reality of little merit.

Therefore, HHJ Thornton QC decided that the decision should be enforced because it was valid and enforceable. However, the resulting judgment was not to be drawn up for six weeks from the date of the handing down of the judgment so that if a subsequent adjudication decision was made in favour of NW (in respect of the defects and the abatement claim), effect could be given to that and so a payment only be made to the net winner.

This way of proceeding best gave effect to the overriding objective which the court must have in mind when seeking to resolve a dispute as expeditiously, economically and fairly as possible between two parties.

Health & Safety

King v Richard Farmer (t/a RW Farmer (Builders))

King, a painter and decorator, fell from a ladder and suffered severe injuries. He then brought a claim against Farmer, the main contractor, alleging that Farmer was in breach of the Construction, Health, Safety and Welfare (Regulations) 1996. He claimed that he was either employed by Farmer or that Farmer was the person controlling the way in which the work was carried out.

Farmer was a building contractor working mainly on domestic properties. He frequently used King's firm to carry out works. He duly instructed King to carry out the works which were the subject of this dispute. Scaffolding was required and Farmer arranged for this to be erected. The scaffolding company did not supply a ladder to reach from ground level to the first stage. This was for safety reasons so as to prevent unauthorised access. In the morning, King used his own ladder to access the scaffolding. He put his ladder up and has little recollection of anything thereafter. He was unable to say how the accident happened.

The case was put solely as a breach of statutory duty. King claimed that Farmer had a statutory duty to provide a safe means of climbing the scaffolding. As this involved a ladder, the duty was to provide either a fixed ladder or to ensure that the ladder was footed when used by him. King did accept that he was under a similar duty and therefore he must bear some of the blame for the accident. Farmer said he did not employ King nor did he controll his work. He said further that the accident was entirely the fault of King. Judge Rutherford noted that the parties saw their relationship as being one of main contractor/ subcontractor. There were three possible tests the Court could adopt:

(i) The organisational test - was King an integral part of Farmer's organisation?

(ii) The economic reality test - who bore the risk of loss and the chance of profit

(iii) The multiple test - looking at all the relevant factors, did the scales come down in favour of employment or self-employment? (This is the most popular.)

King was in no way an integral part of Farmer's firm. Whilst Farmer benefited from the work done by King, King was held to be in business on his own account - making his own profit from the contract. Looking at the method of payment, the organisation of the work and the provision of tools and materials, the Judge held that King was self-employed.

The Judge then had to consider whether Farmer controlled the way in which the work was carried out. However, the Judge found that King had complete control over the way in which he carried out his work. Farmer was the main contractor in charge of getting the job done. He provided the workforce by contracting to King and he provided the scaffold by instructing others to erect it. However, the work King was carrying out was painting, decorating and carpentry. The way in which this work was organised and carried out was entirely within King's control. Therefore no liability attached to Farmer. In addition, the Judge also noted that had he found that Farmer was liable, any damages would have been reduced by 75% to take account of King's contributory negligence.

Cases from the TCC

North Sea Ventilation Ltd v Consafe Engineering (UK) Ltd

NSV carried out work on the instructions of Consafe on heating, ventilation and air-conditioning equipment at a plutonium chemical waste plant at Drigg. Consafe counter-claimed for liquidated damages. NSV said that liquidated damages could not be levied because they were a penalty. As HHJ Cockroft said, if the relevant clause was a penalty, Consafe would not be able to enforce it. However, the onus was on NSV to prove that it was a penalty.

HHJ Cockroft said that a penalty was an extravagant and unconscionable clause in comparison to the greatest loss that would result from a breach, whereas a liquidated damages clause was a genuine pre-estimate of loss. He further quoted from the comment of Lord Woolf in the *Phillips Hong Kong Ltd* v *AG of Hong Kong* case that striking down a penalty clause was a blatant interference with freedom of contract and could only be justified where there was oppression.

Here, the Judge was satisfied that there was no oppression. This was not a case of a big contractor strong-arming a small contractor. On the evidence, there was an equality of arms between the parties. They had a 20- year trading relationship. Further, the liquidated damages clause provided for graduated sums increasing in proportion to the seriousness of the breach, something the Judge described as being commonplace in commercial contracts.

***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.**
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