Fenwick Elliott
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Dispatch

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

Adjudication

CIB Properties Ltd v Birse Construction Ltd

Following an adjudication where CIB were awarded over £2million, Birse resisted enforcement claiming both that there was no dispute and that the size and complexity of the dispute meant it could not be resolved fairly through adjudication. HHJ Toulmin CMG QC recognised that this was the first time such a challenge had been made.

In considering whether there was a dispute, the Judge referred to both the *Halki* v *Sopex* and *Sindall* v *Solland* cases. He said that, "*the test is whether, taking a common sense approach, the dispute has crystallised. Even after it has crystallised, the parties may wish to have further discussions in order to resolve it. Whether or not it has, in fact, crystallised will depend on the facts ... including whether or not the parties are in continuing and genuine discussions ... to try to resolve the dispute.*"

CIB sent a claim, accompanied by an expert report and 15 lever arch files, on 28 July 2003. CIB sought payment within 30 days. Fifty-two files of supporting documents were said to be available for inspection. The Judge noted that as it was holiday time, had the 30-day deadline been strictly adhered to, and had a referral to adjudication followed, he might well have concluded that Birse had not been given a sufficient opportunity to consider the claim and respond and that thus a dispute had not yet arisen.

However, matters progressed. There was a mediation. As the Judge said, "*both sides were jockeying for tactical advantage in a way which is apparently permitted in adjudication but is not permitted in current litigation practice*". The Judge was satisfied that the claim made on 28 July 2003 was disputed by Birse and that the dispute had crystallised by 14 November 2003, the date of the adjudication notice. In the 15 intervening weeks there had been a proper opportunity for Birse to consider the claims and provide a constructive response. However, Birse had attempted to manoeuvre tactically to try and ensure that the dispute had not crystallised and many of Birse's problems were caused by this decision to play for time.

Birse raised a number of complaints based on the size and complexity of the dispute. Birse relied on the value of the claim, over £12 million plus VAT, that 49 files were filed with the Referral Notice (including 16 witness statements), there were a further 52 files related to another claim, and a further 55 files were served during the course of the adjudication. Birse said they were denied the opportunity to investigate properly and/or assess claims made against it or to test the assertions made. Birse was therefore not in a position to defend the case made against it.

In his decision, the adjudicator noted the guidance given by HHJ Wilcox in the *London & Amsterdam* case where the Judge said that the Scheme did not envisage that there should be a provisional resolution of the dispute by an adjudicator at all costs. That would be far greater an injustice than that which the HGCRA was enacted to remedy. The adjudicator, here, said that as a result, he decided that if he came to the conclusion that he had not sufficiently appreciated the nature of any issue referred to him, he would not give a decision on that issue. That said, he was confident that he understood the principal issues here and that he had been able to do substantial justice between the parties in arriving at his decision.

The Judge said that the test is not whether the dispute is too complicated, but whether an adjudicator is able to reach a fair decision within the time limits allowed by the parties. Here, to reach a fair decision, more than 42 days were needed and the adjudicator sought and obtained the agreement to extensions of time. This enabled him to reach a fair conclusion, having given both parties proper opportunity to put their case. The extension of time meant that the adjudicator was able to reach a decision after making a due and impartial enquiry. There is a general right under section 108(1) of the HGCRA for a party to a construction contract to refer a dispute to adjudication and the adjudicator must be able to reach a decision impartially and fairly within the time limits stipulated. The obvious correlation here is that a party is not bound to agree to extend time beyond the time limits laid down in the HGCRA - the question is what if such a refusal renders the adjudicators' task impossible?

Bryen & Langley Ltd v Boston

Langley tendered for a Contract to carry out building works for Boston. The form of the Contract was stated as being intended to be a JCT Form and it was "*to be executed underhand*". The initial letter appointing Langley stated that the Contract documents would be drawn up shortly. No JCT Contract was ever received by Langley nor executed in relation to the job.

As work progressed, Langley issued interim certificates setting out payment that was required. The last certificate was for £115,995.00. Mr Boston paid £50,000.00 and believed that this was in full and final payment of all works. As no further payment was received by Langley in relation to the remaining £64,995.00, Langley issued a Referral Notice for the payment of the outstanding amount.

The matter was referred to adjudication pursuant to the JCT Contract provisions. Mr Boston advised the appointed adjudicator that he required him to enquire into his jurisdiction to deal with the matter. The adjudicator duly considered the request and determined that the Contract the parties had made in terms of the letter dated 12 June 2001 did incorporate the terms of the JCT Form of Contract and therefore he did have jurisdiction to hear the claim of Langley.

The matter went before HHJ Seymour QC who declined to enforce the decision saying that:

"It is plain, in my judgment, that the letter was, as ... submitted, looking forward to the making of another contract, which it was anticipated would be in the JCT Form, and not itself seeking to incorporate that form ... It follows that, as it seems to me, Mr Boston did not make any agreement with B&L which incorporated the provisions as to adjudication in the JCT Form, and thus that, [the adjudicator] had no jurisdiction to entertain the reference to him on behalf of B&L. That conclusion is sufficient to dispose of the application for summary judgment, and indeed of the whole action."

HHJ Seymour QC also noted that the effect of the decision on jurisdiction by the adjudicator here was very limited. Such a decision, if correct, under the JCT Form and the statutory scheme, would be only binding until the dispute was finally determined by legal proceedings. If a decision by an adjudicator that he has jurisdiction over the dispute referred is challenged in enforcement proceedings, usually what the court is then asked to do is to make a final determination on whether the adjudicator had jurisdiction or not. Obviously the court must then form an independent view of the matter and the view of the adjudicator will carry little weight.

Health & Safety

R v P&O European Ferries (RFC Ltd)

Following the death of an employee, P&O had been fined £300,000 plus costs of just over £18,000 for breaches of the Health & Safety at Work Act 1974 and of the Docks' Regulations 1988. P&O had pleaded guilty to both of the charges. However, P&O appealed against the size of the fine.

The CA applied the *R v Howe & Son (Engineers) Limited* decision noting that the objective of prosecutions of health and safety offences in the work place is to achieve a safe environment for both those who work there and for other members of the public. A fine must therefore be large enough to bring that message home, not only to the managers of the company but also to the shareholders.

Amongst the mitigating factors put forward by P&O were that they had entered a plea of guilty at the first opportunity and that they had no previous convictions for offences of this kind. The breaches of duty were not occasioned by any cost savings or financial motives. P&O had also reacted to the tragic accident by implementing all the proposals put forward by the HSE and making other improvements in procedures, training and equipment to try and ensure that such an accident could not happen again.

The CA said that the fine had to be such as to reflect disquiet at the death and also had to be of sufficient significance to reflect the seriousness of the offence and to include an appropriate sting in financial terms. That said, the Court reduced the total fine to £225,000, although P&O had to pay the costs of the CA hearing.

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