Fenwick Elliott
Solicitors

Dispatch

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

Adjudication - Natural Justice

■ Carillion Construction Ltd v Devonport Royal Dockyard

This cases arises from a project involving the fit-out of a submarine dockyard. The dispute here arose after completion. It was one of those big disputes, which some Judges have suggested are not really suitable for adjudication. Carillion sought over £10million and the adjudicator ended up with over 29 lever arch files of materials. As a consequence, the dispute could not be resolved within 28 days and the adjudicator asked for and received two extensions. He therefore had 10 weeks to come to a decision. Carillion were awarded over £10million. Devonport declined to pay.

Mr Justice Jackson in his judgment reviewed the recent case law and set out four basic principles which he said applied to any attempt to enforce an adjudicator's decision:

(i) The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);

(ii) The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law

(iii) Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;

(iv) Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

One of the issues discussed was Devonport's contention that the adjudicator's decision on defects was reached in breach of the rules of natural justice and was not supported by any, or any adequate, reasons. Here the adjudicator had reduced the Devonport claim for defects from £2.9million to £2.3million. In fact, Devonport suggested that their claim for defects was much higher, but the Judge accepted that the adjudicator had considered this aspect of the Devonport claim and rejected it. Accordingly, even if that decision was wrong, it could not be argued that it was something the adjudicator had failed to address.

Here, the adjudicator had accepted the original claim for defects, but made a modest reduction in quantum for what the Judge said were perfectly sensible reasons. This reduction amounted to about 20%, a small sum in the context of the overall dispute. The reduction in quantum was said by the Judge to be the result of the adjudicator casting a critical eye over the expert evidence.

This was precisely the kind of exercise which one would expect the adjudicator (who was himself an experienced engineer) to undertake. It was unrealistic in a case such as this, to expect an adjudicator, who may be struggling under tight time limits with a growing mass of evidence and legal submissions, as well as a barrage of intricate correspondence, to contact the parties and to invite their comments on a matter of this nature. Again, the Judge considered that the adjudicator had properly considered the claims put before him.

Mr Justice Jackson also had to consider interest. He thought that it made obvious commercial sense for an adjudicator to have the power to award interest. Here he agreed that paragraph 20(c) of the Scheme provided a freestanding power to the adjudicator to award interest whether or not there was an express term contained within the contract for the payment of interest.

The case also demonstrates how quickly enforcement cases can move. Here, there were 22 days between the commencement of this case and trial and judgment.

Adjudication - Contracts in Writing

■ Trustees of the Stratfield Saye Estate v AHL Construction Ltd

There has been considerable controversy about the CA decision in the case of *RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd* where the CA held that, for the adjudication provisions of the HGCRA to apply, all the terms of the contract must be evidenced in writing.This, of course, is not an issue which currently forms part of the government's review of the adjudication legislation.

It had been thought that it was not entirely clear which terms they had in mind. According to Lord Justice Walker it is all the terms, according to Lord Justice Ward it is all but the trivial terms, whilst many took comfort from Lord Justice Auld who commented that it was the terms in dispute.

This point was considered by Mr Justice Jackson. The Trustees had sought a declaration that an adjudicator did not have jurisdiction because there was no agreed scope of works in writing. The contract had been agreed on a 'cost plus' basis because the exact work content could not be fully identified. Shortly after AHL had commenced work, the Trustees cancelled the contract and AHL claimed for loss of profit on the cancelled work. AHL were awarded £75,000 by the adjudicator. The Trustees refused to pay.

Mr Justice Jackson considered the RJT decision and decided that that all the express terms of a construction contract had to be in writing if the HGCRA was to apply. He said that "*the reasoning of Auld LJ, attractive though it is, does not form part of the ratio of RJT.*"

However it was not all good news for the Trustees. The contractual terms do not need to be set out in a formal contract document. Here, the Judge held that the contract and the scope of works were sufficiently evidenced in writing by letters, drawings and meeting minutes.

Section 111

■ Machenair Ltd v Gill & Wilkinson Ltd

This was a dispute about a Final Account. Gill raised a Counterclaim including damages for delay. Machenair suggested that Gill were not entitled to pursue this Counterclaim at all. The reason given was that following receipt of various applications for payment, Gill had failed to serve a Withholding Notice in accordance with Section 111 of the HGCRA. Machenair suggested that this meant that the Counterclaim was absolutely barred. Mr Justice Jackson sitting in Leeds disagreed. He confirmed that whilst the effect of Section 111 of the HGCRA was to exclude the right of set-off, it did not bar for all time any otherwise valid claims which might exist against a party.

Health & Safety

■ R v Jarvis Facilities Ltd

In Issue 55 (R v P&O European Ferries) we discussed how the courts assess the size of an appropriate fine following a successful prosecution for health and safety offences. This issue has come before the CA again, in a case following the derailment of a freight train. Here the train was travelling slowly and had remained upright which meant that there had been no significant damage or injury. However the accident had come about following urgent repairs carried out by Jarvis. Whilst no specific method statement had been drawn up, the work had been carried out by people with the appropriate training and qualifications.

Jarvis pleaded guilty and were fined £400,000 plus costs of £28,061. Jarvis appealed against the severity of the fine. When assessing the penalty, the CA noted that the Judge was clearly rightly influenced by the gravity of failing and also by the fact that a sister company had been fined £500,000 in relation to failures giving rise to actual collision risks. The CA agreed that the court is entitled to take a more severe view of health and safety breaches where there is a significant public element, especially where the public simply has to trust in the competence and efficiency of such companies.

However the CA felt that the Judge had overestimated the actual risks. Also the real cause of this incident was an independent failing in the signalling system. The fine was too high. There had been no serious injuries. Thus even allowing for a legitimate element of deterrence and expression of public outrage, the fine in this case should not have exceeded £275,000.

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