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Dispatch

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

Adjudication - Incorporation of adjudication provisions

■ Bryen & Langley Ltd v. Boston

We reported this decision in Issue 55. HHJ Seymour QC declined to enforce an adjudicator's decision in favour of B&L on the basis that the JCT Standard Form of Contract had not been incorporated into the contract. As the Judge had found that the contract did not incorporate any adjudication provisions, the adjudicator accordingly had no jurisdiction.

The CA has now reversed that decision. Mr Justice Rimer held that the surveyor engaged by Mr Boston to prepare the tender, invited tenders on the basis that the contract would incorporate the JCT Form, which, of course, includes adjudication provisions. Further, he wrote a letter to B&L confirming that the contract would be executed under the JCT Standard Form. The fact that a letter giving instructions to proceed envisaged the execution of further documentation, did not preclude the conclusion that a binding contract had been entered into, provided all the necessary ingredients for a valid contract were present.

The CA also considered the argument that the adjudication provisions were unfair terms for the purposes of the Unfair Terms in Consumer Contract Regulations 1999. If this was right, then this would mean that the adjudication provisions were not binding on Mr Boston. It was accepted that the relationship between the Building Contractor (B&L) and the Employer (Mr Boston) were supplier and consumer for the purposes of the Regulations.

The Judge said that in assessing whether a term which has not been individually negotiated is unfair, it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties, but also whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the requirements of fair dealing. Mr Boston had the services of professional advice. Indeed further, here, the relevant adjudication conditions were not imposed upon Mr Boston by B&L but through Mr Boston's own agent, who specified them in the original invitation to tender.

■ Allen Wilson Shopfitters v Buckingham

This case was decided before Bryen & Langley. However it has similar facts and HHJ Coulson QC reached the same conclusions as the CA.

The Judge was asked whether there was a written contract in respect of the works that were the subject matter of the adjudication. He found that there was because the letter of intent incorporated the JCT 1998 Private Without Quantities Contract. The Works performed were carried out pursuant to the contract set out in the letter of intent Therefore the JCT adjudication provisions applied and it was from these that the adjudicator derived his jurisdiction.

In general terms, the parties to a construction contract confer the necessary jurisdiction on an adjudicator in one of two ways. They can agree a contract which contains express written provisions concerning the resolution of disputes by adjudication. Alternatively, if they have a construction contract in, or evidenced in, writing, with no express adjudication provisions then the adjudication provisions set out in the HGCRA will be incorporated and apply.

Further the Judge decided that the agreement to adjudicate was not unfair and thus contrary to the Unfair Terms in Consumer Contracts Regulations 1999. The adjudication agreement would be unfair if:

(i) It was not individually negotiated;
(ii) It was contrary to the requirement of good faith;
(iii) It caused a significant imbalance in the parties' rights and obligations arising under the Contract, to the detriment of the individual as a consumer; and
(iv) It was unfair, taking into account the nature of the goods or services for which the contract was concluded, by referring at the time of the conclusion of the Contract to every circumstance attending the conclusion of the Contract and all the other terms of the contract.

Health & Safety

■ Hood v. Mitie Property Services (Midlands) Ltd & Anr

Following the settlement of a claim brought by Mr Hood against Mitie (as a result of an accident where he fell some 35ft through a Perspex skylight), Mitie sought to recover a contribution from the Post Office pursuant to the Civil Liability (Contribution) Act 1978. Both Mitie and the Post Office were prosecuted under, and pleaded guilty to, breaches of the Health & Safety at Work Act. For the Post Office to be liable to Mitie, Mitie had to show that there had been a breach of duty by the Post Office which caused the accident and that the Post Office were under a duty to take the preventative steps alleged by Mitie.

The Judge rejected Mitie's claim. The contractor here was an experienced roofing contractor. It held itself out to the Post Office, the site owner, as being capable of carrying out roofing work and also to have a conscientious approach to safety. Accordingly, the site owner was not liable to contribute to the damages paid out, as the only duty to be imposed upon the Post Office was the common duty to take such care as was reasonable in all the circumstances. The Post Office was entitled to expect an experienced roofing contractor to guard against the ordinary risks of the job in question.

To impose a free-standing duty at common law on the Post Office, having regard to the dangerous nature of the work, would, felt HHJ Playford QC, be tantamount to imposing on the Post Office, the duty of Mr Hood's employer.

Mitie claimed under the Occupiers' Liability Act, that there was a failure to warn Mitie or its employees that the roof was fragile. The Judge said that the Post Office owed its visitors, including Mr Hood, a common duty of care to take such care as was in all the circumstances reasonable. If that visitor was an employer, who professed a competence to do routine roofing jobs, the Judge was unable to see why the Post Office should not expect that visitor to appreciate and guard against risks ordinarily inherent in the job.

The failure by the Post Office to put up warning signs saying that it was dangerous to walk on the roof might have given rise to a liability towards different visitors, in different circumstances. The risk here was working at a high level in close proximity to an unguarded drop. In relation to fragility, the proper approach is to assume that a roof is fragile until the contrary is established.

Finally, the Judge rejected the suggestion that it was the Post Office who had control of the site. Here a client had contracted with an apparently reputable contractor to conduct construction work in his premises. There was little reason to doubt that it was the contractor who was in control of the way in which Mr Hood carried out his work.

Contracts - Agreements to agree

■ Willis Management (Isle of Man) Ltd v Cable & Wireless plc & Anr

Here, two of the parties to an insurance dispute entered into negotiations to settle liability without the need for proceedings. Willis agreed to do this provided there was a mechanism for quantifying the extent of their liability. Willis did not want to pay the whole of the loss. Willis initialled and returned a letter sent by C&W, accepting liability, but in addition Willis sent an e-mail indicating that they did not accept full responsibility for the damages suffered by C&W merely a share of them, such share to be agreed.

The CA had to decide whether a binding agreement had been reached or whether the letter and e-mail were no more than an agreement to agree. Here, all the parties were doing was agreeing that Willis would pay a proportion of the loss to be determined on principles which required further discussion and agreement. The agreement was not binding because it was no more than an agreement to enter into those negotiations. It therefore lacked certainty.

Whilst the court will strive to give legal effect to what the parties apparently intend, here the CA held that although the parties had agreed that they were to discuss and agree how the share of liability was to be determined, they never did so. Until that had been done, the agreement was incomplete in that essential respect. An agreement to agree an essential term was not a binding agreement and the court could not make for the parties the agreement which they had not made for themselves.

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