Fenwick Elliott
Solicitors

Dispatch

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

Adjudication

■ Carillion Construction Ltd v Devonport Royal Dockyard Ltd

We reported on this case in Issue 60. It has now come before the CA. At first instance, Mr Justice Jackson, set out four basic principles which apply to any attempt to enforce an adjudicator's decision. These general principles were upheld by LJ Chadwick. In fact, the CA did not give permission to appeal in respect of the majority of the areas sought by Devonport. For example, LJ Chadwick said it would be inappropriate for him to express any view as to whether or not the Adjudicator was correct (as a matter of law) to adopt the approach he did. Decisions must be enforced, even if they result from errors of procedure, fact or law. LJ Chadwick concluded:

"*In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he is ordered to pay by the Adjudicator. If he does not accept the Adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the Adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense…*"

However, the CA did consider the question of interest. Mr Justice Jackson had decided that paragraph 20(c) of the Scheme conferred a freestanding power to award interest. Whilst LJ Chadwick disagreed with that, he did agree that, in the circumstances of this adjudication, interest should be awarded. Devonport had not disputed that there was power to award interest if the adjudicator found monies to be outstanding under the agreement. Its position was that the question of interest did not arise because there were no monies outstanding. If Devonport had intended to take the point that interest had not been within the scope of the adjudication, particularly given the extent of representations which were made, it should have said so.

Vicarious Liability

■ Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd and Others

This is a slightly surprising case as it represents a departure from previous case law. Until now the concept of "vicarious liability" has meant the courts assumed only one employer could have control over the acts of an individual and therefore only one party could be held liable for any negligence. However here the CA held that both the subcontractor and the labour-only subcontractor were jointly liable for extensive flood damage to a factory caused by the labour-only sub-contractor's employee. In other words, more than one employer can be found liable for the negligent act of an employee.

The negligent act here was that an employee returned to a roof space by crawling through some sections of ducting which moved coming into contact with fire protection sprinkler system. The system fractured causing a flood. It was agreed that this behaviour was obviously negligent.

At first instance, the parties had preceded and the Judge's decision had been predicated on the assumption that only one of the defendants could in law be liable for the employee's negligence, not both. However, the case before the CA proceeded following discussion of a comment in a text book dating from 1967 that it was strange that the Courts had never countenanced what was termed to be "an obvious solution in some cases" that both the general and the temporary employer could be vicariously liable for an employee's negligence.

The question which determined liability was who was entitled to exercise control over the negligent act. In other words, who was entitled, or in theory obliged, to control the employee so as to stop him crawling through the duct? The only sensible answer, on the facts of this case, was that both parties were entitled and/or obliged, to stop what was described by the Court as the "foolishness". One party was the fitter in charge of the employee's work, the other was the foreman on the spot. They therefore both had control of the employee's work.

The CA considered previous authorities. As far as the CA could tell, the point had never been argued in modern times. LJ Rix noted that vicarious liability does not depend on the employer's fault but his role. It is imposed even though a party may not be personally at fault on the basis that those who set in motion activities of their employees should compensate those who are injured by such activities. Here both parties had a supervisory role. In other words, both had a degree of control (and therefore responsibility) over the negligent employee.

It is not often, in this day and age that new caselaw is made, but that appears to be the case here.

Expert Determination

■ **Thames Valley Power Ltd v Total Gas and Power Ltd**

The contract between the parties provided for the appointment of an expert to determine disputes. Any decision of that expert was to be final and binding. Total gave notice of a dispute in relation to the force majeure clause. In response, TVPL issued proceedings. Total applied for a stay. The question for Mr Justice Clarke was whether there was a "dispute or disagreement" between the parties within the meaning of the contract and whether it was a dispute which was able to be referred to expert determination. The Judge accepted that in ordinary language there was a dispute or disagreement between the parties on the question of whether Total were entitled to serve a force majeure notice. Reference was made to the line of arbitration authorities, such as *Halki* which seemed to confirm this.

However here, the question was what approach should the Court take when faced by an application by one of the parties to a dispute, to stay proceedings in order to give effect to an agreed method of dispute resolution, (other than arbitration), namely in this case expert determination. It was clear to the Court that it had the power to order such a stay. However, a question that arose was the extent to which the merits or lack of them were relevant to the exercise of that discretion. Following a hearing, the Judge commented that the claim to force majeure was ill founded. This weighed heavily in his mind and he refused a stay. Whilst in the case of an arbitration agreement, a stay would have been mandatory, because of the provisions of section 9 of the Arbitration Act, Parliament had not legislated in the same way in respect of every dispute resolution procedure.

The overwhelming reason to refuse a stay was that it had become apparent that Total's claim to invoke force majeure was unsustainable as a matter that proper construction of the agreement. In addition, the parties had prepared for a hearing and conducted themselves on the basis that unless there was a stay, the Court would finally determine the agreed issues. Therefore the proceedings before any expert would represent a complete duplication of effort and expense. Finally, the issues required a speedy resolution. Referring the dispute now to an expert would serve to delay matters.

Apparent bias

■ **ASM Shipping Ltd of India v TTMI Ltd of England**

This was an application, made under section 68 of the Arbitration's Act 1996, that one of the three arbitrators should have withdrawn from the hearing. The essence of the objection to the Arbitrator stemmed from his prior and recent involvement as an advocate in legal proceedings where serious allegations had been made against a key witness in the present arbitration.

The feeling of Mr Justice Morrison was that such a previous involvement was capable of giving rise to a finding of apparent bias. The test for apparent bias is what a fair minded and informed observer would conclude having considered the facts. The threshold is a "real possibility of unconscious bias".

The Judge made it clear that everything depended on the facts. The mere fact that a person selected as an arbitrator may previously have had a trade dispute with one of the parties would not necessarily cause an objectionable situation. Equally the same would be true with a barrister sitting as an arbitrator in a case in which an expert witness whom he had previously cross-examined was to give evidence. However if, as here, that contact had been a short time before and if allegations of dishonesty had been made, then the position could be different. That was the position here and it was held that the Arbitrator should have withdrawn.

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