



Dispatch

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

■ Associated British Ports v Hydro Soil Services NV and Dredging International (UK) Ltd and Haecon NV Others

British Ports engaged Hydro Soil Services to carry out strengthening works to a quay wall at Southampton. The contract was for a lump sum and based on the ICE conditions. Hydro in turn engaged Haecon NV to carry out the design of the strengthening works to the quay wall. The design required ground anchors to be attached to the steel wall and also the insertion of high pressure vertical grout columns along the berth. While the work was being carried out, the sheet piles cracked and bulged. In some places the bulging was almost 1 metre from the original installed position. Remedial work was required. British Ports claimed damages for breach of contract, and the contractor brought a counter claim under clause 12 for unforeseen physical conditions. In addition, a claim was made against Haecon for their design. British Ports argued that the works were not fit for their purpose and that Hydro should pay for all rectification work.

Based upon expert evidence, it was held that the existing condition of the sheet piling wall did not account for the widespread bulging and cracking that had taken place during the grouting. The potential over stressing of the sheet pile wall was something that an experienced contractor should have seen, and therefore the clause 12 claim failed. The spacing of the columns was greater than the design spacing and there was insufficient sheer strength of the grout wall. As a result the works were unfit for their purpose. Equally, it was held that the design of the columns was unfit for their purpose. The original design spacing could not be adhered to, and the revised greater spacing had been designed by Haecon.

The final design should have catered for potential variance of acceptable workmanship tolerances. The only issue arising from workmanship was the decreased diameter of the columns, which was simply bad workmanship. In the case of *Mirant v Ove Arup* (See Issue 42), the court found that an engineer had a duty to warn irrespective of assumptions that were made during the design. Here the design had not taken into account the potential tolerances that might occur once the work was carried out, and this failure was said to be negligent. An engineering designer therefore needs not only to warn their clients about every assumption made, but also consider construction tolerances in respect of every aspect of their final complete design.

Insurance - Conditions Precedent

■ Shinedean Ltd v Alldown Demolition (London) Ltd (in liquidation) and Anr

Alldown was engaged to carry out certain demolition and excavation works at Shinedean's premises. These works caused the wall of an adjoining property to collapse. Alldown notified its Insurer, AXA, of the collapse in September 2002. Shinedean paid the owner of an adjoining property a substantial sum in settlement and then obtained a default judgment against Alldown. AXA refused to indemnify Alldown under the relevant Insurance Policy. The policy obliged Alldown as a condition precedent to provide all necessary information and assistance to AXA, but contained no express time limit for the provision of that information. Although some limited documents had been provided by June 2003, AXA considered that Alldown had failed to provide all the necessary documentation and was therefore in breach of a condition precedent in the policy.

The Judge held that it was an implied condition of the policy that documentation should be provided within a reasonable time. He also decided that a significant amount of information had not been provided to AXA until some two and a half years after the collapse of the wall. However the Judge decided there was no breach because one of the tests for judging reasonableness was prejudice to the Insurer, and since the Insurer here had suffered no prejudice, Alldown's claim would succeed. AXA appealed.

The CA held that whether there had been any prejudice or not would depend on the facts of each case. There is a duty on any Insured to provide documents in reasonable time and the insurance company was entitled to receive the documents in good time. In the present case, the provision of the documentation was unreasonably late as they had only been provided by Alldown during the course of the litigation when AXA became a party to the proceedings. Thus, AXA was entitled to say that the information requested was overdue and that the condition precedent in the contract had been breached. It was therefore entitled to refuse to indemnify Alldown.

This case provides a timely reminder of the importance of complying with conditions precedent under any contract. Here, the CA considered that an Insurer is entitled to know where it stands and under a policy, and AXA were entitled to receive the information in good time, whether they were ultimately

prejudiced by failure to achieve this or not. Equally, the purpose of similar provisions in construction contracts is to enable the owner to consider the position and any financial consequences in good time. This is one reason why the failure to give notice or provide information within the period required may deprive a contractor of any potential remedy.

Adjudication - Did the contract incorporate the JCT terms?

■ Redworth Construction Ltd v Brookdale Health Care Ltd

Redworth carried out construction work for Brookdale. Disputes arose between the parties in relation to questions of time overrun and entitlement to damages. These issues were referred to adjudication. The claim before HHJ Havery QC was to enforce an adjudicator's decision that Brookdale was to pay Redworth £210,576.67. The issues which the Court needed to consider included; whether the contract was in writing, whether the contract included the JCT terms and whether there was a dispute to refer to adjudication.

The parties commenced contractual discussions in early 2003 and in April 2003 a draft Employer's Requirements was produced and sent to Redworth. This document contained a list of contract drawings and documents and referred to the JCT Standard Form of Building Contract with Contractor's Design 1998. The date for completion and the date of possession were blank. Liquidated and ascertained damages were stated to be at the rate of £20,000 per week. The retention percentage was to be agreed. In September 2003 an updated version of the April 2003 draft Employer's Requirements was sent to Brookdale. The only change was the retention percentage was stated as being 3%. In a meeting in November the parties again discussed the works including discussions about the bill of quantities and time for payment. The date of the start of works, the period of works and the date for completion were agreed. The JCT terms were not discussed. In December 2003 Redworth provided Brookdale with a revised contract sum. A further revised contract sum was agreed between the parties. This agreement was recorded in a two line letter in February 2004, which confirmed the contract sum only. In December 2003 an updated draft of the Employer's Requirements was prepared. This included reference to the latest drawings and further information that had been agreed at the meetings.

At the adjudication Brookdale gave evidence that the reference to the JCT terms in the documents were included on the basis of advice Brookdale had received that this would be required for Brookdale to obtain bank funding. In June 2004 Brookdale wrote to Redworth asking it to arrange a completed form of JCT Contract. In July 2004 Redworth sent a draft contract on the JCT terms to Brookdale. That was not enough and HHJ Havery QC held that the JCT terms were not incorporated into the contract. The November 2003 reference was at most a mere intention on the part of the parties to enter into a contract. This intention was never implemented. Brookdale's original reason for requiring a formal executed contract did not materialise. Neither party pursued the matter. The JCT form of contract was never signed let alone executed. It was not orally agreed and it was not discussed at any meetings.

The question of jurisdiction was also considered as Brookdale had stated that as there was not a contract between the parties, the matter could not be referred to adjudication. The court noted that the Referral relied on a single document, the April 2003 document with the JCT terms incorporated. Redworth chose not to rely on the December 2003 document. The court held that Redworth could not now go beyond the matters that it relied on in the adjudication in order to support the adjudicator's decision that he had jurisdiction. The court said that it was relying on the principle of election. A party who has taken some benefit under an instrument such as an order of the court cannot disallow the instrument so as to obtain a further benefit.

Redworth elected to put its argument in a particular way in order to obtain a benefit, namely the decision of an adjudicator in their favour. Redworth could not now resile from that election and seek to include information it had not relied upon during the course of the adjudication. The terms of the agreement reached in November 2003 were not in writing. The documents relied upon by Redworth showed no date of possession of the site, no contract period and no date for the completion of the works. The court held that these items especially the completion date for the works were manifestly relevant to the claim before the adjudicator which was for the recovery of sums withheld because the contract overran the agreed date for completion. Accordingly as these terms were not in writing, the contract was not a contract in writing within the meaning of Section 107 of the HGCRA. Therefore the adjudicator had no jurisdiction to hear the reference.

Finally the court considered whether or not there was a dispute, deciding that a letter from Redworth stating that it would like to meet to try and reach an amicable agreement did not negate the existence of a dispute. It simply showed a willingness to resolve it. Thus the court rejected the claim that there was no dispute.

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