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Dispatch

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

Public Liability Insurance

■ **Tesco Stores Ltd v David Constable & Ors**

Field J had to consider certain preliminary issues on the interpretation of a public liability insurance policy. Tesco had taken out this insurance as part of a standard project insurance package in relation to its plans at Gerrards Cross to install concrete tunnel sections over a railway cutting and to build a supermarket on top of the site. The company operating the railway was Chiltern. Tesco entered into a Deed of Covenant with Chiltern granting the following contractual indemnity whereby Tesco would pay Chiltern:

"on demand such sums as shall from time to time fairly compensate them for all and any costs, losses or expenses arising out of or resulting (directly or indirectly) from … the carrying out of the works … on its existing and/or future railway passenger business."

A section of the tunnel collapsed and part of the railway line was closed for 51 days. Chiltern made a claim for losses which included loss of revenue and loss of business. Tesco agreed to pay Chiltern under the Deed but maintained they were entitled to an indemnity under the public liability section of their insurance policy. The defendant underwriters disagreed. The relevant section of the insurance policy stated that:

"The insurers will indemnify the insured against all sums for which [Tesco] shall be liable at law for damages in respect of
(a) death of or bodily injury to or illness or disease of any person
(b) loss or damage to material property …
(c) obstruction, loss of amenities, trespass, nuisance or any like cause"

There was an extension which covered liability assumed by Tesco under contract or agreement.The underwriters argued that the public liability section of the policy only covered the liability of Tesco to third parties who, as a result of the carrying out of the project works had suffered the kind of losses that would give rise to an action in tort. Underwriters said that Chiltern did not suffer such harm because it lacked a sufficient proprietary interest in the railway track to make a claim in negligence or nuisance. Thus, the damage suffered by Chiltern was pure financial loss which was not covered within the public liability cover.

Tesco argued that the words "liable at law" were broad enough to include liability in contract as well as in tort. Tesco said that as a matter of common sense, if one asked whether there had been an obstruction or loss of amenities or similar consequent on the tunnel collapse that had caused Chiltern damage, the answer would be yes.

Underwriters argued that the wording was a standard public liability policy wording. The traditional view was that such wording did not cover liability to the public for damage solely to economic interests. This liability would only arise in contract. If any other liability was intended to be covered, it should be clearly spelt out in the insuring clause. Reading the insuring clause as a whole, the type of damage referred to was that protected by the law of tort, for example, nuisance, trespass and property interests. The contractual extension was there to deal with situations where there was co-extensive liability in contract and tort. The contractual extension did not require the insuring clause to be given a fundamentally different meaning. In construing the policy, Field J adopted the words of Langley J in the case of *Tioxide Europe Ltd v CGU International Insurance*:

"The general principle is that the above construction is to be determined by the ordinary and natural meaning of the words used in the contractual commercial setting in which the words appear. The niceties of language may have to give way to a commercial construction which is more likely to give effect to the intention of the parties."

The Judge accepted Underwriters' submission that public liability policies are generally regarded as not affording cover against liability in contract for pure economic loss. The clause had to be read as a whole. Paragraphs (a) and (b) contemplated harm for which there was liability in tort and paragraph (c) referred to nuisance and trespass which were well-recognised torts. In other words, the clause described types of harm for which compensation would lie only in tort. The Judge also agreed that the policy covered liability in contract which was co-extensive with the liability in tort comprehended by the insuring clauses. It was not intended that the meaning of the insuring clauses should differ depending on whether the contractual liability extension clause applied. Underwriters' construction made sense of a commercial package and fitted in with the ordinary traditional notions of the public liability insurance. Accordingly, Tesco was not entitled to be indemnified under the insurance policy.

Cost of remedial works

■ **Iggleden & Anr v Fairview New Homes (Shooters Hill) Ltd**

This was a relatively small building defects dispute which came before HHJ Coulson QC. The Iggledens brought a new house from Fairview. Although clause 5 of the contract provided the house would be built in good and workmanlike manner, a number of defects appeared. Some were corrected, others were not. One issue related to the driveway which was said to be defective Two remedial schemes were proposed by the respective experts. The Judge said that if there are two such competing schemes then the court should bear in mind the approach of HHJ Hicks QC in the case of *George Fischer v Multi-Design Consultants* who said that:

"… the acceptance of either is, to some extent, dependent, first, on a judgment as to the ability of the designer, who devised suitable detailed treatment of all the potential trouble-spots and second, on an assessment of the guarantees and bonds offered … since Soladex would be so much the cheaper, and cannot be said to be the more detrimental to the appearance of the buildings … it must clearly be preferred unless the criticisms of its expected effectiveness are … made good on the balance of probabilities …"

Here, the Judge found that the schemes were not roughly equivalent from a technical point of view. Therefore the appropriate remedial scheme was the one which was technically the better. As it happened, this was also the cheapest.

Another issue for the Judge was whether the claimants had failed to mitigate their loss by refusing to allow the defendant to carry out remedial works. The Judge had to consider whether it was reasonable for the claimants to say that in the light of past events they did not want the defendant to come back to the property to undertake any work at all. The outstanding works were more than mere snagging. They arose out of the defendant's original failure to build the property properly. They were compounded by an unwillingness to do the full scale of remedial works which the Judge had determined were necessary. Thus, on all the evidence it was not unreasonable for the claimants to say that five and a half years on, they did not want the defendant to return to the property to undertake any further work.

However, the claimants had, in the view of the Judge, failed to mitigate their loss. There had been delays and the remedial works should have been carried out substantially earlier. In the Judge's view, the claimant's team should have realised by the summer of 2003, that because of their failure to reach agreement with the defendant over the scope of the remedial work, they would have to carry out the works themselves. The remedial works could and should have been completed by the end of 2003. This had an effect on the claim for general damages by the claimants. The Judge considered that the disruption suffered was the "middle" of the sort of disruption that home owners suffer in such circumstances. He awarded a typically modest sum in respect of this, calculated at £750 per person per year by way of general damages. But, the claimants were only entitled to general damages up until the period before the end of 2004, the period by which the remedial works should have been carried out.

Adjudication - contracts in writing

■ **Mast Electrical Services v Kendall Cross Holdings Ltd**

Mast, a sub-contractor issued proceedings against Kendall for declarations that the sub-contract arrangements in respect of three construction projects in Newcastle were contracts in writing for the purpose of section 107 of the HGCRA. Kendall had been seeking to sub-contract the electrical work and had accepted tenders from the Mast, who then provided a revised quotation based on comparable properties to those on which it would be working. These rates were accepted by Kendall in principle. Specific quotations were submitted at a later date. Disputes arose between the parties over what rates, if any, had been agreed. Mast eventually ceased work on the site due to the disputes over the agreed rates. Mast commenced adjudication in respect of one project. Kendall said that there was no contract in writing between the parties and therefore the adjudicator lacked jurisdiction. The adjudicator agreed and resigned. Accordingly, Mast sought a declaration from the court.

Mr Justice Jackson, although he said that he had some sympathy with Mast's position, (as Mast had been permitted or even invited to start work before rates had been agreed), nevertheless held that the documents relied upon by Mast did not satisfy the requirements of section 107. They failed to set out or record all the material terms of the sub-contract, particularly in respect of any agreed rates of payment. Accordingly it was highly probable that there was no contract at all between Mast and Kendall. As a result, Mast was not entitled to the declarations sought and was unable to refer the payment disputes to adjudication. Whilst, Mast may have been entitled to refuse to start work before all contractual terms had been agreed and recorded, commercial pressures overrode legal considerations. In the words of the Judge, *"the parties decided to get on with the project and hope for the best."* All the Judge could offer, was to see if any litigation that Mast might decide to bring could be expedited.

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