Fenwick Elliott
Solicitors

Dispatch

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

LAD's

n AXA Insurance UK PRC v Cunningham Lindsey United Kingdom (an unlimited Company)

This was a claim for professional negligence against loss adjusters in relation to the reinstatement of an old farmhouse. A number of issues were raised, indeed 21 different types of breach of contract were pleaded. One of these was whether provision should have been made in the contract for a specific period for the conclusion of the works and for liquidated and ascertained damages for delay. Both experts agreed that it would have been good practice to do so but disagreed as to whether or not the failure to do so was negligent. Mr Justice Akenhead seemed to accept that whilst it would have been good practice, at least in the circumstances of this case, the failure did not amount to a breach of contract. He noted that:

"the advantage of having a specified contract period and provision for liquidated damages is that they provide a tool or weapon to bring pressure on a contractor who is falling behind. In theory and indeed in practice, a contractor who has not expressly agreed a period for completion or any liquidated damages will be obliged, by occasion to complete the works within a reasonable time and to pay damages at common law for failing to complete within a reasonable time. Thus there will remain a contractual obligation and potential contractor liability with regard to completion and palpably late completion."

International Arbitration

n C v D

C and D entered into a Bermuda form of insurance contract which was governed by New York law but which provided that any arbitration proceedings should take place in London. C obtained an award in its favour against D for unpaid monies. D said that it was going to apply to a US federal court to challenge the award. C therefore sought an anti-suit injunction to prevent D from challenging the award in New York. At first instance, Mr Justice Cooke agreed with C and held that by agreeing to London being the scene of the arbitration, the parties had agreed that any challenge to an award must be made only in the courts of the place where the seat of the arbitration was. Thus, this dispute was about the question of whether English law was the "curial law" of the arbitration. In other words, were only remedies normally available under English law available to D as the party seeking to challenge the arbitration tribunal decision. The CA agreed with Mr Justice Cooke, saying that by choosing London as the seat of the arbitration, both C and D had to be taken to have agreed that proceedings to challenge the award should only be those permitted by English law. Longmore LJ said:

"If there is no express law of the arbitration agreement, the law of which that agreement has its closest and most real connection is the law of underlying contract or the law of the seat of arbitration. It seems to me that … the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract".

Adjudication

n Mrs Williams t/a Sanclair Construction v Noor t/a India Kitchen

In resisting adjudication enforcement claims, the defendant submitted that the party to the adjudication was not Mrs Williams t/a Sanclair Construction but her husband. Judge Higginbottom considered that he should review this claim "*with robust commonsense*". Having done so, he did not find any compelling evidence to support this submission. It was clear that the adjudication was substantially between the parties.

Paragraph 1(3) of the Scheme requires that the Notice of Adjudication sets out briefly the names and addresses of the parties to the contract. The defendant submitted that this was a mandatory requirement. The Notice of Adjudication here did not set out the name of Mrs Williams as the contracting party. The defendant said that this meant the Notice and the adjudication proceedings were invalid. The Judge disagreed that the requirements of the Notice of Adjudication were mandatory in the sense that if the prescribed information was not given in the notice, then the notice and indeed any ensuing adjudication was bad. The HGCRA itself made no such requirement. In the view of the Judge, the Scheme dealt with "*practical matters, rather than matters of principle*." It was contrary to the purpose of the HGCRA to construe the terms of the scheme in a legalistic manner. The main purpose of paragraph 1(3) was to ensure that, when a reference is made to an appointing body, that body has sufficient information to be able to appoint the adjudicator. Here, the argument was ultimately irrelevant as it turned out that the appointment had been made by agreement between the parties.

Costs - mediation

n Nigel Witham Ltd v Smith & Anr

This was a costs decision of HHJ Coulson QC following the principal judgment where the net result was that NWL owed the defendants the sum of £1,683. Two of the issues which the Judge had to consider were who was the successful party and the impact, if any, of the defendants' refusal to mediate until late in the litigation process. There was no doubt that the defendants were the successful party. The test adopted by the Judge was that set out by the Court of Appeal in *Burchell v Bullard*:

"how...does one decide who the other successful party is? This was, after all, a form of commercial litigation where the other side was claiming money from the other. Costs following the event is the general rule and in this kind of litigation the event is determined by establishing who writes the cheque at the end of the case. Here the defendants do. They were the unsuccessful parties and my starting point is that the claimant is entitled to the costs of the proceedings...taken together."

Here, not only did the claimant have to write out a cheque to the defendants, the defendants were successful on an issue basis. This was save for, a major item of counterclaim which was abandoned in the closing submissions. The Judge reduced the defendants' costs by 15% to reflect this.

In relation to the failure to mediate point, the situation was that during the pre-litigation period, the defendants consistently said that they were prepared to consider mediation once the claimant had properly set out its claim. Indeed, this caused the defendants to criticise the claimant for failing to comply with the pre-action protocol. The Judge disagreed, saying this:

"It seems to me, that the pre-action period, both sides were pursuing their own methods of negotiation and preparation, and that the protocol was complied with in spirit, even if it was not followed to the letter."

The Judge accepted that trying to work out when the best time might be to attempt ADR was a common difficulty. He recognised that a premature mediation simply wastes time and can lead to a hardening of positions on both sides. Of course, the converse is that a delay in mediation can mean that the costs which have been incurred become the principal obstacle to success. The Judge thought that here, the critical moment, if it ever existed, was missed. There was an unsuccessful mediation, by way of a judicial settlement conference in October 2007, shortly before the trial. By then extensive costs had been incurred on both sides and attitudes had hardened. That said, the Judge was not persuaded that even if the defendants had agreed to an early mediation it would have led to a settlement. He noted that compromise or reconciliation did not feature prominently, if at all, in the claimant's correspondence. Thus, had there been an earlier mediation, the claimant's uncompromising attitude would have been meant that it would not have had a reasonable prospect of success. Finally, there was nothing to demonstrate that the defendants had unreasonably delayed the mediation.

Time bars

n W.F. Price (Roofing) Ltd v Primebuild Ltd

In this Scottish case, the contract contained a provision that:

"...not later than 6 months after practical completion of the Sub-Contract Works the Sub-Contractor shall send to the Contractor all documents necessary for the purpose of computing the Ascertained Final Sub-Contract Sum."

The question before the Court was whether this clause provided a six-month time bar in respect of any claim for payment being made by the sub-contractor. The contractor said that the existence of the word "shall" would have no effect if a strict time limit was not imposed by the clause. Sheriff Principal Taylor did not agree. He said that when interpreting a commercial contract the Court should adopt a businesslike approach and try to ascertain what was the commercially sensible construction which two businessmen might have intended when they agreed to be bound by the contractual terms. Here, it seemed unlikely to the Court that such businessmen would have intended that the condition in question should preclude an otherwise legitimate claim for payment. For example, the sub-contractor would almost certainly have incurred costs in both materials and labour in fulfilment of his contractual obligations. It should not be forgotten that in such circumstances, there is a counterpart obligation on the contractor to pay the sub-contractor.

To deny the Sub-Contractor payment because he has failed to provide documentation in a given time frame could not, under this wording, be a proper commercial interpretation of the contract. That said, the Sheriff noted that if the sub-contractor failed to provide documentation within the six month period, this would be a breach of contract. Accordingly, it would be liable should any loss be incurred by the contractor as a consequence.

***Dispatch* is produced monthly by Fenwick Elliott LLP, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.**
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