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Dispatch

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

Was there a contract and if so on what terms?

- **A E Yates Trenchless Solutions Ltd -v- Black & Veatch Ltd**

[2008] EWHC 3183 (TCC)

Mr Justice Akenhead had to decide the nature of the contractual relations between the parties. It should be noted that the original contractor Gleesons novated their contract to B&V. Both parties accepted that there was a sub-contract, but they differed as to whose terms and conditions were incorporated. There was thus a "battle of the forms". In summarising the relevant case law, Mr Justice Akenhead noted that "*the counter-offer kills the original offer*".

Here there had been a formal meeting between the parties, it being Gleesons' practice to have an interview meeting with a proposed sub-contractor. At this meeting, an offer made by Yates was rejected. There were differences on price grounds, on the basis of the proposed incorporation of the IChemE Brown Book contract conditions and in connection with the rate of liquidated damages. Subsequently, Gleesons sent a sub-contract agreement to Yates. This was an offer to Yates that they should carry out the sub-contract works on the terms indicated in the sub-contract documentation. The response of Yates was that the contract documents would be forwarded to head office for approval. This did not amount to an acceptance, but it was not a rejection. The language of the letter suggested that approval was a formal step. Indeed in the view of the Judge, the offer was accepted by the later conduct of Yates for a number of reasons including:

(i) The receipt without question by Yates of variation instructions and the acting by Yates upon those instructions by carrying out the works. The Judge said this was the clearest recognition that Yates accepted that those instructions were issued in accordance with the sub-contract.

(ii) The signing and returning of the self-billing system form referred to in the offer letter. This amounted to a clear acceptance of the terms put forward in that letter.

(iii) The commencement of the sub-contract works including the variations. Again, this occurred without qualification or reservation and amounted to acceptance.

(iv) Yates subsequently purported to give notice of a claim "under the contract". The claim was made pursuant to terms of the IChemE Brown Book and the sub-contract amendments sent out under the offer letter.

Therefore, the fact that the offer letter asked Yates to sign and return the sub-contract and the fact that Yates had not done this, did not change things. The wording in the letter did not seek to make the signing of the sub-contract a pre-condition to there being a contractual relationship.

Particularly in light of the proposed changes to the adjudication legislation, this is another case which stresses the importance of keeping written records of all contract negotiations. Where some provisions are agreed and others are not, keep a record of those differences. Remember too that your conduct in carrying out works (or perhaps permitting them to be carried out) can amount to acceptance of another's offer. Here, the fact that Yates followed procedures in accordance with proposed contract terms was viewed as evidence that Gleesons' terms had been accepted

Adjudication - contracts in writing

Euro Construction Scaffolding Ltd -v- SLLB Construction Ltd

[2008] EWHC 3160 (TCC)

ECSL sought enforcement of an adjudicator's decision. There was a dispute as to whether the contract between the parties was in writing for the purpose of s107 of the HGCRA. There was also a dispute as to whether the parties had given the adjudicator jurisdiction to decide whether he had jurisdiction. Mr Justice Akenhead noted that as far as jurisdiction challenges are concerned, it is necessary for the party objecting to the adjudicator's jurisdiction to make a clear and full reservation. Here, a number of reservations had been made on behalf of SLLB and the adjudicator himself believed that SLLB had reserved its right to make a jurisdiction objection to the contract issue.

However, that said, the Judge did consider that the adjudicator had jurisdiction. The defence run by SLLB in the adjudication was based on an implied term of fitness for purpose, based on certain oral communications made by the parties. However, on analysis of the evidence before the court, the Judge was of the view that the language used was not that of agreeing to an express term (which would mean that there would be an oral term of the contract) but was in the context of communicating the purposes or function of the, here, scaffolding. SLLB had not set out any oral requirements and certainly there was no issue as to whether there was an oral term that had been agreed. Therefore, the written quotation which had been accepted, contained all the agreed terms. There was a contract in writing.

EU Procurement - remedies for breach

■ **Henry Bros (Magherafelt) Ltd & Ors v Department of Education for Northern Ireland**

We have previously reported on this case in Issues 96 and 101. Previously, Coghlin LJ had found that the tender process operated by the Department in relation to a Framework Agreement was flawed. This latest Judgment discusses remedies and the decision closely follows the *McLaughlin & Harvey* case reported in Issue 102. Accordingly, the Judge ordered that the Framework be set aside and re-tendered. There was one important difference. Here, certain individual contracts had already been entered into by the Department under the Framework. These specific contracts could not be set aside and so, the Court was restricted in its power to order any remedy other than an award for damages.

Adjudication - stay to mediation

Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd **[2008] EWHC 3029 TCC**

A number of disputes arose following the failure by Modus to honour an adjudication decision. Firstly, Modus said that the application for enforcement should be stayed to mediation. Clause 39.1 of the contract stated:

"Either party must identify to the other any dispute or difference ...that it considers to be capable of resolution by mediation and, upon being requested to do so, the other party shall within 7 days indicate whether or not it consents to participate in the mediation...The objective of mediation under clause 39 shall be to reach a binding agreement in resolution of the dispute..."

Mr Justice Coulson was not prepared to grant a stay. First, he said that the mediation agreement was nothing more than an agreement to agree. It was therefore too uncertain to be enforced by the court. Further, the Judge noted that even if there was a binding agreement to mediate, he would only stay the claim to mediation if the party making the claim was not entitled to summary judgement. If a party applies for summary judgement, it is because there is no defence to that claim. If that was right, it would be wrong to refer such a dispute to mediation.

Modus also claimed that the adjudicator had failed to give Modus an opportunity to put in a rejoinder to Balfour Beatty's reply. The Judge agreed that the provision of late material can sometimes give rise to an arguable breach of the rules of natural justice. It depends on the nature of the information concerned, the lateness of the material, whether it could be described as an ambush, the surrounding facts and the obligation to comply with the tight timetable. Here, the adjudicator set out a timetable which made no allowance for a further response from Modus. However, Modus did not during the adjudication ask the adjudicator for permission to serve a rejoinder. Further, in the hearing before the Judge, Modus had not identified any significant new points raised by Balfour Beatty for the first time and failed to indicate what new points they would have included in any rejoinder. Therefore, they had failed to demonstrate how such rejoinder would or could have had any effect on the outcome of the adjudication.

Adjudication - disputes arising under a contract

■ **Air Design (Kent) Ltd v Deerglen (Jersey) Ltd.**

[2008] EWHC 3047 (TCC)

We reported on the decision in the *Fiona Trust* case in Issues 81 and 89. In that case in the CA, LJ Longmore had concluded that arbitration clauses in international commercial contracts should be given a liberal interpretation and that:

"For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context... The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."

Mr Justice Akenhead adopted a similar approach here agreeing that a clause which said that "a dispute or difference" under the contract could be referred to adjudication should be construed in such a way so as to cover "*any dispute arising out of the relationships into which they have entered or purported to enter*"

Deerglen had argued that a dispute under more than one contract had been referred to the adjudicator and that therefore he had no jurisdiction to decide the disputes referred. Adopting a "liberal" approach, the Judge held that the separate contracts were actually variations to the original agreement. Accordingly there was only one contract:

"Whether he [the adjudicator] was right or wrong to find or make the assumption that there was effectively one contract which was varied...is immaterial...in the current case all the disputes could properly be said to have arisen under the Basebuild Contract and the commercial parties could properly be said to have intended to have agreed to the adjudicator appointed under that contract to have jurisdiction to determine the value of sums due under that contract and any variations to that contract."

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