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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Expert evidence

Scott & Others v E.A.R. Shepherd Consulting Civil and Structural Engineers

[2016] EWCA Civ 553

In this case, the Claimants sought damages from a firm of structural engineers who had prepared a report upon which the Claimants said they relied prior to purchase of a property. It transpired that the lean on the property was so bad it had to be demolished. Unsurprisingly, this was a case where the expert structural engineering evidence was key. However, Mr Justice Fraser noted that that evidence was "*notable*" for a number of reasons. For example, the Joint Experts' Statement contained, in the words of the Judge, "*precious little, if any, agreement*". The Judge was also clear that he preferred the evidence of one expert over the other, even though they were both "*adequately qualified*" to give evidence. He said this for the following reasons:

- Only one of the experts personally inspected the property. This was even though the defendant had ample notice of the "*claim, the situation, the intended demolition, and the express invitation if not encouragement to inspect*". The expert was only instructed after the demolition had taken place.
- The expert was "*remarkably quick to dismiss evidence that did not fit his overall thesis, from which he appeared reluctant to move*". Mr Justice Fraser gave an example relating to photos, noting that "*it is rare for an expert to comment upon what appears to be a perfectly straightforward photograph and comment that 'it might be distorted'*". There was no such reason to suggest this.
- The second expert also made an allegation of serious unprofessional conduct on the part of two professional engineers, suggesting that their views may have been influenced by the prospect of further fee income involved in being instructed for the demolition works. The Judge said that this allegation was unfounded for two reasons. It would be an obvious breach of professional conduct on the part of the engineers in question and there would be higher fees available in any event for an unscrupulous engineer if alternative remedial schemes (short of demolition) were to be pursued. The Judge went as far as to suggest that the approach was nothing more than "*mud-slinging*".
- Then the Judge found the second expert's approach to the relevant BRE Guidance on tilting walls in buildings to be "*verging on the cavalier at times*".
- The second expert also "*constantly confused or failed to differentiate between the advice that should have been given at the time, with what could have been done to remedy the problems with the building*". The Judge noted that the feasibility of wildly different remedial schemes, and their cost, is a different issue to breach of duty. The issue here was: what should Sheppard Ltd have advised at the time?
- The second expert applied the wrong standard of proof. Beyond reasonable doubt is not the standard of proof in civil litigation.
- Finally, the second expert's attitude to answering questions was rather evasive; even the most simplistic questions were simply avoided and opposing counsel often had to put the same question two or even three times.

Amending the Claim Form to increase the claim value

Glenluce Fishing Company Ltd v Watermota Ltd

[2016] EWHC 1087 (TCC)

Here, having made a claim for losses following problems with an engine installed by Watermota in one of their fishing vessels, Glenluce sought permission to amend its Claim Form to reflect the sums now claimed in the Particulars of Claim. Watermota resisted on the grounds that with due diligence the claim now put forward could and should have been recognised in the Claim Form. As this was not done, an inappropriate court fee was paid when the proceedings were commenced, with the consequence that the amendment to introduce a new head of claim outside the limitation period should not be allowed.

The original claim was £69k, representing the value of the engines, the cost of repeatedly replacing the fuel injectors and interest. The revised claim of £162k, included claims based on the value of the vessel, scrapping costs and costs for extra maintenance and wasted expenditure. The case as put by Watermota was as follows:

(i) The claim form stipulated a value of the claim, namely £69,694.06.

(ii) The appropriate fee for a claim of that size was paid.

(iii) The claim was now valued at £162,132.06.

(iv) Had the claim been valued at that figure, a significantly higher court fee would have been paid.

(v) With due diligence, Glenluce could and should have identified at the time that the Claim Form was issued that the amount claimed was understated.

(vi) The Limitation Period had now expired.

(vii) The application to amend to increase the claim should therefore be refused.

Watermota did not suggest that there had been an abuse of process here, for example deliberately undervaluing the Claim in order to pay a lesser court fee. Further, Watermota could not point to any prejudice which it had suffered by reason of the fact that the value of the claim was stated in a lesser sum in the Claim Form than in the Particulars of Claim.

Further Mr Roger ter Haar QC noted that the Court Service would not be the loser since the Claimant proposed to pay the appropriate increase in court fee. The Judge also noted that whilst there had been some criticism of the time taken by Glenluce to get its claim together and it could have proceeded faster to identify the true value of its claim, at least a significant part of the delay in issue of proceedings was the agreement by Watermota to supply documents, an agreement which it did not honour.

This meant that if the appropriate court test was whether or not Glenluce did all that it reasonably could to bring the matter before the court in the appropriate way, including identifying before issue of the Claim Form the true value of the claim, reflecting that in the Claim Form and paying the resultant fee, then the Judge would have been bound to resolve this matter in favour of Watermota.

However, the Judge did not consider that this was a case where the Defendant was seeking to strike out the claim on the basis that the claim was not "*brought*" within the applicable limitation period. Here, to the extent that the amendment introduced a new "*claim*" (which was an arguable point), it did not introduce a new cause of action, but only significantly altered the heads of claim. The Judge accepted that the increase was significant in monetary terms and as a multiple of the claim first put forward. However, in the absence of any prejudice to Watermota if the amendment was allowed, and the significant potential prejudice to Glenluce if it was disallowed, this was an amendment which should be allowed.

Expert determination: submitting to jurisdiction
ZVI Construction v The University of Notre Dame
[2016] EWHC 1924 (TCC)

In this case, one of the issues between the parties was whether or not ZVI had submitted to the jurisdiction of an expert to make a determination under the contract and so lost the right to object. In considering the issue, Deputy Judge Furst QC referred to the decision of Mr Justice Akenhead in the case of *Aedifice Partnership Ltd v Shah* [2010] EWHC 2016 (TCC), a decision about adjudication. The Judge summarised five relevant principles, which we set out here, by way of a reminder:

(i) If it is said that there is an express agreement to give an adjudicator jurisdiction to make a binding decision on his jurisdiction, it simply has to be shown that this was the case.

(ii) For there to be an implied agreement giving the adjudicator such jurisdiction, you need to look at everything material that was done and said. It will have to be clear that some objection is being made in relation to the adjudicator's jurisdiction.

(iii) One principal way of determining that there was no such implied agreement is if at any material stage shortly before or, mainly, during the adjudication a clear reservation was made by the party objecting to the jurisdiction of the adjudicator.

(iv) A clear reservation can, and usually will, be made by words expressed by or on behalf of the objecting party. It is legitimate to ask: was it or should it have been clear to all concerned that a reservation on jurisdiction was being made?

(v) A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation. This will again be a matter of fact. It would be difficult to say that there was a waiver if the grounds for objection were not known or capable of being discovered at the time.

In the case here, the Judge felt that not only did ZVI not advance any reservation, it took an active part in the expert process about whether and to what extent, if at all, ZVI were liable for certain major defects and the remedial costs of those defects. Indeed, it did so for a period of some six months from about the middle of December 2014 to June 2015. Clause 17.1 of the Development Agreement noted in respect of the individual appointed to determine the dispute that:

"such person shall act as an expert and his decision shall be final and binding on the parties hereto".

The Judge concluded:

"Having impliedly agreed to submit the dispute as to whether there were defects for which ZVI ... were responsible under the Development Agreement, ZVI is now bound by Clause 17.1.1 which renders the expert's determination final and binding on it. There is nothing unfair or illogical about this. ZVI had every opportunity to argue these points but for whatever reason it either chose not to deploy those arguments or did not consider them."

Whilst this case is very different from adjudication, in that the timescales were far longer, the essential principles are very much the same.

As an aside, there was also a clause in the contract stating that it could not be varied unless the agreement to vary was in writing and signed. Following the *Globe* and *MWB* cases (Issues 192 and 193), the Judge accepted that the parties could vary the contract in other ways.

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