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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.

Assessing witness evidence

Lumley v (1) Foster & Co Group Ltd & Ors
[2022] EWHC 54 (TCC)

The only issue before Deputy Judge Coppel QC was: which of the six potential defendants were parties to the contract formed with Mrs Lumley on or around June 2016? It was common ground that the contract was concluded at a meeting at the property on 21 June 2016 which was attended by Mr Foster and Mrs Lumley. The parties accepted that the scope of the works was agreed in broad terms at that meeting as well as a contract price (£100,000). Mr Foster's normal business practice was to provide his clients with a formal written contract but that did not occur in this case.

To answer the question as to who were the parties to the contract, the Judge took, as a starting point, the objective test set out in the case of *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470:

"The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible."

Having ascertained the relevant facts surrounding the meeting on 21 June 2016, what would a reasonable person conclude from those facts as to the identity of the parties to the contract? A key to this was the witness evidence. Ultimately, the Judge found Mrs Lumley to be: "*an honest but frustrating witness ... open and persuasive, and clear in her recollections.*" It was significant that there was no documentary evidence which contradicted any part of her testimony. In contrast, there was documentary evidence which contradicted the competing account of Mr Foster, which was "*internally inconsistent and inconsistent with contemporaneous documentation.*"

One important issue was the existence (or not) of a written quotation. Mr Foster said it had been hand-delivered; Mrs Lumley said the first time she had seen it was as part of the disclosure process. The Judge noted that there was no evidence that Mr Foster or anyone else requested that Mrs Lumley return a signed copy of the quotation or reminded her to do so at any stage, including when he visited the property again on 30 June 2016. There was no reference to the quotation in any of the communications between the parties. The Judge also considered the metadata on drawings, which suggested that at least one, which was referenced in the quotation, had not been prepared until after the quotation had been allegedly delivered.

The importance of this issue was that it also coloured the Judge's assessment of the evidence on issues other than the quotation. The precise terms of the contract were not for this court, but the Judge here found that Mr Foster offered, and Mrs Lumley accepted his offer, to undertake her project for £100,000 including VAT. At that point in time, the Judge found that the objective evidence did not support the proposition that Mr Foster held himself out as contracting on behalf of a company. On the contrary, he was concerned to give every impression that Mrs Lumley was reaching agreement with him, that she could trust him and that he would be personally responsible for the project. It may have been that, if Mr Foster had taken reasonable steps to document and formalise the contract, it would have been made clear that the contract was with FCCL or some other corporate entity. But that was not done.

Adjudication enforcement

Cubex (UK) Ltd v Balfour Beatty Group Ltd
[2021] EWHC 3445 (TCC)

Cubex sought the summary enforcement of an adjudicator's decision in the sum of £410k. BB said that the contract related either wholly to excluded activities or at least in part to them. Following the case of *Cleveland Bridge UK Ltd v. Whessoe-Volker Stevin Joint Venture (Dispatch* Issue 186*)*, if the contract related in part to excluded operations, then, as a hybrid contract, the court would not have jurisdiction. Cubex was required to carry out the design and supply of the doors in issue. BB relied on sections 105(2)(d)(i) and (ii) of the HGCRA saying that the contract would be one for the manufacture or delivery to site of building or engineering components or equipment, materials, plant, or machinery.

The Adjudicator concluded that as an agreement to undertake design was within the scope of the HGCRA, that meant that the contract was not a supply only contract. The Judge disagreed, noting that section 104(2) of the HGCRA provided that:

"(2) References in this Part to a construction contract include an agreement -
(a) to do architectural, design or surveying work, or [...]
in relation to construction operations
(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations."

On the basis that the design was said to be in relation to the supply of doors, this brought matters back to section 105(2)(d). The contract was not, therefore, a construction contract within the meaning of the HGCRA. This was sufficient to end Cubex's claim. But the Judge went on to address certain other issues. One of these related to the contract. It was said that the Adjudicator had not been appointed under a contract about which there was or could be no dispute.

The Adjudicator found that the essential terms of the contract had only been agreed by 23 February 2017. However, there was nothing in the evidence which indicated what those outstanding essential terms were said to be. The Judge noted that this was:

"perhaps unsurprising given that 23 February 2017 was not a date for which either party contended as the date of a concluded contract." Further, it appeared that the adjudicator had found a contract which was not contended for by either of the parties relying on the agreement of essential terms on that date, which terms Cubex itself could not identify. The failure to draw the parties' attention to the Adjudicator's analysis which concluded with the contract camw into existence on 23 February 2017 was a sufficient breach of natural justice to be material.

BB had also suggested that the claim for enforcement has been brought late. Specifically, that there had been "*inordinate delay*" on the part of Cubex between the Decision being issued on 1 May 2018 and the commencement of the enforcement proceedings in September 2021. The explanation for the delay included that that the solicitor involved had changed firms and financial constraints on Cubex.

The Judge did not consider that there was any specific obligation to bring enforcement proceedings by any particular date within the relevant limitation period.

Injunction: delivery up of software

Transparently Ltd v Growth Capital Ventures Ltd
[2022] EWHC 144 (TCC)

TL applied for a mandatory interim injunction requiring GCV to deliver up to TL software, source code and other documents required for completion of an IT platform developed by GCV.

Delays occurred and a dispute arose. TL said that the software product delivered by GCV was incomplete, late, and defective. GCV disagreed. By notice dated 25 October 2021, TL terminated the SDA, alleging material breach of the contract, repeated breaches, or repudiation at common law.

In its letter before action, TL estimated the costs of rectifying and completing the software at £340k. On the same day, but before receiving this letter, GCV disputed the allegations of breach made by TL and alleging breach of contract on the part of TL in failing to issue shares to GCV. The letter noted that GCV were ready on completion to deliver the product, including all software, source code(s) and work in progress as well as assigning all IP rights and licences to TL.

With interim injunctions, the well-known test set in *American Cyanamid v Ethicon Ltd* [1975] AC 396, is applied. Is there a serious question to be tried? Would damages be an adequate remedy and, if not, where does the balance of convenience lie?

In addition, as this was an application for a mandatory injunction, there was a further test as set out in *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 where the overriding consideration is which course is likely to involve the least risk of injustice if the claim turns out to be wrong. The court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made, than an order which merely prohibits action, thereby preserving the status quo. Therefore, a court can consider whether it has a high degree of assurance that the claimant will be able to establish this right at trial. That said, there may still be circumstances where the risk of injustice if an injunction is refused will outweigh the risk of injustice if it is granted.

The Judge felt that it was clear from the evidence before the court that there was a dispute about the value of the product delivered, responsibility for delays and defects in the software as well as the quantum of both claims. However, the court was not in a position to resolve any aspect of that dispute.

Whilst the claim for interim relief was for delivery up of the software, there was no pleaded case before the court setting out TL's case that it had a contractual right to the software, prior to allotment and issue of certain shares to GCV. This was a problem for TL as the terms of the contractual arrangements contained a complete code in the event of termination, including any termination for breach on the part of GCV. Termination for any reason triggered a requirement for TL to allot and issue certain shares, at the agreed share price within ten days of termination. TL's entitlement to delivery up of the software was subject to completion of this. TL had not satisfied its own obligations on completion and was therefore, not entitled to delivery up of the software requested.

TL said that it was always contemplated that TL would end up with the intellectual property rights in the software. However, the contract made clear that for the intellectual property rights in the software to vest in TL, that vesting shall occur "*immediately following the later of*" acceptance or payment of the price agreed, including the equity consideration. Neither acceptance, nor payment of the equity consideration forming part of the sums due, had occurred. Therefore, the obligation to transfer intellectual property rights had not arisen.

TL had not identified an arguable case that it was entitled to delivery up of the software, Accordingly, the court did not have a high degree of assurance that TL would establish its right at trial. Further, TL had not produced sufficient evidence to demonstrate that it was likely that damages would not be an adequate remedy if the injunction were refused, and TL succeeded at trial.

TL asserted that it would not survive if the software, including source code, was not delivered to it now. There were cash flow forecasts showing limited cash reserves but no management accounts or other information showing that TL was insolvent. In fact, the estimates provided by TL in evidence showed that it could quantify its loss to support a claim for damages by way of compensation.

Conversely, GCV would not be adequately compensated by an award of damages if an injunction were to be granted but then shown to be wrong. Although TL had offered the usual undertaking in damages, on its own evidence, it did not have funds to satisfy any such award.

Finally, the balance of convenience lay in maintaining the status quo. TL had a simple solution if the court did not order delivery up as sought. It could allot and issue the shares to GCV in return for which it would obtain the software, code and documents that would allow it to raise further funds and complete what it anticipated would be a very profitable project.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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