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

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Dispatch

Expert determinations

GSY Hospitality Ltd v Gladstone Court Developments Ltd

[2025] EWHC 3231 (TCC)

GSY sought summary judgment in proceedings arising out of an expert determination in relation to the development of a luxury hotel. During the project, a dispute arose between the parties concerning certain terms of the Sale and Purchase Agreement as amended (the "SPA") and payments which had been certified. This was referred to expert determination in accordance with the relevant provisions of the SPA. Amongst other things, the expert found that the parties had agreed a variation that GCDL's liability was capped at £800k.

GSY said that this aspect of the determination was arrived at in error of law or was based on a manifest error and therefore was incorrect and did not bind the parties.

Clause 14.4 of the SPA included an *"entire agreement"* clause and Clause 14.5 included a *"No Oral Modification"* clause:

> *"This Agreement may only be varied or modified by a supplemental agreement which is made in writing by the parties or their solicitors and in such a form that complies with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989."*

Clause 18.1(e) of the SPA provided that:

> *"(e) Decisions of the Specialist will be final and binding on the Parties except in the case of manifest error or in relation to questions of law."*

The expert's determination included discussion of whether or not there was a variation The expert noted that the £800k cap figure had not been challenged, which was consistent with GCDL's case that an agreement was made. This absence of a challenge was: "*very stark*". The expert also noted the absence of documentation recording the agreement. However, on balance, the expert determined that, in particular due to the absence of any challenge, such an agreement did come into existence and was binding on the parties.

Deputy Judge Ter Haar KC discussed the effect of a no oral modification clause in English Law referring to the decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* (*Dispatch*, Issue 216) where the Supreme Court upheld the efficacy of these clauses in excluding later informal or non-complying variations. Lord Sumption said:

> *"What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause."*

GSY said that the variation, as found by the expert, was not evidenced in the manner required by the no oral modification clauses. Therefore, the expert's conclusion was wrong in law.

In *Premier Telecommunications Group Ltd v Webb* [2014] EWCA Civ 994, Moore-Bick LJ said:

> *"(1) Where the parties have chosen to resolve an issue by the determination of an expert rather than by litigation or arbitration, the expert's determination is final and binding unless it can be shown that he acted outside his remit ...*
>
> *(8) Where the expert has made an error on a point of law which is not delegated to him, the error means that the determination will be set aside ...".*

The expert did consider the *MWB* decision. GSY said that, if the expert had done so, they should have concluded that there was no valid variation. GCDL agreed that the expert's analysis was wrong in law.

However, GCDL also said that, although the reasoning was open to challenge, the expert came to the right decision, albeit for the wrong reasons, and that accordingly this part of the determination should not be set aside. GCDL said that the same factual material as was placed before and relied upon by the expert established an estoppel by convention that GCDL's contribution would be limited to £800k. GSY agreed that this case would have proceeded to trial. If it succeeded, the result would be that the expert's decision would be correct, even if the reasoning was wrong. Therefore, the application for summary judgment was premature.

The judge accepted GSY's submission that, under the expert's mandate, they were obliged to reach a decision which (a) contained no manifest error; and (b) contained no error of law. Failing to consider the no oral modifications clause and the *MWB* decision amounted to an error of law, which led to the legally incorrect decision that there was a valid and binding variation. In *Premier Telecommunications*, the CA also said this:

> *"(7) Once it is shown that the expert departed from his instructions in a material respect, the court is not concerned with the effect of that departure on the result. The determination is not binding."*

Therefore, the court is not concerned with the effect of that departure on the result and is obliged to conclude that the determination in relation to the variation is not and was not binding. Given that "*firm*" conclusion, GSY was entitled to summary judgment reflecting it.

Challenging Arbitral Awards: time limits

Northfield Property Solutions Ltd v Dykes & Anor

[2025] EWHC 2926 (TCC)

The principal issue here for O'Farrell J was whether NPS was entitled to an extension of time for the issue of the claim form challenging an arbitration award beyond the 28-day statutory period.

The parties had entered into a JCT Minor Works Building Contract with Contractor's Design (2016 Edition) for the partial demolition, reconstruction, and extension of the main entrance over two floors

of the Dykes' property. Disputes arose, including over termination, and the Dykes served a notice of arbitration. There were a number of delays to the arbitral process, and an Award dated 27 August 2024 was released to the parties on 3 September 2024, following payment of the arbitrator's fee by the Dykes. Amongst other issues, the arbitrator found that the termination notice served by the Dykes was valid.

NPS sought legal advice, as it considered that the arbitrator had overlooked and accordingly failed to take into account evidence that was before it which contradicted the conclusions in the Award. On 13 September 2024, NPS wrote to the Tribunal (also having cc'd the Dykes), setting out details of the errors in the Award and asking the arbitrator to consider further submissions. On 24 September 2024, the Dykes objected, and on 13 October, arbitrator indicated that there were no grounds for correction of the Award.

Under section 70(3) of the Arbitration Act 1996 (the "Act"), the statutory 28-day period for a challenge to the Award for serious procedural irregularity under section 68 of the Act expired on 24 September 2024, being 28 days after the 27 August 2024.

A draft Arbitration Claim Form, seeking to make a section 68 challenge, was dated 24 September 2024. As that was the latest day on which the Claim Form could be issued, an application without notice was made, quite properly, requesting an extension of time to 1 October 2024. As the judge commented, *"unfortunately, this is where things started to go wrong"*, and there were a number of administrative issues which led to delays. As the judge noted, it would be unjust to penalise NPS for an administrative or other error by the CE-file system. This meant that the real issue before the Court was whether, in those circumstances, NPS was entitled to an extension of time for issue of the Claim Form in order to mount its challenge to the partial Arbitration Award.

Regardless of any delay caused by the administrative error or other malfunction of the CE-file system, NPS needed an extension of time from 24 September 2024 to 8 October 2024 for completely unrelated reasons. Section 70(3) of the Act provides that any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process. The judge noted that the strict time limits for any challenges to arbitration awards:

> *"reflect the stated purpose of the Arbitration Act 1996 to obtain a fair resolution of disputes by a tribunal without unnecessary delay or expense and to promote the finality of arbitration awards.".*

In *Terna Bahrain Holding Company v Al Shamsi* [2012] EWHC 3283, Popplewell J noted that the relevant factors for the court to take into account include:

> *"(i) the length of the delay;*
>
> *(ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;*
>
> *(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay".*

Popplewell J added that the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore, a delay measured in days was significant, and a delay measured in many weeks or in months was substantial. A party seeking relief from the court would normally be expected to explain why there had been a delay. The court should also consider whether the party who has allowed the time to expire had acted reasonably. Finally, when it came to merits:

> *"the Court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However, if the court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application."*

Ignoring the delays caused by the administrative issues, the initial delay after the expiry of the statutory period was from 24 September 2024 until 8 October 2024, a period of 14 days. That was a significant delay when compared with the yardstick of 28 days provided for in the Act.

As for the period when NPS wrote to the arbitrator about the complaints that formed the basis of the challenge now being made, the judge noted that there was no obligation on arbitrator to respond with speed to NPS in circumstances where NPS had chosen to delay collecting the Award. In those circumstances, NPS did not act reasonably in delaying until the very last moment to try and start the Arbitration Claim. Although the delay was not intentional, *"it was a risk that [NPS] chose to take"*.

Whilst there was no deliberate decision to delay making the claim, NPS did not provide a reasonable explanation for the delay of 14 days following the expiry of the statutory period for issuing a challenge to the Award.

When it came to prejudice, NPS said the delay was short and no prejudice had been caused. The judge noted that, on one view, there is always prejudice to respondents to an application for an extension of time where the strict time limits for challenging an arbitral award are not respected. Here, it was not severe, although the Dykes had, taking into account the timing of the court hearing, been deprived of finality in respect of the Partial Award, issued now well over a year ago.

When it came to the strength of the application, it was said that the tribunal overlooked, and accordingly failed to take into account, relevant email communications which were provided and which were material to determining the issues in the first part of the arbitration. It was said that this amounted to a failure to act fairly and impartially between the parties, in breach of its duties under section 33 of the Act. O'Farrell J disagreed for a number of reasons. In particular, arbitrator's decision on the issue of whether NPS was in default was not simply based on the date on which the information was provided. The complaint, which was resolved in favour of the Dykes, went further than that. For example, NPS had failed to advance the planning design and failed to provide the requested details within the timetable requirements set out in the default notice. On the documents before the Court, the proposed arbitration challenge was: *"intrinsically weak"*.

Taking everything together, this was not an appropriate case in which to grant the extension of time necessary to extend the time for issue of the Arbitration Claim Form from 24 September 2024 to 8 October 2024. The challenge was made out of time and could not proceed.

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.

Dispatch is a newsletter and does not provide legal advice.

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