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Dispatch

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

Adjudication

Beck Peppiatt Ltd v Norwest Holst Construction Ltd

This decision of Mr Justice Forbes provides further guidance on the question of what constitutes a dispute. It also provides an example of a Claimant, rather than proceeding with an adjudication, actively seeking a declaration from the courts that the adjudicator had no jurisdiction before the adjudicator had the chance to make a decision.

Mr Justice Forbes quoted with approval the words of HHJ LLoyd QC in *Sindall v Solland* (See Issue 16):-

"For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided."

He approached the *Beck* case on the basis of these words and further held that he did not see any conflict between this approach and the approach of the Court of Appeal in *Halki* v *Sopex* (See Issue 32 and the discussion of *Cowlin* v *CFW*). Here on reviewing the facts of the case, Mr Justice Forbes concluded it was clear that, before the Notice of Adjudication was served, the process of discussion and negotiation had ended and that something was needed to be decided, namely the correct position with regard to the outstanding items on the final account.

This was notwithstanding that some two and a half weeks before the adjudication began, Norwest Holst had served 11 lever arch files of documentation on Beck. Beck had suggested that they had not been given sufficient time to consider the files before the adjudication began. However, the Judge looked at the factual context as a whole. The 11 files largely consisted of information which Beck had seen before. The files were also a response to Beck's position and were sufficient in themselves to give rise to a dispute since the serving of the files had thereby served to reject that position.

Galliford (UK) Ltd v Market Capital Ltd

MHA had acted as structural engineers in a project for the conversion of flats into an Hotel. Part way through the project, the existing roof slab was found to be inadequate as a result of a failure by MHA to produce adequate structural calculations to support its design. As a consequence, there was a 24 week delay to the project and Galliford suffered losses in excess of £2million.

Galliford sent a letter of claim to MHA but before the claim had progressed very far, in July 2002, MHA went into voluntary liquidation and a liquidator was appointed. Nevertheless, in August 2002, Galliford commenced adjudication proceedings against MHA. MHA's insurers, MCL, instructed solicitors who both disputed jurisdiction on the ground that there was no written contract and contested the adjudication. The adjudicator found in favour of Galliford. However, no money was paid by either MHA or MCL.

Galliford then, rather than issue enforcement proceedings, issued proceedings against MCL claiming a right of indemnity in respect of the amount ordered to be paid by the adjudicator under the Third Parties (Rights Against Insurers) Act 1930.

MCL said that the right of indemnity could only be transferred to Galliford once a relevant liability had been established by judgment of the Court, arbitration award or agreement and that the adjudication decision was not sufficient by itself.

HHJ Behrens agreed, stating that although an adjudicator's decision creates a contractual obligation to pay, that obligation is not an absolute one. The decision will not be enforced if the adjudicator has exceeded his jurisdiction. Accordingly, liability under the insurance policy was not established until the adjudicator's decision had been enforced by a judgment of the court or by agreement. Therefore the proceedings brought by Galliford were dismissed.

Other Cases of Interest

City Inn Ltd v Shepherd Construction Ltd

Shepherd carried out the construction of a Hotel for City Inn. The contract incorporated the JCT 1980 Standard Form (Private Edition With Quantities) as amended.

The contract works were not completed by the completion date. Shepherd claimed that it was entitled to an extension of time. The architect allowed 4 weeks, an adjudicator allowed 5 weeks. City Inn said that both the architect and adjudicator were wrong. In addition, City Inn claimed liquidated and ascertained damages and the repayment of loss and/or expense allowed by the architect as a consequence of the extension of time award.

Although the Hotel was in Bristol, the dispute came to trial in Scotland. City Inn said that Shepherd was not entitled to any extension of time. Primarily this was because it had failed to comply with the requirement of (an amended) clause 13.8.1. This clause required Shepherd, on receipt of an instruction and before carrying out the work instructed, to give notice to the architect of both the likely costs of carrying out that instruction and an initial estimate of the likely extension of time to which Shepherd might be entitled as a result of that instruction.

Clause 13.8.5 stated that:

"If the Contractor fails to comply with any one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under Clause 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3."

The Judge at first instance, Lord MacFadyen, found in favour of City Inn. The Inner House of the Court of Session (the Scottish Court of Appeal), agreed with that decision, although its reasoning was slightly different.

Shepherd was not obliged to invoke the protection of clause 13.8 and was not, therefore, in breach of contract for failing to do so. However, if Shepherd wanted to seek an extension of time as a result of an instruction then Shepherd had to comply with the requirements of clause 13.8.1 and provide the particulars of the likely costs and delay arising from the instruction. Clause 13.8 was thus a condition precedent to Shepherd's entitlement to an extension of time.

Health & Safety

As part of the continuing campaign to bring about a decrease in the number of deaths and injuries caused by falls from heights, the HSE has launched a new campaign, "Don't Fall For It" which will include two nationwide site inspections, one in June, the other in September.

William Hare Ltd, who pleaded guilty, have been fined £75,000 plus costs of just over £9,000 following the death (over four years ago) of a worker who fell from a wooden staging board. Whilst trying to retrieve a ladder, the board became unbalanced and tipped the man off. The HSE commented that the method statement for the scaffolding had been insufficiently detailed which led to an improvised system being developed on site which consequently lead to the accident.

Mediation

Changes to the CPR

The CPR Pre-action Protocol Practice Direction has been amended, as of 1 April 2003, to include new requirements for the letter of claim which commences the Protocol process. These include a new item 4.3(f) which says that the proposed claimant must state if he wishes to enter into mediation or any other alternative method of dispute resolution. The proposed defendant must likewise indicate whether or not it wishes to mediate the matters in dispute.

This brings the Protocol Practice Direction into line with the Construction & Engineering Protocol which at item 5.4 states that the parties should consider whether some form of alternative dispute resolution procedure, and if so which form, would be more suitable than litigation.

Construction Industry Law Letter

CILL, which is edited by Tony Francis and John Denis-Smith of Fenwick Elliott and published by Informa UK Ltd, provides an in-depth insight into these and similar cases. For a free sample copy please email your details to eleanor.slade@informa.com, quoting Ref: The Dispatch.

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