Fenwick Elliott
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Dispatch

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

Adjudication

The Highland Council v The Construction Centre Group Ltd

This decision is part of an ongoing dispute in relation to the Small Isles and Inverie ferry scheme. (See Issue 26). HC brought an adjudication, claiming liquidated damages, partly as a means of continuing to withhold the sum ordered to be paid in an earlier judgment. HC suggested that, in the current adjudication, CCG had argued that any award made could be taken as extinguishing the amount owing to them from a previous adjudication. CCG (now in receivership) said that the argument merely went to jurisdiction, namely that the adjudicator could not award less than the sum claimed in the adjudication notice.

Lord Carloway agreed that CCG had simply submitted that no award could be made by the adjudicator since the whole sum claimed was not due. It was not, even impliedly, an argument that CCG were surrendering their right to payment in the event of a decision going in favour of HC. Further, he noted that under Scottish law, CCG held a decree for payment. Unless HC discharged that debt in some form, the decree could only be satisfied by payment of the whole. HC could not plead set-off by virtue of another sum due under a decree in their favour. Whilst a creditor could discharge the debt by accepting a lesser (or no) payment, this is not what had happened here.

The decision is interesting because the Judge recognised that this finding may result in funds being lost forever to HC. Notwithstanding this, he came to the view that the balance of convenience, and also equity, favoured CCG:

"The whole process of adjudication procedure is to secure quick payments. The Petitioners have been withholding the sum in the decree from the Respondents for over a year and indeed for some months since the Inner House of the Court ordered it to be paid over. The Court is bound to be less than impressed with a public authority failing to respond with reasonable expedition to the Court's determinations on matters of law governing its relations with private contractors."

Environment

Re Anglian Water Services Ltd

Anglian appealed against a fine imposed for breaching section 85(3)(a) of the 1991 Water Resources Act. Anglian pleaded guilty to discharging sewage effluent which had had a catastrophic effect on fish and wildlife over a 200 metre stretch of a river. Although the Trial Judge took into account by way of mitigation, the guilty plea and the fact Anglian quickly restored the river, he still fined Anglian £200,000. He ruled that Anglian had been grossly irresponsible in its failure to have a relevant safety system in operation which might have prevented the discharge.

In considering whether this fine was reasonable, the CA held that compared with the fine of £80,000 imposed upon Yorkshire Water in 2001 (who pleaded guilty to 17 offences for supplying water unfit for human consumption), the fine of £200,000 was clearly excessive and accordingly the CA reduced the fine to £60,000. In doing this, the CA stressed that it was important that the fine was at a level to make some impact on the company concerned in order to overcome any suggestion that it might be cheaper to pay the fine rather than undertake the work necessary to prevent the offence in the first place.

Case Update

Jewson Ltd v Kelly

In Issue 27 we reported on this case which considered the test to be applied to establish whether goods supplied in the course of business are of "satisfactory" quality. That test is whether the reasonable person would consider the goods to be satisfactory taking into account the whole circumstances of the sale. The CA has recently overturned the original decision on the basis that the Judge had not done this. Whilst Kelly had told Jewson how and where he intended to use the boilers (which were the subject of the claim) and had indeed relied on what Jewson told him, he also had access to his own advice and had thus not relied on Jewson to select the actual boilers for him. As a result, Jewson were not responsible for the failure of the boilers to comply with the applicable ratings.

Other Cases of Interest

CJ Elvin Building Services Ltd v Noble & Noble

Mr and Mrs Noble purchased a domestic property and engaged Elvin to carry out works there. The HGCRA did not apply. The Nobles considered that the rate of progress was poor and failed to make payment in respect of invoices submitted by Elvin, which suspended its works, making it clear that it was prepared to proceed but only once its account was settled or reduced. Elvin issued proceedings seeking payment but the Nobles said that the sums claimed were not due because of defective work, and/or that that no sums were due as Elvin was in repudiatory breach of contract.

Recorder Akenhead QC held that on the evidence before him, he was not able to find that Elvin was contractually responsible for the delays which had occurred and found that it was the Nobles who had been in repudiatory breach by refusing to make payments and that Elvin had been entitled to suspend its works. By failing to pay the outstanding sums the Nobles were in breach of contract. It was not a valid excuse for the Nobles to put forward, as an excuse not to pay, financial difficulties. The financial difficulties were not down to Elvin. It was simply the case that the Nobles were not prepared to make any further interim payment.

Having decided that the Nobles were in serious breach of contract for failing to pay a significant outstanding sum which was due, the Recorder then considered whether or not, in all the circumstances, Elvin was entitled to suspend work. The reason why Elvin did suspend work was that it had not been paid sums which were due. Elvin was not willing to continue with and complete the work unless further sums due were paid.

Elvin''s suspension was brought about directly as a result of the Nobles' breach of contract in failing to pay. In those circumstances, Elvin was entitled to suspend the work. The Judge said:

"*Failure or refusal to pay sums due under a building contract can amount and often does amount to repudiatory conduct on the part of the employer. This will obviously depend upon the terms of any construction contract. Many construction contracts have termination clauses which, invariably, permit the Contractor to terminate under the provisions of the contract on the grounds of non-payment by the Employer. The obligation to pay on the part of the construction contract employer is one of the most important obligations which the Employer has. A refusal to honour payment obligations, at least insofar as it relates to a relatively sizeable sum of money due or the threat not to pay further sums due in accordance with the contract must be capable of being repudiatory*."

Deeds of Warranty

Northern & Shell Plc v John Laing Construction Ltd

Laing entered into a contract, in the JCT Private with Quantities form, to construct an office block. Under the terms of the contract, Laing was required to enter into a deed of warranty whereby Laing guaranteed the quality of the work, workmanship and materials. The deed of warranty provided that it "*shall come into effect on the day following the date of issue of the certificate of practical completion under the building contract*".

N&S commenced proceedings against Laing after discovering alleged defects with the cladding, roof coping and weather proofing. The practical completion certificate was issued on 25 August 1989. Proceedings were issued on 14 January 2002. Accordingly, Laing claimed that the limitation period of 12 years had expired and the claim was statute barred. N&S said that the effective date of the warranty was the date the deed was signed (namely 16 January 1990, some 5 months after practical completion) and thus that the claim had been issued within the limitation period.

HHJ Thornton QC agreed with Laing. The wording was clear. The warranty would come into effect on the day following the date of issue of the practical completion certificate. There could be no ambiguity. N&S appealed.

The CA agreed with Laing. The parties clearly intended that the clause would have a retrospective effect. If the fact that the deed had been signed after practical completion meant that the warranty would only come into effect on the day it was signed, then the parties could have made that clear on the face of the deed

Dispatch is produced monthly by Fenwick Elliott, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.
Dispatch is a newsletter and does not provide legal advice.

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