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Dispatch

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

Adjudication

Westminster Building Co Ltd v Andrew Beckingham

WBC tendered for refurbishment works to a property owned by Beckingham. Part 1 of the specification stated that the contract would be in the form of JCT IFC 1998 incorporating various amendments. The letter of intent instructed WBC to proceed and stated:

"My Surveyor will be progressing the preparation of the formal contract documents over the next few weeks for signature by both parties, in the interim please proceed to make arrangements for the implementation of the works. In the unlikely event of matters not progressing I would confirm that you will be reimbursed any reasonable expenditure in connection with the project."

The day after work started a completed contract was sent out. Whilst WBC signed and returned it, Beckingham did not sign. Work proceeded and a "capping agreement" was signed by both parties. This stated that the fees would not exceed £300,000 including VAT, and provided for a staged release of retention. Payment certificates 5 and 6 were issued by which time the contractor had been paid £284,209.90. Beckingham refused to pay on the basis that the maximum sum due in accordance with the capping agreement was £270,000 (after deduction of the £30,000 retention). He did not serve any withholding notice. The dispute was referred to an adjudicator who decided that Beckingham should pay WBC £122,409.16 plus interest.

A variety of issues arose including whether the contract was governed by an adjudication clause, whether the adjudicator had jurisdiction to deal with the dispute because of the capping agreement, and whether the adjudication was unfair and therefore not binding.
HHJ Thornton QC held that the letter of intent was not sufficient to form a contract because when the body of the letter was read with the last paragraph, the intention was clearly that if a contract was not concluded then the contractor would be reimbursed any reasonable expenditure. Further, it was also anticipated by the parties that there would be a formal contract document.

A formal contract was prepared and signed by WBC and given to Beckingham for signature. However, although he received the signed contract and allowed the works to proceed, Beckingham did nothing further. By acting in this way, Beckingham was held to be signifying acceptance of the contract terms put forward by Westminster and to be waiving any pre-condition as to signature, if such was the effect of the wording of the letter of intent. The absence of any executed documentation did not prevent the Court from finding that a binding contract had been entered into because all of the necessary ingredients for a valid contract were in existence.

The capping agreement set the fee at £300,000, and provided a mechanism for release of retention. However, it did not amount to a settlement agreement. The adjudicator had decided that the agreement was a variation to the original contract but was of no effect because it was not supported by consideration. In the absence of a withholding notice, Beckingham had no surviving defence to resist payment of the decision, save for a challenge pursuant to the unfair Terms in Consumer Contracts Regulations 1999. HHJ Thornton QC held that those regulations, whilst applicable, did not assist Mr Beckingham because the contract was in plain language, Mr Beckingham had been professionally advised, there was no significant imbalance in the terms of the contract, and the adjudication clause did not significantly exclude or hinder his (i.e. the consumer's) right to take legal action.

Court of Appeal Cases - LADs and Injunctions

Bath & North East Somerset DC v Mowlem plc

Mowlem contracted with the Council in August 2000 to fit out hot springs in Bath. The project overran considerably and problems became apparent in the paint coating which had been applied to part of the works in the four pools on the site. The Council claimed that this was a workmanship fault. Mowlem denied this suggesting there had been inadequate design or the specification of inappropriate materials. The Council issued an architect's instruction to Mowlem to remove the paint. Mowlem refused to carry out the instruction. The Council then instructed a different contractor to carry out the work set out in the instruction. Mowlem denied this contractor access to the site. The Council applied to the TCC for an interlocutory injunction restraining Mowlem from denying the new contractor access to the site. HHJ Seymour QC granted the injunction and Mowlem appealed. The key question was whether the judge should not have granted the injunction on the grounds that the Council could be adequately compensated for any delay for which Mowlem was ultimately found to be responsible through an award of the LADs to which it was entitled under the contract.

Section 37(1) of the Supreme Court Act 1981 gives the Court the power to grant an injunction "*in all cases in which it appears to the court to be just and convenient to do so*". The CA held that the balance of convenience favoured leaving the injunction in place.

It was not necessarily correct that the Council would be adequately compensated by a later award of damages if Mowlem were later held responsible for the delays caused by the problems with the paint. It was likely that the Council would incur losses in excess of the LADs (£12k per week) if the injunction was lifted.

The reason the CA came to this conclusion was that in assessing the likely future losses of the Council, it considered the potential adverse effect of further delay caused by Mowlem's actions in preventing another contractor from entering the site. These included the potential negative effect of the economic regeneration in the locality generally. The CA said that this whole picture should be taken into account when exercising its discretion as to whether to award an interlocutory injunction.

Mowlem had argued that an injunction should not be granted as the Council must be taken to be adequately compensated by the agreed level of LADs, whatever the likely future losses evidenced at any hearing for an injunction. The CA did not accept this argument suggesting that if it did so it would effectively be holding that LADs were an agreed price to permit a contractor to breach its contract. Accordingly, Mowlem were in breach of its contract by denying the other contractor access to the site.

Court of Appeal Cases - Phoenix Companies

■ Ricketts v Ad Valorem Vectors Ltd

This appeal turned on the application of sections 216 and 217 of the 1986 Insolvency Act. These sections affect directors of companies which have gone into liquidation and were enacted to curb what is known as Phoenix syndrome, namely, where directors of defunct companies incorporate new companies with suspiciously similar names and continue trading.

Under these two sections, directors may be guilty of a criminal offence and/or personally liable for debts or other liabilities if they act in relation to other companies known by a name which is either the same as or similar to that of the insolvent company.

Here, Air Component Company Limited went into voluntary liquidation. Ricketts was a director at the time. He was also a director of a company known as Air Equipment Limited. This company owed money and the debt was assigned to Ad Valorem who claimed that Ricketts was personally liable for the debts of Air Equipment. This was even though there had been no transfer of assets between the companies at an undervalue or any evidence that the companies were used to run up debts and to avoid payment. Equally, there was no evidence that the creditors or anyone else had been misled by the similarity of the names of the two companies.

The CA agreed that the name of Air Equipment was so similar to the name of Air Component as to suggest an association with it. The CA came to its decision by making a comparison of the company names in the context of the circumstances in which they were used or likely to be used. LJ Mummery looked at the types of product dealt with, the locations of the businesses and the types of customers dealing with the companies. LJ Simon Brown said that the similarity between the two names must be such as to give rise to a probability that members of the public, comparing names in the relevant context, will associate the two companies with each other. Therefore, even though there was no proof that there had been any misrepresentation or that anyone had been deceived into thinking there was an association between the companies, the similarity in names was enough to establish liability.

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.
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