



Dispatch

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

Duty to act impartiality

■ **Costain Ltd & Others v Bechtel Ltd & Anr**

Costain were part of a consortium of contractors carrying out work in respect of the Channel Tunnel Rail Link. The consortium entered into a contract to carry out the extension and refurbishment of St. Pancras Station. The contract provided that:

"The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract."

The contract, though amended, was based upon the NEC Form of Contract. The contract was a target cost contract with a pay and gain mechanism providing for the Costain consortium to be paid actual cost less disallowed cost as defined by the contract.

The project manager ("RLE") was another consortium. The dominant member was Bechtel Rail Link Engineering. Many of the RLE personnel who worked on the contract were also Bechtel employees. On 6 February 2005, RLE issued payment certificate no. 47. This valued the work carried out as approximately £264 million, but disallowed costs of some £1.4 million. On 8 April 2005, payment certificate 48 was issued. The total of disallowed costs had risen to £5.8 million.

The Costain consortium alleged that at a meeting held on 15 April 2005, one Mr Bassily instructed all Bechtel staff to take a stricter approach to disallowing costs. It also alleged that he instructed the Bechtel staff to disallow legitimate costs when assessing the payment certificates. The Costain consortium were concerned that Bechtel had deliberately adopted a policy of administering the contract unfairly and adversely to them. Accordingly, the consortium issued a claim alleging that Bechtel and Mr Bassily had unlawfully procured breaches of contract by the employer. The claim sought interim injunctions restraining the RLE consortium from acting in such a way in relation to the assessment of the contractor's claims.

Bechtel argued that they were obliged to look after the employer's best interests and that therefore they did not owe a duty to act impartially in respect of consideration of the payment applications.

Mr Justice Jackson disagreed, holding that it was properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer or contractor.

On the evidence before the Court, Mr Justice Jackson found that Mr Bassily had, in fact, been telling Bechtel staff to exercise their functions under the contract in the interests of the employer and not impartially. However, when acting as project manager, it was the RLE consortium's duty to act impartially as between employer and contractor and not to act in the interests of the employer.

This was an application for an Injunction and the Judge agreed that the Costain consortium had raised serious questions to be tried both in relation to whether RLE had acted in breach of its duty to act impartially as between employer and contractor and whether as a consequence the employer was thereby in breach of contract. In addition to this, the Costain consortium had raised a serious question as to whether the RLE consortium had committed the tort of procuring a breach of contract.

However this was not an appropriate case in which to grant an interim injunction. The Costain consortium had, when it came to considering the question of balance of convenience, failed to show that this was a proper case for the granting of an interim injunction. The fact that there were potentially serious questions to be tried was not enough.

Mr Justice Jackson was not prepared to exercise the court's discretion at this interim stage (and it is important to bear in mind that this judgment does not provide a definitive answer on this issue) to correct any failings in the contractual payment procedures. These could ultimately be compensated for by way of damages.

Adjudication - Stay of execution

■ Wimbledon Construction Company 2000 Ltd v Vago

Vago engaged WCC, to carry out extension and refurbishment works at his house. Disputes arose and WCC commenced an adjudication. The Adjudicator awarded WCC the sum of £122,923.34. This was not paid and WCC commenced enforcement proceedings. At about the same time Vago commenced arbitration proceedings to challenge many of the adjudicator's findings. In the Court proceedings, Vago consented to judgment being entered and offered to pay the sum of £122,923.34 into court. That offer was refused. Vago then sought an order that enforcement be stayed, pending the outcome of the arbitration proceedings, on the grounds of WCC's uncertain financial position.

In addition, WCC sought summary judgment for £6,507.97, being the agreed value of post-contract works carried out at the property. This was not disputed but Vago maintained that he had a set-off and/or counterclaim in respect of alleged defects in the heating and ventilation works which, it was said, operated as a complete defence to this element of the claim. WCC complained that the nature of the counterclaim was extremely vague. There was no attempt to identify how and why the items could be said to constitute a breach of contract.

HHJ Coulson QC said that the uncertainty within Vago's own evidence as to what the proposed cross-claim might be worth typified the fact that next to no analysis and/or particularity had been provided in respect of this proposed claim. Therefore on the basis of the scant information available to him he concluded that Vago had no real prospect of successfully defending the claim.

The Judge then considered whether there should be a stay of the enforcement proceedings. In doing so, he set out the following principles:

- (i) Adjudication is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
- (ii) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
- (iii) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under CPR 47
- (iv) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of CPR rule 47.1(1)(a) rendering it appropriate to grant a stay.
- (v) If the claimant is in insolvent liquidation, or there

is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted.

(vi) Even if the evidence of the claimant's present financial position suggested that it was probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(a) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or

(b) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

On the basis of the evidence before him, the Judge considered that Vago had not demonstrated a probable inability on the part of WCC to repay the judgment sum, if that was the outcome of the subsequent arbitration process. WCC was making a modest profit and was not insolvent.

The directors of WCC had made loans to the company. Whilst this may have been a legitimate concern, here HHJ Coulson QC said that the loans demonstrated a high degree of practical faith in the future of the company on the part of the directors, and that faith might be regarded as the best possible evidence that any sums, if they had to be, would be repaid.

In addition, the Judge was in no doubt that WCC's present financial position, and its likely position in a year's time, was the same or very similar to its financial position at the time when the contract was made. He also was of the view that part of WCC's particular financial difficulties were due, at least in significant part, to the failure on the part of Vago to honour the adjudication decision.

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