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Dispatch

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

Adjudication - reasons

■ **HS Works Ltd v Enterprise Managed Services Ltd**

[2009] EWHC 729 (TCC)

Following disputes about the final account and contra-charges, there were two separate adjudications. Following the first, Enterprise were required to pay £1.8m; in the second, the adjudicator made a declaration as to the proper valuation of the works allowing for contra-charges. The result of the second decision meant that at least part of the sums due under the first decision should be repaid. Both parties argued that the decision where they had lost, was invalid. Mr Justice Akenhead considered how a court should deal simultaneously with two adjudications which decide different things but which might impact upon each other. He noted that, provided both decisions are valid:

(i) It is necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set-off does not arise;

(ii) If it is clear that both are so capable, the courts should give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. There is no reason to favour one side if both have a valid and enforceable decision in their favour;

(iii) How each decision is enforced is a matter for the Court. It may be wholly inappropriate to permit a set-off of a second financial decision, as such, in circumstances where the first decision was predicated upon the basis that there could be no set-off.

The Judge also considered the approach to "kitchen sink" adjudications, where the dispute is so extensive that an adjudicator or defending party cannot readily or easily deal with it in the standard adjudication period. The Judge said the courts should have regard to:

(i) Whether and if so upon what basis the adjudicator felt able to reach his decision in the time available;

(ii) In terms of the opportunity available to the defending party, the court should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and what that party was able to and did do in the time available in the adjudication to address the material provided to it and the adjudicator.

In the first adjudication, Enterprise argued that the decision was unenforceable because the adjudicator failed to address the merits and make findings in relation to the contra-charges which it had put forward. However, on review of the decision, the Judge noted that the dispute referred included the assertion that as there were no or no effective, withholding notices, the amounts withheld from the contra-charges were not properly withheld and were duly payable by Enterprise. As a matter of logic, if that primary case was upheld, there was no need for the adjudicator to consider the alternative case as put forward by Enterprise. This was exactly the view expressed by the adjudicator. Mr Justice Akenhead said that:

> *"it cannot be incumbent upon an Adjudicator, at least generally, to include in his or her decision a commentary let alone findings upon every issue which arises in the reference, save to the extent that it is necessary to provide reasons and explanations for what he or she does decide"*

In the second adjudication, it was suggested that the adjudicator failed to act fairly and/or apply the rules of natural justice, in part this was because of the extent of the adjudication. However, Mr Justice Akenhead (reaching a similar view to that of Mr Justice Coulson in the *Dorchester v Vivid* case, see issue 104) noted that it was clear the adjudicator himself did not ultimately consider that he needed more time in which to produce his decision. In his decision, the adjudicator averred to the fact that his job had been onerous but he had been given a week's extension of time and did not ask for more.

The Judge also noted that the adjudicator was provided with extensive evidence and argument by each party in relation to the valuation of final account and contra-charge items. The parties had conveniently sub-divided the disputed items into categories and in respect of each separate category, the adjudicator took account of the parties' representations and depending on the volume of supporting documentation either checked all the information or in the case of a large disputed item carried out a series of spot checks. Bearing in mind the tight adjudication timescale, the adjudicator's approach could not be criticised.

Thus both decisions were valid and enforceable. On balance, the Judge considered that his order should reflect the net effect of the decisions. Calculating the net effect would include taking account of the interest position in relation to the payment (or non payment) of the respective adjudicator's decisions and costs.

Contract formation - net contribution clauses

■ **Langstane Housing Association Ltd v Riverside Construction (Aberdeen) Ltd & Others**

[2009] COSH 52

In this Scottish case, Lord Glennie had to decide what terms had been incorporated into an engineering contract. During the course of renovation works, a building collapsed and Langstane brought proceedings against the contractor, architect and consulting engineer. Specifically, the engineers said that the contract was subject to the ACE Conditions of Engagement, which included at Clause B8.2, a net contribution clause. Such clauses are often bones of contention when it comes to negotiating contracts, but it is rare for them to be discussed in court proceedings.

An expert explained to the court, that a consulting engineer would want a net contribution clause to be included in any collateral warranty as well as in the contract. The idea of such a clause is that each party should pay for their own mistakes and their mistakes alone, thus avoiding the risks of a joint and several liability clause, which may leave a party vulnerable in the event of the insolvency of another contractor or consultant. It was always open to the employer to insist upon the contractor or other consultant having liability insurance or even insurance against insolvency of the professional team.

Also, the standard ACE form in question here, contained a lengthy pro forma Memorandum of Agreement to be filled out by the parties. The Guidance Note which came with the contract made it clear that the Memorandum was an important element of the contract and contained blanks which must be filled in to create an agreement.

Lord Glennie concluded that the contract came into being by virtue of a letter and also Langstane's conduct in instructing work to be done and paying for it against an invoice. The letter in question referred to the basis of agreement being the "ACE Conditions of Engagement Agreement - B1". The Judge considered that that this must mean that the current version of those conditions should apply. If you referred to the incorporation of a standard form of contract, without any specific indication to the contrary, the most up-to-date version would apply.

Next, the Judge had to consider whether all the standard ACE terms had been incorporated into the contract, i.e. whether clause B8.2 applied. As the starting point was that the contract terms specifically referred to those terms, it was difficult to see on what basis clause B8.2 would be excluded. However remember that the contract was concluded through a letter which referred to the ACE standard form. This meant that the parties here had not filled in the blanks on the Memorandum of Agreement. This meant, for example, that they had failed to fill in and set out a monetary limit of liability. The Judge said that the consequence of failing to fill in the relevant figure was that clause B8.1, (which provides that the liability of the consulting engineer shall not exceed the sum stated) became ineffective.

Overall, although the ACE Guidance was important, what mattered to the Judge was contractual intention. If the parties had concluded a contract by letter and conduct, there was no reason why they should not, if they so wished, incorporate the ACE conditions by reference in that letter without completing the Memorandum. In reality, it is likely that the parties had simply not got round to filling in the Memorandum. However, they could have. Here, the Judge thought that the parties could be taken as having intended the ACE Conditions to govern the contract. Thus he held that the whole of those conditions should apply, save where the parties by actual admission or omission (i.e. the failure to fill in certain figures) had indicated that a particular condition should not.

Finally, Langstane argued that as a consequence of the onerous nature of the net contribution clause, it was not fair nor reasonable to incorporate the clause into the contract. The Judge disagreed. At the time the proposal was submitted for the project, the net contribution clause had been in circulation for over seven years. Anyone who contracted on the basis of the standard ACE terms would therefore be well aware of its existence. Therefore there was no need for the engineers to specifically draw Langstane's attention to the clause. Further, the clause in question did not seek to exclude or restrict liability for the engineers' breach of duty. The Judge said that:

"it simply sought to ensure that the second defenders were only held liable for the consequence of their own breach of duty and were not held liable, by the doctrine of joint and several liability, for the breaches of duty by other contractors and consultants."

In the view of the Judge, the clause was a fair and reasonable one. It was relevant that the clause was part of a body of conditions drafted by a professional body which was widely used within the industry. The fact that the clause attracted controversy, did not stop it being used. It was open to Langstane , who chose their own professional team, to negotiate different terms or ensure that proper insurance was in place in the event that one or more of them was in breach of contract. For example, the Judge said, if proper insurance was in place, then it should be possible in the event of insolvency to claim against the insurer.

Whilst, it should be noted that this is a Scottish decision and so is not binding on the English Courts, that will not, of course, stop it being referred to in contractual negotiations.

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