



Dispatch

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

Entitlements to extensions of time and concurrency **City Inn Ltd v Shepherd Construction Ltd** [2010] ScotCS CSIH 68

We have reported on this long-running case before - see Issue 91. It has now reached the Inner House of the Scottish Court of Session or the Scottish Court of Appeal who recently handed down a majority verdict in relation to the claims being made.

Shepherd was engaged by City Inn to build a hotel in Bristol. The contract incorporated the JCT Standard Form of Building Contract (Private Edition with Quantities) 1980 Edition, with further bespoke amendments. At clause 25, the contract contained extension of time provisions that were broadly similar to the standard JCT provisions: the architect could award extensions of time where a relevant event had caused or was likely to cause the works to be delayed.

The court below held that City Inn was responsible for nine causes of delay to the completion of the works (such as late instructions from the architect), with two causes of delay the responsibility of Shepherd. The causes for which City Inn was responsible were relevant events under clause 25. City Inn argued that Shepherd was not entitled to any extension of time, due to the concurrency of the delays caused by both parties.

The issue before the Scottish CA was to determine the correct approach to be taken when awarding extensions of time for concurrent delays under clause 25.

Leading the majority, Lord Osborne upheld the earlier decisions, in that where there are concurrent delays, caused by the employer and the contractor, delay may be apportioned between the competing causes. Following a review of relevant case law in Scotland, England and Wales and the United States., Lord Osborne put forward the following five propositions:

- (i) It must be established that a relevant event has occurred and is a cause of delay, and that completion of the works is likely to be delayed or has been delayed by that relevant event;
- (ii) Whether the relevant event has had or will have any causative effect is a question of fact to be determined by common sense;
- (iii) In deciding whether the relevant event has caused delay, the architect can consider any factual evidence he considers acceptable. A critical path analysis is not essential;

- (iv) If a dominant cause can be identified as the cause of a particular delay, effect will be given to that by leaving out of account any causes which are not material. Therefore, in those circumstances, the success of an extension of time claim will depend on whether the dominant cause is a relevant event; and
- (v) Where a situation exists in which two causes are operative, and one is a relevant event and the other is caused by the contractor, and neither can be described as a dominant cause, it will be open to the architect to approach the issue in a fair and reasonable way to apportion the delay between the causes.

In contrast Lord Carloway, in his dissenting opinion, agreed with the overall result of the other judges, but applied different reasoning. He considered that apportionment was not the correct method of awarding extensions of time between two concurrent causes of delay. He considered that the architect's sole task is to decide whether the relevant event is going to, or has, caused delay. If he considers that it has, then he should award an extension of time that is fair and reasonable. If a relevant event occurs, then the fact that the works would have been delayed because of a contractor culpable delay is irrelevant.

This decision does not alter the judgment of the previous hearing in 2007. In summary, the position stands that when an architect is making an award on an extension of time where there are concurrent causes of delay, he should use his common sense and approach the decision in a fair and reasonable manner. In Lord Osborne's analysis of concurrent delays, he stated that when deciding if two or more delays are concurrent, an overly analytical view should be discouraged. An architect should not be chiefly concerned with the precise chronology of the delays, but should instead look at the effects of the delays on the completion date.

Adjudication - delivery of the decision **Lee v Chartered Building Properties (Building) Ltd** [2010] EWHC 1540 (TCC)

Ms Lee engaged Chartered to carry out refurbishment works on the basement and ground floors at a residential property. Chartered completed the works and submitted its final account. Ms Lee disagreed with the final account, and instructed the architect to discuss this with Chartered. In mid-2009, the parties agreed to drop the claims they had against each other. An email from Chartered stated that the parties should exchange formal letters to this effect; however, this did not take place. Subsequently, Chartered purported to refer the final account dispute to adjudication.



After two abortive adjudications, Chartered commenced a third adjudication. The adjudicator awarded Chartered a total of £73,982.38. Ms Lee did not pay the amounts awarded and commenced proceedings in the TCC. Chartered counterclaimed for the enforcement of the adjudicator's decision. Ms Lee resisted enforcement on six grounds. Namely, that the appointment of the adjudicator was invalid; no dispute had crystallised; Chartered had referred more than one dispute; the dispute between the parties had been settled; there was a breach of natural justice by the adjudicator; and that the adjudicator issued his decision out of time.

Mr Justice Akenhead held that the decision should not be enforced because the adjudicator did not deliver his decision as soon as possible after he had reached his decision. The parties had agreed that the adjudicator could issue his decision by Friday, 13 November 2009. At 2.48pm on 13 November, the adjudicator advised he had now reached his decision but it would be issued on Monday. Chartered had consented to this timing, but Ms Lee had not. The Judge considered that 74 hours was not necessary for typing and proof reading a decision:

"There seems to be no obvious good reason why with some effort and application the decision could not have been communicated on 13 November; there is no obvious explanation as to why virtually the whole of the working day of 16 November was required before the Decision was sent out."

The Judge also decided that Ms Lee had demonstrated that there were other triable issues which could not be decided by way of summary judgement. Firstly, the Judge found that there were factual discrepancies in the account given by Chartered as to whether or not the notice of adjudication had been delivered to the nominating body prior to the application for nomination. Secondly, the email correspondence in mid-2009 may have resulted in a settlement of the dispute. The surrounding circumstances of the emails and the factual discrepancies in the account needed to be explored and this was not something that could, or should, be performed at a summary judgement.

The remaining grounds were dismissed. The Judge considered that the dispute had crystallised by the time the adjudication was commenced and did not consider that more than one dispute had been referred. He also held that there had not been a breach of natural justice by the adjudicator. Finally, Mr Justice Akenhead held that Ms Lee had not been ambushed as there was clearly a significant and long standing dispute.

Adjudication - exhaustion of jurisdiction **RGB Ltd v SGL Carbon Fibers Ltd** [2010] ScotsCS CSOH-77

The parties entered into an amended NEC3 Engineering and Construction Contract, June 2005 Option C, for RGB to carry out certain works at SGL's premises. RGB referred a dispute to adjudication which related to its entitlement to a change in the Completion Date and to the payment of five invoices. RGB was successful but SGL did not pay the sums awarded. At the enforcement proceedings SGL contended that the adjudicator's decision should be set aside as he had failed to exhaust his jurisdiction.

SGL stated that in failing to consider all the evidence before him, the adjudicator had misconstrued the extent of the dispute between the parties, thereby unjustifiably restricting the material he considered. It was further submitted that the adjudicator could not determine the extent of his own jurisdiction and unless he decided all issues referred to him, he failed to exhaust his reference.

SGL's case was that the adjudicator's jurisdiction was to determine what sum RGB was entitled to be paid under the contract. To do so, he was obliged to consider any overpayments that had previously been paid to RGB. RGB, by contrast, stated that the adjudicator was being asked to look at the five invoices in question and not any overpayments. RGB suggested that if this were an error, then the Court could not correct his decision as all he had done was to answer incorrectly the correct question. The adjudicator, however, did not consider the issue of overpayments as he considered it outside his jurisdiction.

Further, RGB submitted that this was not a question on jurisdiction at all. In order to determine what was due under the invoices the adjudicator had to take a view as to how the contract payment mechanism operated. There was an informal process in which RGB and SGL would agree the amount due at the end of the month and RGB would then submit an invoice for that amount. Therefore the Price for Work Done to Date ("PWDD") had been agreed and SGL should be allowed to abjure from that agreement.

The Judge held that as the adjudicator had rejected RGB's submission, in order properly to answer the dispute referred to him, he was required to revisit the PWDD and consider any overpayments. The Judge stated:

"The adjudicator had power to, and was bound to, consider the evidence and submissions of the defender relating to alleged earlier overpayment. He could not properly answer the question put to him regarding the pursuer's entitlement to be paid in terms of these invoices unless he did so."

The adjudicator had, in fact, considered overpayments in some respects (i.e. sums due for site labour and welding equipment) and so he understood that his jurisdiction empowered him to consider them. He had misconstrued the extent of his own jurisdiction by having not done so in regard to other overpayments, thereby failing to exhaust his jurisdiction. The Judge declined to enforce the decision.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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