Fenwick Elliott
The construction law specialists

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# Dispatch

*Dispatch* highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

## Adjudication: what is a single dispute?

**Witney Town Council v Beam Construction (Cheltenham) Ltd**
[2011] EWHC 2332 (TCC)

Beam's Adjudication Notice included claims for money and time and that the Council was in breach of contract. The Council promptly made it clear that it considered that more than one dispute was being referred to adjudication but the adjudicator equally clearly and promptly made it clear that he did not consider the point a good one. The Council duly reserved its position and the parties found themselves before Mr Justice Akenhead.

The parties accepted that, save where otherwise agreed, only a single dispute may be referred to adjudication. The Judge noted that it was important to bear in mind that construction contracts are commercial contracts and parties can be taken to have agreed that a sensible interpretation will be given to what the meaning of a dispute is. Some disputes are simple: what is due to one or other of the parties? Equally, the Judge continued:

*"A particular dispute, somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on; the typical example in a construction contract is the ever increasing dispute about what is due to the contractor as each monthly valuation and certificate is issued; a later certificate may accept amounts in issue previously not certified but then reject some more items of work. One may in the alternative have a dispute, like the proverbial rolling stone gathering no moss, which remains the same and unaffected by later events; an example might be disputed responsibility over an accident on site."*

This led the Judge to conclude that:

*"(i) Disputes arise generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.*
*(ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.*
*(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication.*
*(iv) What a dispute in any given case is will be a question of fact. Courts should not adopt an over legalistic analysis of what the dispute between the parties is.*
*(v) The Adjudication and Referral Notices are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.*
*(vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise.*
*(vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 can not be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."*

Here, the Council said that there were effectively four disputes being referred, (i) the draft final account, (ii) the actual final account, (iii) a claim for interest on underpayment of retention and (iv) the claim for the whole retention based on repudiatory breach. Beam said that in essence there was one dispute, namely what was due and owing to it from the Council. Mr. Justice Akenhead agreed with Beam. There was in reality only one dispute. The Judge's reasons included that:

(i) It was agreed that each different component identified in the Adjudication Notice was in fact disputed;
(ii) The "draft final account" of 21 January 2011 was disputed. However, the use of the expression "draft" final account must be interpreted as meaning that it was simply a draft and interim or provisional assessment by Beam as to what was due;
(iii) The draft final account sought the return of half of the retention amount pointed clearly to an issue which had emerged relating to when or if Practical Completion had occurred;
(iv) There was a clear issue between the parties as to whether Beam was entitled to an extension of time, and if so what;
(v) The final account was disputed by the Council. This account added two additional variation claims, additional and altered prolongation claims, two interest claims, an insurance premium claim and legal costs claim;
(vi) The final account was obviously intended to be an updated and finalised final claim and must be seen to have replaced the "draft final account;" and
(vii) There were clear links between the final account and the other matters in issue. The prolongation claims could not be resolved without deciding what if any extension of time was due. Similarly, one could not decide the insurance claim or the level of retention to be maintained without determining when or if Practical Completion had occurred.

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## Procurement: ineffectiveness and time limits

**Alstom Transport v Eurostar International Ltd & Anr**
[2011] EWHC 1828 (Ch)

Towards the end of the summer, the long-running dispute over the award of a contract for a new generation of trains to be used in the Channel Tunnel came to an end. The part of the case discussed here is interesting for two reasons. Firstly, Alstom objected to the decision and commenced proceedings in which it sought a declaration of ineffectiveness in relation to a preliminary contract. Second, it was said that the claim was brought out of time.

The power to declare that a contract was ineffective if it was entered into before a contracting authority has completed the proper procurement process has existed since 20 December 2009. It was not however something that had been considered by the courts until now. Here, Alstom argued that the contract eventually entered into with Siemens was materially different to the contract tendered for, which meant that the contract had been awarded without prior publication of a notice of the Official Journal. Further this material difference meant that Eurostar had not observed a proper standstill period; both reasons why a proper procurement process had not been followed.

Mann J looked at the qualification notice issued by Eurostar to commence the tender process and held that it was wide enough to cover the contract signed with Siemens, even in its varied form. The Judge said that the test of whether a proper notice has been provided is a "mechanistic" one which was satisfied here. There was a further problem for Alstom in that on the facts, there was no reason why Alstom could not have brought its claim for ineffectiveness before the end of the standstill period and so before the contract had actually been entered into. Alstom needed to establish that there was a breach of the standstill requirement and that that breach prevented Alstom from starting proceedings before the conclusion of the contract, or prevented it from bringing those proceedings to a conclusion. Here, there was a standstill period announced by Eurostar. There was a moratorium. Within that period Alstom managed to formulate and bring proceedings seeking to stop the contract. While those proceedings at that time did not have all the material currently available, it was apparent that the essence of the current argument about the varied contract was recognisable. Accordingly, either there had either been no breach of the standstill obligation, or if there had been, it had not deprived Alstom of the opportunity of starting proceedings. Mann J continued:

*To some extent the ineffectiveness provisions are obviously intended to operate only when anticipatory proceedings could not be brought. One can understand that as a rationale - it was obviously thought that it would better to try to stop a contract than to try to bring an existing contract to an end. Particularly after it has been on foot for some considerable time. The possibility of the former should exclude the latter; the latter should only be available when the former has not been possible because of act of the utility in not holding its hand on contracting to the requisite extent. In the present case Alstom's own acts have demonstrated that it was able to launch proceedings before the contract was entered into.*

## New amendment to the Public Procurement Regulations

As you may well know, on 1 October 2011, the Public Contracts Regulations 2006 were further amended by the Public Procurement (Miscellaneous Amendments) Regulations 2011. One reason for this was as a result of the *Uniplex* decision, (see Issue 114.) In *Uniplex*, the European Court had suggested that the current UK requirements to bring procurement challenges promptly were imprecise and uncertain. The result of these changes is to increase the pressure on a contractor who considers that he might want to challenge the tender process, to do so promptly, albeit as the Alstom case demonstrates, that is already something contractors must be alive to, and by promptly we mean from the date when the contractor suspects that there has been a breach, and that, of course, is not necessarily at the end of the tender process.

The key change introduced is that the time limit for bringing a procurement claim will be reduced to 30 days from the date of knowledge, that is the date on which the economic operator first knew, or ought to have known, that grounds for starting proceedings had arisen. The court will continue to have discretion to extend this period where there is good reason for doing so, subject to an absolute maximum period of three months. If the date of knowledge was before 1 October 2011, then the old time limits, namely three months from the date of knowledge will continue to apply.

If a formal claim is to be made, the new regulations make it clear that proceedings will commence, and the time clock will stop ticking, on the issue of the claim form rather than the date of actual service on the defendant. The claim form must however then be served on the contracting authority within 7 days after the date of issue.

The amended Regulations also make it clear that the automatic suspension of a contracting authority's ability to enter into a contract will be triggered when that contracting authority becomes aware that a claim form relating to the contract has been issued. Finally, the Regulations have also been amended to reflect the new criminal offences introduced by the Bribery Act 2010, which came into effect on 1 July 2011.

*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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Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

**www.fenwickelliott.com**