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: forum shopping and alleged bias

Lanes Group plc v Galliford Try Infrastructure Ltd
[2011] EWCA civ 1617

Galliford commenced adjudication and applied to the ICE to appoint an adjudicator. Mr Klein was appointed. However, Galliford's solicitors failed to take the next step, namely sending referral documents. As LJ Jackson characterised the position, the solicitors, honestly but mistakenly believing that Mr Klein was disqualified on grounds of bias, served a fresh notice of adjudication. They then applied to the ICE to appoint a new adjudicator. The ICE responded by appointing Mr Atkinson. Lanes' solicitors protested that he did not have jurisdiction, on the grounds that Mr Klein rather than Mr Atkinson was the only adjudicator appointed to resolve the dispute. During the adjudication, Mr Atkinson sent to the parties a document entitled "Preliminary Views and Findings of Fact". This set out the his provisional conclusions. In due course both parties submitted their comments and submissions in relation to the Preliminary View. Mr Atkinson ultimately awarded Galliford £1.2million. Lane challenged the validity of Mr Atkinson's appointment and the validity of his decision.

Did Mr Atkinson have jurisdiction as adjudicator? Lanes argued that s108 of the HGCRA and clause 18B of the sub-contract conditions permitted a party to refer a dispute to adjudication on one occasion only. If the party seeking adjudication did not follow through the reference, that was the end of the matter. The right to adjudication of the dispute notified in the notice was lost forever. Therefore, Galliford having allowed the adjudication before Mr Klein to lapse could not commence a new adjudication in respect of the same subject matter. LJ Jackson was initially attracted to this, noting that permitting a claimant to allow an adjudication to lapse because it disapproves of the appointed adjudicator and then to start a fresh adjudication before a different adjudicator was not appealing. However ultimately the CA agreed with Galliford. There are occasions when an adjudication is not pursued further after the preliminary steps have been taken. There was no authority to suggest that this meant that the claimant would lose its right to adjudicate that dispute for ever. Second, the Blue Form sub-contract, the ICE Adjudication Procedure and the Scheme recognise a right to restart an adjudication in a number of circumstances. It was therefore not right that a claimant's entitlement to adjudicate the dispute would be irretrievably lost. LJ Jackson said that:

"Forum shopping is never attractive. My first view of this case was that Galliford could not be permitted simply to drop the first adjudication and then adjudicate before a different adjudicator whom it preferred. Mr. Marrin's submissions have persuaded me, however, that Galliford's conduct was permissible under the contract and the second adjudicator did indeed have jurisdiction."

Was the adjudicator's decision tainted by apparent bias? LJ Jackson confirmed that the test was that of the fair minded observer, but also commented that the fair minded observer must be assumed to know all relevant publicly available facts and to be neither complacent nor unduly sensitive or suspicious. He or she must be assumed to be fairly perspicacious or in other words be able to distinguish between what is relevant and what is irrelevant, and when exercising his judgment he or she must be able to decide what weight should be given to the facts that are relevant. LJ Jackson then looked at the Preliminary View document and noted that the adjudicator used phrases such as "I find" and "I hold". But the Preliminary View began with the following passage:

"The statement "I find", "I find and hold" and "Decision" and other similar statements are not and not intended to be decisions of the adjudicator but preliminary views and findings of fact preparatory to the decision. The preliminary views and findings are a step in making the decision and I am not bound by them...."

LJ Jackson thought that there was nothing objectionable in a judge setting out his provisional view at an early stage, so that the parties have an opportunity to correct any errors or to concentrate on matters which appear to be influencing the judge. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional view which is disclosed for the assistance of the parties. Here, in LJ Jackson's view, the fair minded observer would have no difficulty in deciding that the Preliminary View was a provisional view, disclosed for the assistance of the parties, not a final determination reached before Mr Atkinson had considered all the submissions.

The Judge said that he was reinforced in this by the fact that this was an adjudication, not an arbitration award or a judicial decision.

"Adjudication is a rough and ready process carried out at great speed. Vast masses of submissions and evidence have to be assimilated by the adjudicator in a short space of time. The adjudicator will fashion his procedure in whatever way enables him to discharge his onerous duties most swiftly, effectively and fairly...An adjudication decision is not final. It is only binding until such time as the parties have concluded their litigation or their arbitration or their settlement negotiations or some other form of ADR.

Because adjudication has all these features, courts are reluctant to strike down adjudication decisions for breach of natural justice or on similar grounds, unless the complainant's case is clearly made out.."

A comment parties would do well to bear in mind when considering challenging an adjudicator's decision.

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Expert evidence: was the draft report privileged?

ACD (Landscape Architects) Ltd v Overall & Anr
[2011] EWHC 3362 (TCC)

In the course of a witness statement prepared for a strike out application, the Defendants said this:

"23…the Defendants are in a position to call expert evidence from a landscape architect supporting their case.... I am in possession of a draft report from a chartered architect …which is a privileged document and in which I am not authorised to waive privilege. ..

24. I can, however, confirm, … that ... if accepted by the Court, the effect of this material if adduced at trial in a Part 35 compliant report will be to underpin the following salient points…"

The statement then contained, according to Mr. Justice Akenhead, a number of points which can only have been taken from that expert report. The claimant applied for disclosure of the draft report on the basis that any privilege had been waived. Part 31.14(1) of the Civil Procedural Rules states that a *"party may inspect a document mentioned in … (b) a witness statement".* The Judge then went on to consider the previous legal decisions on this issue and drew the following propositions:

"(a) Unless there is a good reason otherwise, documents referred to in a witness statement submitted to be used in interlocutory or final court hearings must be disclosed by the party submitting the statement.
(b) One good reason is that the documents are privileged.
(c) Privilege will be waived where the otherwise privileged document is actually or effectively referred to in a witness statement and or part of its contents are deployed for use actually or potentially in the interlocutory proceedings or in the final trial, as the case may be.
(d) A party which deploys part of the privileged document in a witness statement will, at least as a matter of general principle, be required to disclose the whole of the document because it is not just to allow a party by way of cherry picking to rely only on that part.
(e) The test of whether a document or part of it is being deployed is whether the contents of the document are being relied upon rather than the effect or impact of the document.
(f) Once having referred to the document or part of it in a witness statement, generally at least the Court will presume that it is relevant, because the very fact that it is referred to in the statement demonstrates its relevance."

The Judge concluded that privilege had been waived and the draft report should be disclosed. His reasons included that:

(i) The expert had been recently retained to bolster the defence to the strike out application;
(ii) Significant parts, at least, of that draft report were used in the witness statement, such that it was in part at least a précis of the report or substantial parts of it;
(iii) The Defendant was therefore clearly relying on the draft report to demonstrate the strength of the support to the Defendants' case on the application.

This deployment of the material contained in the draft report meant that the fact that the Defendant had sought expressly to maintain privilege was immaterial.

Bonds and guarantees - electronic signatures

WS Tankship II BV v The Kwangju Bank Ltd & Anr
[2011] EWHC 3103 (Comm)

In Issue 131, we discussed the *Golden Ocean Group* case where the court noted the emails which constituted the contract were signed by the electronically printed signature of the persons who sent them and that this was sufficient to constitute a signature for the purpose of the Statute of Frauds. This decision has now been followed in the case here. Section 4 of the Statute provides:

"No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged...."

Kwangju Bank's guarantee was issued by being sent by the international department in Seoul by SWIFT message to the buyers' bank, which was ABN AMRO Bank, Amsterdam. SWIFT is the provider of secure financial messaging services to banks and other institutions internationally. This method was entirely conventional, and enabled ABN to be sure that the guarantee in fact came from the bank that purported to issue it. It was also accepted by Kwangju Bank that the word "signed" in the Statute of Frauds does not necessarily involve signature by an individual using an ink pen and that it suffices that the guarantor's name is written or printed in the document. In the body of the guarantee the words "Kwangju Bank" did not appear. The bank was referred to as "we". The defence was to the effect that it was thereby unsigned. As Mr Justice Blair noted, as a matter of common sense, authentication by sending was equivalent (in modern terms) to authentication by signing, and so within the spirit, if not the letter of the Statute of Frauds.

However, further, the words "Kwangju Bank Ltd" were contained in the header to the SWIFT message. Kwangju Bank argued that this was not text which it typed in, but an output message header, that is, text generated by the SWIFT messaging system. However for the Judge, the fact that the name appeared was a sufficient signature for the purposes of the Statute of Frauds. The words "Kwangju Bank Ltd" appeared in the header, because the bank caused them to be there by sending the message. Whether or not automatically generated by the system, and whether or not stated in whole, or abbreviated this was a sufficient signature.

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.

Dispatch is a newsletter and does not provide legal advice.

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