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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: limitation periods

Aspect Contracts (Asbestos) Ltd v Higgins Construction plc

[2013] EWCA Civ 1541

As Mr Justice Akenhead pointed out, when the case came before him, this case raises an important issue as to when a dissatisfied party to an adjudicator's decision must issue proceedings if they want to overturn that decision. The issue was of such importance that it ended up before the CA which had to decide whether a claim by the losing party to the adjudication for repayment of sums paid over to the successful party was subject to a time bar accruing at the time of the (supposed) original breach of contract, or only from the date of the (supposedly) unnecessary payment made as a result of the adjudication. Mr Justice Akenhead held that the cause of action accrued "*whenever it otherwise did before the decision was issued*". Lord Justice Longmore set out a brief chronology of events:

(i) March 2004: Aspect carried out an asbestos survey;

(ii) 27 April 2004: Aspect sent their survey report to Higgins;

(iii) 24 June 2004: Higgins paid Aspect's invoice;

(iv) February 2005: alleged discovery of additional asbestos containing material (or "ACMs");

(v) July 2005: additional ACMs removed by Falcon;

(vi) 26 June 2009: Higgins refers dispute with Aspect to adjudication;

(vii) 28 July 2009: adjudicator issues decision in favour of Higgins;

(vii) 6 August 2009: Aspect pay the sum of £658,017 as set out in the adjudicator's Decision;

(viii) 3 February 2012: Aspect issue Claim Form;

(ix) 4 May 2012: Higgins' Defence and Counterclaim served.

When Aspect began proceedings, it was much more than 6 years after their supposed breach of contract or duty, which occurred back in 2004, but less than 6 years after making the payment. Aspect sought to imply the following term into the contract:

"… that in the event that any dispute between the parties was referred to adjudication pursuant to the Scheme and one party paid money to the other in compliance with the adjudicator's decision made pursuant to the Scheme, that party remained entitled to have the dispute finally determined by legal proceedings and if or to the extent that the dispute was finally determined in its favour, to have that money repaid to it."

Lord Justice Longmore noted that here the contract incorporated the Scheme and expressly provided that the adjudication is only to be binding until the dispute is finally determined. Thus, the final determination may be different from the adjudication and so it will be the final determination that is to be determinative of the rights of the parties. If the final determination decides that a particular party has paid too much, repayment of any "adjudication monies" must be made.

The appellate judge concluded, and in doing so disagreed with Mr Justice Akenhead, that if the contract is construed in accordance with what it appears to say, namely that any overpayment can be recovered, then the correct answer to the question posed would be that the accrual of that cause of action is the date of overpayment since the losing party is (on this hypothesis) "entitled" to have the overpayment returned to him. Therefore the claim had been brought in time.

Costs: attitude of courts to breaches of rules

Mitchell v News Group Newspapers Ltd

[2013] EWCA Civ 1537

The fallout from Andrew Mitchell's altercation with the police whilst trying to ride his bike out of Downing Street, is of course, not just limited to politics. The libel action he has brought against the *Sun* newspaper has called into clear focus the attitudes the courts will take to the late filing of costs budgets. Here Master McCloud had held that because the costs budget had not been filed in time, Mr Mitchell was to be treated as having filed a costs budget comprising only the applicable court fees. The costs budget actually filed (late) by his solicitors was in the sum of £506,425. In the CA, the judgment was given by the Master of the Rolls, Lord Dyson, who noted that the question at the heart of the appeal is: how strictly should the courts now enforce compliance with rules, practice directions and court orders? The traditional approach of our civil courts on the whole had been to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs).

However, in April 2013 there was a change in the court rules, with the new CPR 3.9(1) providing that:

"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

The CA noted that, in applying this new rule, it will usually be appropriate to start by considering the nature of the non-compliance. If it can be considered to be trivial, the court will usually grant relief provided that an application is made promptly. Examples given were where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. Further, applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.

However, where the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. If (and it appears to be a fairly big "if") there is a good reason then the court will be likely to decide that relief should be granted. But the mere overlooking of a deadline, whether on account of overwork or otherwise, is unlikely to be seen as a good reason. Here there was no good reason put forward and the CA adopted what they termed a robust approach and upheld the Master's Order. The Master of the Rolls said:

"The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously."

Case update: unreasonable refusal to mediate

PGF II SA v OMFS Co & Anr

[2013] EWCA Civ 1537

We first reported on this case in Issue 140. On 10 January 2012, the day before the trial was due to start, PGF accepted a Part 36 offer that had been made on 11 April 2011. This left the question of costs. PGF at the time OMFS made their Part 36 offer, proposed mediation. No response was received. PGF tried again in July 2011. Again no response was received. PGF relied on the well-known *Halsey* principle which says that, as an exception to the general rule that costs should follow the event, a successful party may be deprived of its costs if it unreasonably refuses to mediate. In other words, PGF argued that OMFS should not have the benefit of the usual costs protection provided by successful Part 36 offers. At first instance the TCC agreed. It was appropriate to depart from the usual principles and OMFS were not entitled to their costs for the period from 21 days following the date the offer was made.

In the CA PGF argued that the silence of OMFS was tantamount to a refusal to mediate and that the silence was itself unreasonable. Lord Justice Briggs stated that:

"silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable ..."

There was a practical reason for this. The fact of the refusal meant that an investigation of alleged reasons for the (alleged reasonableness of the) refusal advanced for the first time, possibly months or even years later, at a costs hearing, when none had been given at the time of the original invitation, raised forensic difficulties for the court in establishing what had actually happened. Of course, those difficulties fall on the party asserting its refusal to mediate was justified. If, and there can certainly be reasons why ADR is premature, a party refuses an invitation to mediate, then it is sensible to explain why at the time.

Equally, there is nothing especially unsurprising in the CA's decision, but it serves as a useful reminder of the support that the courts in general provide to all forms of ADR. Whilst the court cannot compel a party to mediate; it can penalise in costs a party who unreasonably refuses to see whether there is an alternative way to resolve the dispute in question. Lord Justice Briggs had begun his judgment by noting that:

"In the nine and a half years which have elapsed since the decision in the Halsey case, much has occurred to underline and confirm the wisdom of that conclusion, reached at a time when mediation in particular had a track record only half as long as it has now.""

There are policy reasons for this, which the CA linked to the April changes to the court rules. Lord Justice Briggs referred to the constraints that now affect the provision of state resources for the conduct of civil litigation, which he said call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it. With proportionality in mind, Lord Justice Briggs also noted:

"A positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which may save the parties and the court time and resources. The invitation may simply be accepted, and lead to an early settlement at a fraction of the cost of the preparation and conduct of a trial. ADR may succeed only in part, but lead to a substantial narrowing of the issues. Alternatively, after discussion, the parties may choose a different form of ADR or a different time for it, with similar consequences. "

Finally, Lord Justice Briggs said that:

"this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres."

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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