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

Dispatch

Agreeing contracts: another reminder

Williams Tarr Construction Ltd v Anthony Roylance Ltd & Anthony Roylance

[2018] EWHC 2339 (TCC)

This was another dispute about who had entered into a contract with whom. WTC was the main contractor on a housing development project, where because of a slope a retaining wall was required. WTC engaged Construction Site Services (UK) Ltd ("CSS") as its sub-contractor. Mr Roylance provided civil engineering services in respect of the Site (doing this either in his personal capacity or through the First Defendant). It was common ground that Mr Roylance worked closely with CSS and that at first WTC did not engage either Defendant. During the construction of the retaining wall, a band of running sand was encountered. This meant that the water flows behind the retaining wall were greater than anticipated. The responses to these problems included WTC's engagement of one of the Defendants in November 2010.

WTC said that the First or Second Defendant was engaged to design and provide a solution to the retaining wall problem ensuring that the wall would be fit for purpose. The Defendants said that the engagement did not require either of them to bring forward a solution to the problems with the retaining wall let alone warranting that the wall would be fit for purpose. Instead they were asked to design a drain which would address the problem with water inflow which was affecting access to the rear of the wall.

It was common ground that the retaining wall as constructed was defective. WTC successfully adjudicated against CSS contending that the deficiencies were the result of failures on the part of CSS in the course of the construction and installation of the retaining wall. The Defendants agreed. However, CSS went insolvent. This led the Defendants to say that the current claim was only brought to find a solvent party from whom to seek compensation. The allegations made against them were inconsistent with the case brought in the adjudication. The crucial issue was the scope of the November 2010 engagement. The Judge said this of the key witnesses:

"I am satisfied that each man believed that what he was saying in his evidence was correct. However, in assessing their evidence and their presentation in the witness box I have to be very conscious of the fact that both men were inevitably recollecting matters from a particular viewpoint and also to be conscious of the common human inclination to recollect past events as having actually happened in the way in which the person recalling them believes they would, or indeed should, have happened."

HHJ Eyre QC said that he would look at the evidence:

"through the prism of the contemporaneous documents; of those actions which are accepted or clearly demonstrated to have happened; and of inherent likelihood. To the extent that the contemporaneous documents show a picture different from that depicted by either witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened."

WTC believed that Mr Roylance was responsible for the design of the retaining wall as he was the only civil engineer involved in the project. However after a review of the various drawings and other documentation that had been produced, the Judge considered that the design had been carried out by a different party, and that the scope of the Defendants' appointment was limited to the drain. For example, the retaining wall operated as a system consisting of the gabion baskets and the backfill behind them. The gabions and the backfill behind them were both important parts of that system and were designed by another party. For the system to work as a retaining wall it was necessary not only for there to be properly constructed and designed gabions but also appropriate backfill, and the wall composed of the gabions had to be built at the correct angle. The retaining wall was a system and the various elements of that system had to be designed to work together.

Whilst the Judge considered that the most likely analysis of the arrangements as between CSS and its contractors was that there was no one person with overall responsibility for the design, to the extent that there could be said to have been a principal designer, that would appear to have been the other party. The Second Defendant produced drawings which were used and intended to be used for construction purposes but that was in a context where he was developing the original drawing and adding material to it so that it could be used for construction. Therefore, the Second Defendant was not the designer of the retaining wall and neither Defendant accepted overall responsibility for the wall's design.

It was common ground that in November 2010, WTC engaged either the First or Second Defendant to undertake civil engineering design works. The Defendants asserted that all dealings had been through the First Defendant and that the Second Defendant had not acted at any point in his personal capacity. However this was not what the documents said. The Judge concluded that:

"I accept the Second Defendant's evidence that the sums received for his civil engineering work were paid into the bank account of the First Defendant and processed through that company. Indeed I accept that the Second Defendant personally regarded himself as operating through the First Defendant. However, that was not explained to the Claimant or to the other persons with whom the Second Defendant dealt. The company was not referred to on the letterheads which were used nor was it otherwise mentioned in correspondence…At no time before the engagement was there any express indication to the Claimant that the Second Defendant operated his professional activities through the First Defendant. The exchange of e-mails which constituted the engagement not only made no reference to the First Defendant but rather appeared to be from the Second Defendant in his personal capacity. In those circumstances the engagement was a personal one of the Second Defendant and he and not the First Defendant was the party to the agreement with the Claimant."

WTC accepted that the engagement was "a bit of a rushed job". This was because the problems with the retaining wall were holding up work on the Site generally and so WTC was "desperate" for a solution to those problems. The result was the need for a court case to establish who had contracted with whom and on what terms.

Adjudication enforcement and Part 8

Maelor Foods Ltd v Rawlings Consulting (UK) Ltd

[2018] EWHC 1878 (QB)

Rawlings made an application for the stay to arbitration of a Part 8 claim. Maelor had engaged Rawlings to carry out works at a meat processing premises in Wrexham on the basis of the 2011 JCT standard building contract with approximate quantities. Disputes arose and an adjudicator issued a decision in favour of Rawlings for some £720k. Maelor then issued the Part 8 proceedings noting amongst other things that:

- The objections to the adjudicator's jurisdiction would be relied upon in defence of any enforcement proceedings.
- Maelor sought the court's determination of issues of law which arose in the adjudication.
- In the adjudication, as well as disputing the adjudicator's jurisdiction Maelor submitted that the interim payment notice (IPN) was invalid so that no pay less notice was required to be served and no sum was payable to Rawlings.
- The adjudicator rightly accepted that in order to succeed in a reference the IPN had to be contractually valid, but wrongly decided that the IPN was valid.

Article 8 of the Contract provided that any dispute or difference between the parties of any kind whatsoever arising out of or in connection with this contract should be referred to arbitration in accordance with CIMAR. However, Article 8 also provides for two exceptions to that arbitration provision. The second exception was:

"Any disputes or differences in connection with the enforcement of any decision of an adjudicator."

The question for the court was whether the dispute between the parties contained in the Part 8 claim form was governed by the arbitration agreement or the exception. If the dispute was within that exception, then there could be no stay because the dispute would not be covered by the arbitration agreement.

Maelor said that if one focused on the dispute at hand, the reality of the situation here was that the Part 8 claim was a response to the adjudication award and a way of forestalling enforcement. Thus it was a defence to enforcement. Mr Justice Eyre QC disagreed. The dispute did not fall within the exception and was not a dispute in connection with the enforcement of a decision of an adjudicator. The wording of the exception specifically referred to "the enforcement of" an adjudicator's decision.

The Judge said that:

"The use of those words and the need to give effect to them is... significant in the context where the underlying approach to adjudication awards is one of 'pay now, argue later', but where there are categories of challenge to an award which can operate as a defence to enforcement. One can see ample sense in the parties excluding from arbitration an application actually to enforce an adjudication award and a line of defence which relates closely and directly to enforceability of such an award."

The wording of the Part 8 claim also included not only that: "The objections to the adjudicator's jurisdiction will be relied upon in defence of any enforcement proceedings", but also that "the employer seeks the court's determination of issues of law which arose in the adjudication". Maelor were seeking declarations said to be a matter of law as to the invalidity of the IPN, the incorrectness in law of the adjudicator's decision and of whether sums were due pursuant to the IPN. Maelor referred to the Part 8 claim as being a "pre-emptive strike to defeat enforcement of the [adjudicator's] decision". This led the Judge to "pause for thought", but in the end the Judge said that this could not prevail against the wording of the arbitration clause here and the emphasis in that clause on disputes in connection with the enforcement of a decision:

"The fact that a challenge by way of Part 8 claim, or indeed otherwise, to the correctness of an adjudicator's decision might be a pre-emptive strike if made and determined in time, and might at the end of the day render nugatory the relief awarded by way of enforcement of an adjudicator's decision, does not mean that it is a dispute or difference in connection with enforcement."

Expert evidence: conditional fees

Gardiner & Theobald LLP v Jackson Ltd

[2018] UKUT 253 (LC)

The issues here were summarised by the Judge in this way:

"Does the obligation to declare a success-related fee arrangement apply to remuneration not only for services as an expert witness, but also for services provided by that expert (or the practice for which he or she works) other than as an expert witness, whether before or during the currency of those proceedings? To what extent may success-related fees be compatible with an expert's obligation to the Tribunal to act independently?"

The obvious and unsurprising answer to that question was: not at all, never. The issue arose because the firm the expert worked for had an arrangement which included success-based fees for pre-Tribunal work. The expert said that the fee for attendance at the Tribunal fell outside of any success-based fee, being the subject of individual instructions. However, this apparent split did not exclude the possibility that whilst on the one hand, the Tribunal fee was "additional", on the other hand, the overall fee earned would depend on the "success" at the hearing. The Tribunal noted that:

"In practice, an individual expert may not consider questioning the content of the standard conditions which are regularly used by the firm for which he or she works. But that cannot override or detract from the obligations which each individual expert personally owes... All these considerations only serve to emphasise the importance of a practice ensuring that its standard terms of engagement are drafted with care and clarity so that they do indeed comply with those obligations. Furthermore, individual experts must ensure that any specific terms agreed for individual cases, whether varying or supplementing the standard conditions of a practice, also meet the same requirements."

Whilst this case is no doubt an exception, by way of a reminder, item 2 of the formal declaration that should appear at the end of any expert report states:

"I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case."

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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