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The construction & energy law specialists

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

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Dispatch

Witness evidence

Instrument Product Development Ltd v W D Engineering Solutions Ltd

[2022] EWHC 1994 (Ch)

A key to the outcome of this case was a telephone conversation, held in March 2017. However, the two witnesses had critically different recollections of that call, to which they were the only parties. Deputy Judge Farnhill reviewed the case law and summarised the principles that were relevant here:

(i) In interpreting an oral contract, the parties' subjective understanding about what they were agreeing is relevant and admissible evidence;
(ii) What is critical is their understanding at, or immediately after, the point at which contract is entered into;
(iii) Later statements and actions are much less reliable indicators of what the parties understood to have been agreed. Just as memory is affected by the process of preparing for trial, it is affected by seeing how a transaction works out in practice;
(iv) Subsequent conduct and statements may be relevant to variations and estoppel. Here, the analysis is principally, but not exclusively, an objective one. The focus is on what the parties said and did, more than on what the parties thought;
(v) To the extent that it exists, documentary evidence of what was said in meetings and conversations will almost inevitably be a more reliable guide than the witnesses' unaided recollections.

There was no dispute that the Agreement was formed by way of a telephone call between the two witnesses on 6 March 2017. The parties further agreed that it gave rise to a 50/50 profit share. The disagreement concerned whether that profit share arrangement related to the pilot Nespresso store in Cannes, then specifically in contemplation or whether it was to cover all future supplies to Nespresso of the props designed by IPD.

The key evidence was not the witnesses' different recollections of the call, but an email sent the next day. The Judge held that the Agreement, at least at the point of formation, was wholly oral and the purpose of the email was simply to document what had already been agreed. It was not to supplement or amend that Agreement. The 7 March 2017 email was focussed almost exclusively on the potential Cannes order. Subsequently, the Agreement evolved, and other projects were added. They were not covered by the 6 March 2017 telephone call but were added to the Agreement by virtue of variations agreed by the witnesses.

And when it came to the variations, the Judge noted that evidence of subsequent conduct may also be relevant. However, that process differed from the exercise of interpreting an oral agreement in that it was primarily objective rather than subjective. The focus was on what a reasonable onlooker would have understood from the parties' words and actions, rather than what the parties themselves thought they meant. Later in the Judgment, the Judge discussed events at a meeting between the Parties. He considered that this was an instance of the witnesses' recollection having been influenced by subsequent events.

Here, the Judge said that the parties went to the meeting expecting to make progress towards an order for the wider rollout but not expecting an order to be agreed. The latter outcome was considered "improbable it was not impossible." Further than that, it was their ultimate objective. When the improbable happened, at the meeting, the parties attached more weight to that meeting subsequently than they had done in the run-up to it.

The Judge noted that the parties had transacted informally throughout, and he took into account whatever documents there were, including emails and WhatsApp messages. Another point at issue was whether there was an agreement to reinvest sums due or to set them off against a different project. Again, both parties were relying on undocumented discussions. Both could be wrong, but both could not be right because, if the reinvestment was agreed along the lines suggested, there would be no basis for the set-off.

The Judge, again, preferred the evidence of the witness whose recollection of the original meeting was supported by the follow-up email. Although the witness could not recall the precise timing of the meeting, that was not thought to be especially surprising considering it was five years ago. The witness gave a clear description of the meeting itself and their reaction to it. In conclusion, the Judge said that the starting point was obviously the conversation on 6 March 2017, the day on which the Agreement was reached. The email sent the next day was intended to record the Agreement and was by far the best evidence of its terms.

He also noted that, as a final point, the relationship between the Parties deteriorated, positions inevitably polarised and both parties increasingly prepared for a dispute in some form. The Judge derived no assistance from the exchanges at this time, as all of the difficulties inherent in the process of recollection would have been aggravated by the litigation process.

Fraud

Oil States Industries (UK) Ltd v "S" Ltd & Others

[2022] ScotCS CSOH_52

A material part of the claim here was founded on an allegation that the award of the building contract to the second defender was procured by bribery; specifically, by the giving of bribes in the form of cash, and the provision of free building services, to a project manager ("PM") employed by the first defender, who ran the procurement process and whose decision it was

to appoint the second defender. The first defender's position was that it knew nothing of any bribes given to the PM, now a former employee.

There was no direct first-hand evidence of any cash bribes having been paid (although there was direct evidence of the building works having been carried out and paid for by the second defender). OSI said that the allegations of bribery were proven by a combination of (a) circumstantial evidence surrounding the appointment of the second defender as building contractor, (b) the building works to the sister's house, and (c) hearsay evidence that bribes were paid (some, although not all, of which was from an anonymous source).

Lord Braid noted that there was no distinction between English and Scots law in the treatment of bribery: *"In both, it is the temptation to act against the interests of one's principal which is the mischief struck at. In both, a bribe is but one species of secret profit received without the consent of a person to whom the recipient owes a fiduciary duty."*

This means that there is no requirement to prove the mens rea of fraud. In other words, there was an "irrebuttable presumption" that the recipient of the bribe was influenced by it. Lord Braid said:

"I find that bribery is a free-standing cause of action, distinct from any cause of action arising out of fraud, and that once payment of the bribe is established, it is to be irrebuttably presumed that the recipient was influenced by its payment."

Here, there was strong evidence of fraud and circumstantial evidence giving rise to a legitimate (and unanswered) inference that the PM was influenced by bribery to award the contract to the second defender. For example, police recovered deleted emails from a laptop, including emails which alluded to the receipt and giving of "sweeties".

The parties agreed that the requisite standard of proof is balance of probabilities: It was said that the payment of bribes by businesspeople was inherently improbable. The Judge held that the "sweeties" emails removed, at a stroke, any inherent improbability which might otherwise have existed.

The Judge also accepted that hearsay evidence must be treated with caution. But that did not mean that no weight whatsoever was to be attached to it, especially where some parts of the hearsay statements were corroborated by other evidence, including contemporaneous documentation.

The Judge concluded that the facts which led to an inference that the PM had received benefits which influenced the award of the contract to the second defender included:

(i) The "sweeties" emails, which (in effect) mentioned bribes at the very outset;
(ii) The procurement process and inference from emails that the PM was assisting the second defender with its bid including the *highly irregular*" sharing of price sensitive information during the procurement process;
(iii) Other communications, which were *"redolent of shady goings-on"*;
(iv) That the second defender was awarded the contract;
(v) The anonymous letter and hearsay evidence;
(vi) Works undertaken on the sister's house, which provided clear evidence that a bribe had been paid in the shape of work, which was paid for by the second defender, then re-invoiced so that it was charged to OSI.

Did those benefits paid amount to bribes? The Judge felt that they fell within the classic definition of bribery. The PM owed a duty of trust and confidence to the pursuer, being a fiduciary duty in the widest sense and was in a position to affect the course of business between the pursuer and the second defender. More than that, the PM was the "very person entrusted with ensuring a level playing field in the tender process." OSI were, therefore, entitled to "his disinterested loyalty."

Even if the payments and benefits provided constituted a reasonable fee for efforts in assisting the second defender to win the tender, they ought to have been disclosed to the pursuer but were not. The cash payments, and benefits in kind, to him amounted, in law, to secret profits or bribes.

Was the first defender liable for their PM's actions in receiving bribes which induced him to award the contract to the second defender? Were they vicariously liable for the PM's actions in accepting bribes?

The Judge accepted that where a corporate entity is employed to provide services, it is possible that the bribe will be taken by an employee without the knowledge and approval of its directors. However, a company will nonetheless be vicariously liable for intentional wrongdoing by one of its employees if their wrongs were so closely connected with their employment that it would be fair and just to hold the employers vicariously liable.

In *Petrotrade Inc v Smith* [2000] Lloyds Rep 486, employees of the defendant, who had authority to enter into port agency contracts on the defendant's behalf, bribed an employee of the claimant to secure a port agency contract for the defendant. The court held that the relevant contracts could be categorised as: "*the conclusion by illegitimate means of a transaction that they were authorised to conclude by legitimate means.*" Therefore, the defendant was vicariously liable.

Here, the question was whether the employer of the recipient of the bribe, rather than the person who made it, should be held vicariously liable. Lord Braid thought that it was difficult to see why there should be a different outcome. The PM was authorised by the first defender to administer the procurement process on behalf of the pursuer, the very service which the first defender was contractually obliged to provide. Not only the PM, but the first defender itself, owed a fiduciary duty to the pursuer. In awarding the contract to the second defender, the PM was carrying out work he was authorised to do, but in an unauthorised way.

This meant that the wrongful act was so closely connected with his employment that it was fair and just to hold the first defender vicariously liable for payment of the bribes and the (still be to be established) loss caused.

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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