Fenwick Elliott
Solicitors

Dispatch

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Dispatch highlights a selection of the important legal developments during the last month.

Adjudication

Lovell Projects Ltd v Legg and Carver

Legg and Carver entered into a contract with Lovell for the refurbishment of a house. Following section 106 of the HGCRA, the Act would not have applied. However, the contract entered into by the parties incorporated the terms of the JCT Agreement for Minor Building Works which does include provisions for adjudication.

Disputes arose and following an adjudication, Legg and Carver were ordered to pay Lovell over £80k. Legg and Carver suggested that the dispute resolution clause was unfair in that it contained an imbalance in the terms between the parties and that, accordingly they were not bound by the adjudication provisions by reason of the Unfair Terms in Consumer Contracts Regulations 1999.

However, HHJ Moseley QC held that the clause was equally balanced. Either party could refer a dispute (and there were obvious potential costs benefits in doing this.) In addition, the form of contract here had been insisted upon by Legg and Carver who had taken advice from both a firm of solicitors and a contract administrator.

HHJ Moseley QC also refused a stay on the grounds of the poor financial condition of Lovell, noting that the reason for this was the non-payment by Legg and Carver.

Brack and Anr v Billinghurst

The parties entered into a contract incorporating the JCT Agreement for Minor Works. A dispute arose as to the costs of additional temporary structural propping works. Following two successful adjudications, the Claimants sought summary judgment.

However, prior to the matter reaching court, there had been settlement discussions. The Defendant's solicitors made an offer, enclosing a cheque in full and final settlement. The letter accompanying the cheque said that the payment was tendered, by a third party, as a compromise settlement which "*will be deemed to have been accepted by you and therefore be contractually binding if it is presented to your bank and cleared for payment.*"

Two days after the cheque was presented for payment, the Claimants withdrew all previous offers for settlement and advised they were seeking payment in full of the amount awarded by the Adjudicator. The Judge agreed the Defendant had a complete defence. An offer had been made, albeit here by a third party, on clear terms and the cashing of the cheque constituted the clear acceptance of the offer of compromise.

Mediation/Costs

Royal Bank of Canada v The Secretary of State for Defence

This is another case which shows the costs difficulties caused by a refusal to consider mediation. Here, the Defendant won on the majority of issues. Thus, the starting point was that it would be right for the Defendant to recover some (if not necessarily all) of his costs.

However, Mr Justice Lewison took into account the conduct of the parties before as well as during the proceedings. The Claimant had on a number of occasions expressed a willingness to mediate. This request was refused by the Defendant. The Judge decided that this refusal was surprising because the Lord Chancellor's department had issued a press notice in which it made a formal pledge committing government departments and agencies to attempt to settle legal cases by ADR techniques wherever the other side agreed to this.

The Judge held that this dispute, where the main issue was one of interpretation of a lease, was suitable for ADR. He also thought it important that the government had not abided by its pledge here. Therefore, this failure to attempt to resolve the dispute by mediation, led to the Judge deciding that the Defendant should not recover any further costs from the Claimant, notwithstanding its success in the litigation.

Other Cases of Interest

Hurst Stores and Interiors Ltd v ML Europe Property Ltd

This was one of those rare cases where the matter proceeded to court following an adjudication. Hurst had contracted as a package contractor for fit out works at the new Headquarters for ML Europe in London. The final account prepared by Hurst was returned because the construction manager believed that an agreement had already been made as to the value of Hurst's works.

The reason for this arose out of the system used for interim statements of accounts. Each month, a schedule would be issued detailing all instructions issued to Hurst. Hurst was required to value this schedule and return it within 7 days. Over 500 instructions were issued. The Hurst project manager returned the form each month completed and signed. He believed that by his signature he was indicating agreement to the net value of the instructions received by Hurst but no more than that. Six months before the works were finished, the schedule procedure was changed. The word "final" was substituted for "interim" and the wording changed to say that the calculated amount payable was accepted by Hurst in full and final settlement of all claims arising out of or in connection with the trade contract works. Hurst's project manager paid little attention to this.

The Adjudicator had held that the account was binding and that no further claims could be made for events which occurred up to the date of the account. This effectively barred Hurst's final account in the sum of some £2.5m.

Hurst said that the documents should not be binding for two reasons. First, the project manager did not have authority to enter into such an agreement and second, the document was entered into on the basis of a unilateral mistake on the part of the project manager and the documents should be rectified so as to remove reference to full and final settlement of claims.

Mr Recorder Reese QC concluded that the project manager had powers only to deal on Hurst's behalf with matters concerning progress and payment required by the contract terms. He thus did not have authority to vary the contract. For a document of this type to have contractual effect it would have to first be authorized by the contracting parties. This had not been done. In addition, the reference to the full and final settlement was to be deleted on the basis that there was a unilateral mistake. The evidence showed that the construction manager was aware that Hurst did not understand the true intention of the document. ML could not be allowed to place reliance on the documents and therefore, the documents did not have any binding effect in respect of the claims for delay and disruption that Hurst intended to make.

Health & Safety

Fytche v Wincanton Logistics Plc

The CA had to consider regulation 7(1) of the Personal Protective Equipment at Work Regulations 1992. This provides that "*every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair*".

Here, Fytche was employed as a heavy goods vehicle driver. Wincanton provided him with steel capped safety boots designed to protect his feet against the falling of heavy articles or injury due to coming into contact with hard or sharp objects. In very cold weather, whilst walking on ice and snow, and whilst attempting to rescue his lorry, Fytche got frostbite in the little toe of his right foot caused by water entering his boot through a hole where the toecap met the sole. Fytche claimed that this was down to Wincanton who had failed to ensure that the boots were of a satisfactory quality and had been maintained in a state of good repair.

The question for the Court was whether the regulation provided for an absolute obligation solely in relation to the risk in question for which the protective equipment was supplied or whether it applied to any risk that may arise if the equipment was not in a sufficient state of good repair. The CA held that the obligation to supply and maintain protective equipment related solely to the identified risks. The steel toecap was not defective and was not there to protect against frost bite and so the claim failed.

Dispatch is produced monthly by Fenwick Elliott, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.
Dispatch is a newsletter and does not provide legal advice.

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