Fenwick Elliott
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Dispatch

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

Adjudication

Thomas-Fredric's (Construction) Ltd v Wilson

This is a decision of the Court of Appeal. Wilson maintained both during the adjudication and before HHJ MacKay (at a hearing to enforce that decision at first instance) that the contract which was the subject of the adjudication had been made not with him personally but with a company, Gowersand Ltd. Thus the adjudicator did not have jurisdiction.

Wilson was the principal shareholder and company secretary of Gowersand. An agreement to carry out construction work was made orally with TFC which was later evidenced in writing by a letter. This letter referred to Wilson in the heading but was signed by Wilson, on behalf of Gowersand.

The adjudicator's jurisdiction only arose as a result of s107(2)(c) of the HGCRA which provides that a contract is only in writing if it is evidenced in writing. Here the only evidence in writing was this letter. The CA said that that letter did not provide clear evidence that Wilson and not Gowersand was the contracting party.

However, the CA also considered the question of whether Wilson had agreed to accept the adjudicator's ruling as to the identity of the contracting parties and thus to accept jurisdiction. The Trial Judge had suggested that as the adjudicator was asked to make a decision on this point and as he actually did do this, his decision had to be followed by the court.

The CA disagreed. Following the decision of HHJ Gilliland QC in *Nordot v Siemens*, which required a clear and unequivocal statement or agreement to be bound by an adjudicator's decision on jurisdiction, LJ Brown said that there was no such clear evidence that Wilson was submitting to the jurisdiction of the adjudicator in this full sense. Therefore the decision of HHJ Mackay was overturned on the basis that the adjudicator did not have jurisdiction to hear the referral.

LJ Brown also took the opportunity to comment on a suggestion made in the Building Law Reports that there was a danger, following cases such as the decision of Dyson J in *The Project Consultancy v Trustees of the Gray Trust*, that any arguable challenge to jurisdiction would result in an adjudicator's decision which was not summarily enforceable and that this in turn would have the effect of undermining one of the prime objectives of the HGCRA, namely the prompt resolution of disputes.

LJ Brown said the following:

"Let me now return briefly to the editors' commentary in the Building Law Reports. I readily recognise the concern lest this salutary new statutory power to promote early payment in construction contract cases be emasculated by jurisdictional challenges. The solution, however, seems to me not in finding defendants too readily to have, in the full sense, submitted to the adjudicator's jurisdiction, which if properly advised they plainly would not do. Rather, as Dyson J observed in paragraph 8 of his judgment in the Project Consultancy Group case, it is for courts (and adjudicators) to be "vigilant to examine the arguments critically." It is only if the defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him.

The position can I think be summarised in the following two propositions. (1) If a defendant to a Part 24(2) application has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue. (2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Part 24(2) summary judgment upon the award if the adjudicator's ruling on the jurisdictional issue was plainly right."

Costs

■ London Fire & Emergency Planning Authority v Meritor Light Vehicle Systems (UK) Ltd and Anr

This was one of the final decisions of HHJ Bowsher QC before his retirement from the bench. Having found in favour of the defendants, he then had to consider the question of costs. Both defendants sought their costs on an indemnity basis. This would mean that where there was an element of doubt about the reasonableness of the costs claimed, the court would decide that point in favour of the party being paid. When costs are assessed on a standard basis, that element of doubt goes in favour of the paying party.

The relevant test was whether or not, in all the circumstances of the case, it was just that the claimant should have the onus of having to pay the costs which the defendants said were incurred unreasonably. For an award of indemnity costs to be made, the court must be satisfied that there has been some conduct which takes the case out of the norm. Here the Judge felt that the pleaded case and the supporting evidence was never from the very outset going to stand up and so never had any prospect of success. Therefore indemnity costs were awarded from the time when the case began.

Health & Safety

The Health & Safety Executive ("HSE") has recently published on its website details of two separate studies on the causes of accidents in the construction industry carried out by engineering consultants BOMEL Ltd and Loughborough University. The key findings from the two research reports include:

(i) There were a high number of accidents to workers who were moving around the site, handling materials or accessing or leaving the 'workface';

(ii) Loughborough's research found that a significant number of accidents could have been mitigated by design changes;

(iii) Both studies suggested that accident investigations by contractors were superficial and concentrated on site issues rather than more fundamental issues such as poor planning and effective safety management controls;

(iv) Poor supervision, communication and competence and lack of client involvement were significant contributors to accidents; and

(v) Bomel's research noted that a lack of manual handling training was frequently cited as a significant cause of musculoskeletal disorder (MSD) injuries.

Further details of the studies and further information about Health & Safety matters in general can be found at the informative HSE website at www.hse.gov.uk

■ R v Bristol Magistrates Court ex parte Junttan Oy

This House of Lords' decision considered the question of whether Junttan could be prosecuted under both s6 of the Health and Safety At Work Act and for breach of the 1992 Supply of Machinery (Safety) Regulations 1992 following the death of an operative who was operating a piling rig supplied by Junttan.

The Divisional Court had said that the HSE could not prosecute under the HSWA when there was a specific statutory offence under the Regulations covering the same ground but put in a different way which meant that different issues could arise as to the standard of safety and as to the imposition of a penalty. However although the HL was divided, it ruled that the HSE had been entitled to prosecute Junttan Oy under the HSWA.

Lord Steyn referred to s18 of the Interpretation Act which says that where an act or omission consititutes an offence under two or more Acts, whilst an alleged offender is liable to be prosecuted under either Act he will not be punished more than once for the same offence.

The real reason for the court challenge was in all probability the fact that under the HSWA the maximum penalty was a fine not exceeding £20,000 on a summary conviction or a fine of an unlimited amount if convicted on indictment. Under the regulations, the maximum level of fine was £5,000 and there was no provision for trial on indictment.

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.**

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