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Dispatch

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

Adjudication

Rupert Morgan Building Services Ltd v Jervis & Anr

This is a brief but important case from the CA which concerns the meaning of s111 of the HGCRA. Here, Jervis withheld payment of part of an interim certificate, but failed to issue a withholding notice as prescribed by the Act. The defendants said that it was open to them to prove that items of work that went to make up the unpaid balance were not done, were duplicated or represented snagging for work that had already been paid for.

Although LJ Jacob made reference to the numerous authorities on this question, he felt that they concentrated on the *"unspoken but mistaken assumption...that the provision is dealing with the ultimate position between the parties"*. He turned to the actual contract in question, which was in the standard form provided by the Architecture and Surveying Institute. Clause 6.22 said that *"the Employer shall pay the Contractor the amount certified within 14 days of the date of the certificate"*. Thus it was not the amount of work done which defined the sum that was due but the sum stated in the certificate. LJ Jacob continued:

"In the absence of a withholding notice, s111(1) operates to prevent the client withholding the sum due.The contractor is entitled to the money right away. The fundamental thing to understand is that s111(1) is a provision about cash flow. It is not a provision which seeks to make any certificate, interim or final, conclusive."

If, as in *SL Timber v Carillion Construction*, the contract did not provide for a system of certificates and a contractor simply presented a bill for payment then that bill would not make any sums due. Therefore, no withholding notice would be necessary in respect of work not done, as payment would not be due. LJ Jacob set out the following five advantages of this approach:

(i) It draws a line between claims for set-off which do no more than reduce the sum due and claims which go further such as abatement;

(ii) It provides a fair solution which safeguards cash flow but does not prevent a party from raising disputed items in adjudication or litigation;

(iii) It requires the client who is going to withhold to be specific in his notice about how much he is withholding and why. This limits the amount of withholding to specific points, which must be raised early;

(iv) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or, if necessary, arbitration or legal proceedings; and

(v) It is directed at the mischief which s111(1) was aimed at - namely, payment (or non-payment) abuses.

It was conceded that the principal disadvantage was the risk of insolvency. However, as the CA said, this risk can be minimised if certificates are carefully checked and any withholding notice is given within time.

Interestingly, LJ Jacob flagged up the possibility that there may be a duty on architects (and presumably other contract administrators) to ensure that a lay client is aware of the possibility of serving a notice in sufficient detail and good time. Given the clarity of this CA ruling, even if there is no legal responsibility for failing to do this it is surely good practice, even if the client has some experience of the construction industry.

Therefore, this judgment is of assistance in clarifying the position where no withholding notice has been given. Where an interim certificate has been issued, the absence of a s111 notice will mean that it is not permissible to withhold from the payment due (in respect of items of work already paid for or work not in fact carried out). The issue here related to interim certificates. In these circumstances, it may well be possible for a party who fails to issue a legitimate withholding notice to remedy the situation in a later certificate. However, with a final certificate, the situation may well be different and it may therefore be necessary to instigate proceedings to recover any overpayment.

■ Dean & Dyball Construction Ltd v Kenneth Grubb Associates Ltd

D&D retained KGA to design an impounding gate across the entrance of a marina. The gate never worked properly. D&D brought a successful claim for breach of contract and negligence in adjudication. KGA refused to honour the adjudicator's decision. KGA resisted enforcement of the decision on a number of grounds, including:

(i) The claim referred was not the same claim as the one the parties had been corresponding about prior to the notice of adjudication;
(ii) The adjudicator made an error of law and answered the wrong question; and
(iii) The procedure adopted by the adjudicator was unfair.

HHJ Seymour QC disagreed.

(i) He laid emphasis upon looking at what, on the facts, the dispute was about. Here, it was clear that there was a dispute between the parties about liability. This dispute had crystallised and would not go away simply because the quantum of the claim had changed;
(ii) The adjudicator had addressed the correct issue in law, namely whether KGA had performed its contractual obligations with reasonable skill and care; and
(iii) The procedure adopted by the adjudicator of conducting separate interviews with the parties and their experts was permitted by the CIC Model Adjudication Procedure. It was also fair because the adjudicator informed the parties of the details of his interviews.

HHJ Seymour QC was critical of the approach adopted by KGA, which he said was *"simply to seek to raise any and every point, good, bad or indifferent, by way of objection to the Decision without regard to whether any particular point was consistent with, or arguably properly alternative to, any other point."*

Cases from the TCC - Letters of Intent

■ Tesco Stores Ltd v Costain Construction Ltd & Others

This is a lengthy judgment of HHJ Seymour QC about a number of preliminary issues following a fire at a Tesco store in Redditch. One of these issues was the nature (if any) of the contract between Tesco and Costain.

The Judge noted that the test for contract formation is an objective one. The intentions of a party are to be derived from contemporaneous communications with the other supposed contracting party and not from unexpressed, private thoughts or feelings about whether a contract had been concluded. HHJ Seymour QC then went on to discuss what he termed a *"mythical beast"* namely the letter of intent. He stressed that the legal effect of such letters was dependent on the true construction of the correspondence between the parties. It did not necessarily entitle a contractor to payment for what he did, without exposing that contractor to any risk because it did not impose any contractual obligations.

Here the contract was a simple one set out in a countersigned letter dated March 1989. All Costain agreed expressly to do was to commence the work which it alone was to undertake in relation to the store either directly or by sub-contractors. Costain did not accept contractual responsibility towards Tesco for work of design done by others. The only material express terms were that Costain would commence the execution of the work of constructing the store in advance of agreeing a formal contract and that in return Tesco would make payment in accordance with the terms set out in the letter.

On top of this, it was then implied that Costain would perform any construction work which it undertook under the contract in a good and workmanlike manner. Further, insofar as any design decision in relation to the store was made by Costain, it was to be implied that that element of design would be reasonably fit for its intended purpose.

Finally, HHJ Seymour QC held that the duty of care owed by Costain to Tesco was to execute any building or design work that Costain carried out with the care and skill to be expected of a reasonably competent building contractor so as not to cause damage to person, property, or economic loss. Potentially, that work included both physical construction work and the making of design decisions.

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