Fenwick Elliott
Solicitors

Dispatch

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

Adjudication

William Verry (Glazing Systems) v Furlong Homes Ltd

Furlong commenced a "kitchen sink final account adjudication". The adjudication notice and the referral were drafted very widely and covered all aspects of the final account. One of the matters referred was Verry's entitlement to an extension of time. Having been granted an extension of time to 2 February 2004, Verry submitted a claim for an extension of time down to 24 June 2004. Furlong responded that Verry had provided nothing that would add to the extension of time already granted. Furlong's adjudication notice requested a decision that the extension of time granted by Furlong to 2 February 2004 was correct. Alternatively, the adjudicator was asked to decide the appropriate extension of time.

In its response, Verry claimed an entitlement to an extension of time to 27 July 2004. Furlong objected to this, stating that Verry were putting forward a new extension of time claim. Following submissions concerning authorities such as *Nuttall* v *Carter* and *AWG* v *Rockingham*, the adjudicator decided that Verry could rely upon the matters referred to in the extension of time submission in its response and he decided that Verry were entitled to an extension of time to 27 July 2004. In the enforcement proceedings, Furlong contended that the adjudicator did not have jurisdiction to consider Verry's "new claim" for an extension of time.

HHJ Coulson QC decided that there were three questions to answer. First, whether the extension of time part of the response was a new claim for an extension of time which had not been made before. Second, if it was, whether Verry were entitled to rely upon it in an adjudication. Third, if Verry were not entitled to rely upon it in principle whether they were able to rely upon it in fact because, by their conduct, Furlong gave the adjudicator the necessary jurisdiction.

In answering the first question, the Judge formed the view that Verry's response was a fuller explanation for the claim originally made on 2 July 2004. The fact that a new extension date was sought, reflected the fact that work continued on site after 2 July 2004 and down to 27 July 2004.

Further, the Judge accepted the new supporting documentation and the new extension of time date. Even if the claim were new, the adjudicator was entitled to have regard to it. This was a matter of commercial commonsense. If Furlong had wanted to restrict the scope of the adjudicator's investigation they could have defined the dispute as being whether or not on the basis of the letter of 2 July 2004 and the information contained within it, Verry were entitled to an extension of time beyond 2 February 2004.

The Judge then considered the authorities on the question of what can and should constitute a dispute. In *Carter* v *Nuttall* it was held that "*when a party had had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a dispute between the parties is not only a claim which has been rejected... but the whole package of arguments advanced and facts relied upon by each side...*" In contrast, in *AWG* v *Rockingham*, it was held that "*...an Adjudicator is not confined to considering rigidly only the package of issues, facts and arguments which are referred to him.*"

Here the Judge said that even if the extension of time claim was a new one, it formed part of the dispute which was referred by Furlong. In addition, Verry were responding to this claim, they did not start the adjudication. They had to defend themselves as best they could against the suggestion that their entitlement to an extension of time was to 2 February 2004 and that liquidated damages should be deducted for the period of delay thereafter. They were not to be taken as having agreed that in some way they could only defend themselves with half a shield relying on some matters of fact but not others. According to the the Judge, Verry were entitled to take whatever points they liked to defend themselves and the adjudicator was obliged to consider all such points.

Without Prejudice Correspondence

■ Schering Corporation v Cipla Ltd & Anr

Laddie J had to consider whether a document marked "without prejudice" was in fact privileged. Here, in a case where patent infringement was being alleged, the main grounds for the allegation were based on a letter which was marked "without prejudice". Cipla who wrote the letter said the contents of the letter were to be treated as privileged and thus Schering had no material that it could rely upon for the basis of the action.

In reaching his decision, the Judge referred to the public policy benefits of assisting those who are trying to negotiate settlements. It is better if litigation can be avoided and if parties are negotiating, there is a chance that this will lead to a resolution of the dispute. The privilege attaching to a without prejudice document is there to support that policy.

In determining whether or not a document is really without prejudice, one must look at all the circumstances of the case. Merely using the words "without prejudice" does not conclusively mean that a letter is privileged. Whilst it is a factor (albeit an important one) in determining the document's status, the court will have to consider the intention of the author and how that intention would be understood by a reasonable recipient.

The Judge then considered the letter here. As is common in correspondence between parties who face potential litigation, the author had maximised the strength of his case. That had happened here and Cipla asserted that it felt able to proceed without regard to Schering's position if negotiations are not entered into. However, the letter then went further and talked about avoiding confrontation if "*there was an alternative commercial solution acceptable to both parties*". This was a clear indication that Cipla wanted to talk. Thus, overall, the letter as a whole was an invitation to negotiate. As a consequence, the letter was covered by the without prejudice privilege and it could not be referred to by Schering in its claim.

Adjudication - Case Update

■ Connex South Eastern Ltd v MJ Building Services Group plc

In Issue 49, we reported on this case where HHJ Havery QC had decided, amongst other things, that MJB had the right to refer the dispute between the parties to adjudication notwithstanding that the agreement had been discharged by the acceptance by MJB of Connex's repudiation of that contract. In particular, Connex were aggrieved that whilst this acceptance had taken place in November 2002, the adjudication did not commence until February 2004. Indeed, before the CA, Connex submitted that this was an abuse of process. In other words the phrase "at any time" to be found in s108 of the HGCRA had its limits.

Although LJ Dyson doubted whether it was appropriate to refer to Hansard, he noted with interest the comments of Lord Lucas, during the parliamentary debate which lead to the HGCRA, who said that the words "at any time" were necessary since otherwise:

"it will be possible for a party bent on avoiding adjudication to insert a term which would allow notice to be given within an unreasonably narrow window, and we cannot allow that...I am of course aware that some have doubted the wisdom of allowing parties to refer a dispute...long after work under the contract has ceased. However, as long as there is any possibility of disputes arising...parties will have to live with the fact that an adjudicator's decision may be sought. Indeed, there may be times, even at such a late stage, where it is desirable to have a quick and cheap procedure that can produce an effective temporary decision...this will not prevent parties from seeking a permanent decision through arbitration or the courts."

Connex said that if, as a result of the passage of time, it is no longer possible to have a quick and cheap adjudication, then it was an abuse of process to permit an adjudication to take place. The CA disagreed. The phrase "at any time" meant exactly what it said. It would have been possible to restrict the time within which an adjudication could be commenced by reference to the date when work was completed or the contract terminated. This was not done. Subject to circumstances where the right to refer might have been waived, there was nothing to prevent a party from referring a dispute to adjudication at any time.

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Fenwick Elliott
Solicitors

Aldwych House
71-91 Aldwych
London WC2B 4HN

T +44 (0)20 7421 1986
F +44 (0)20 7421 1987
Editor Jeremy Glover
jglover@fenwickelliott.co.uk
www.fenwickelliott.co.uk