Fenwick Elliott
Solicitors

Dispatch

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

Adjudication

■ Castle Inns (Sterling) Ltd v Clark Contracts Ltd

In this Scottish case, Castle sought to have a number of items which had previously been referred to adjudication finally determined by the Court.

The first issue related to sums paid by Castle in respect of the adjudicator's fee and expenses. Castle suggested that were the Court to reach a decision that was contrary to the adjudicator's decision, then as that decision would be at an end, it would be open to the Court to reach a contrary view of any part of that decision. This included the power to revoke the adjudicator's decision on liability for his fee. In other words, if Castle succeeded in overturning the adjudicator's decision, it was also entitled to overturn the fee apportionment made by the adjudicator on the basis of what was now an erroneous decision.

Lord Drummond Young held that Castle could not do this. First there were a number of practical difficulties involved. The circumstances of the adjudication were likely to have been very different to the proceedings before the court. Second, any apportionment by the adjudicator in respect of his fees, whilst it formed part of his decision, did not relate to the dispute that was the subject of the adjudication. It was an ancillary finding which did not involve the "dispute" in the contractual sense.

The dispute between the parties also included the question as to whether Castle's claim for the balance due under the Final Certificate was time barred on the ground that the claim involved reconsideration of disputes dealt within one of the adjudications. Under the contract, a challenge to the adjudicator's decision given after the date of the Final Certificate could only be made within twenty-eight days after the decision was made. Here, the decision was given after the issue of the Final Certificate and the present proceedings were not started until some five months after the issue of the Final Certificate.

The Court found in principle that clause was designed to impose a strict contractual time bar on beginning proceedings to have any matter decided by an adjudicator finally determined. If proceedings were not begun within the twenty-eight day period, the time bar operated in respect of items that formed part of the decision, with the result that the decision became final and binding for the purposes of the Final Certificate.

Adjudication

■ Captiva Estates Ltd v Rybarn Ltd (in administration)

Paragraph 6 of the Construction Contracts Exclusion Order 1998 provides that a construction contract is excluded from the operations of the HGCRA if it is a development agreement which includes provision for the grant or disposal of a relevant interest in the land on which the principal construction operations to which the contract relates takes place. A relevant interest in land means either a freehold, or a leasehold for a period which is to expire no earlier than 12 months after the completion of the construction operations under the contract.

Perhaps surprisingly it is not a provision which has reached the courts until now. However HHJ Wilcox had to decide whether the contract here included a provision for the grant or disposal of a relevant interest in the land on which the construction operations had been carried out by Rybarn.

Here, Captiva said that it did and that accordingly the agreement between the parties fell within the ambit of that exclusion order. Captiva further said that the clear intention of the parties was that the leasehold interests in the flats built by Rybarn which were owned by Captiva would be transferred under the terms of the contract.

The Judge who laid stress on the words “includes provision for” agreed and found that the effect of the contract was to grant Rybarn options for the grant of leases for the flats that were built. Accordingly there was no statutory right to adjudicate.

Adjudication

■ All In One Building & Refurbishments Ltd v Makers UK Ltd

This adjudication enforcement case came before HHJ Wilcox. Makers suggested that no dispute had arisen since the 30 day period contractually allowed to pay interim payments had not lapsed when the adjudication was commenced. The Judge did not accept this. It is the denial of a claim which gives rise to a dispute. It was also evident from previous decisions that the Court should adopt a "*a vigorous and commonsense approach*" and there was no "*warrant for being legalistic and overly technical when considering what labels are used and identifying whether and what dispute has arisen.*" The court must look to the substance of the claims identified and denied and not to the descriptive labels given to the claim.

Makers also sought a stay of execution stating that AIO had ceased trading. It no longer had any trading premises and had no work in progress. AIO submitted that this situation was in all probability brought about by the failure of Makers to pay the adjudication claim. There was no direct evidence of this. However, it was evident to the Judge that the profile and substance of AIO was the same now as when Makers chose to enter into a contract with them. In addition, in all probability AIO was insolvent. It was doubtful it would be in a position to re-pay the adjudication sums. However, there was no evidence as to when, if at all, it might be called upon to repay the debt. No proceedings or arbitration had been embarked upon. Therefore, (although the Judge noted that had it been demonstrated that the company was in liquidation, then it would have been appropriate to stay judgment) here he exercised his discretion and refused a stay.

Arbitration - Joinder of Disputes

■ City & General (Holborn) Ltd v AYH Plc

C&G appointed AYH as project manager and quantity surveyor in relation to refurbishment and rebuilding works. The contract between C&G and AYH provided for disputes to be referred to arbitration. Clause 17.2 further provided that *"if the dispute to be referred to arbitration under this deed raises issues which are substantially the same as, or are connected with issues raised in related disputes…the dispute under this deed shall be referred to the arbitrator appointed to determine the related dispute"*. A reasonable objection would be if the arbitrator was not appropriately qualified to determine the dispute.

The contract was some 80 weeks late and the main contractor was granted substantial extensions of time. The contractor also claimed an additional £11 million. Disputes arose as to who was responsible for the delays and cost increases. There were a number of adjudications. A notice of arbitration was served and an arbitrator was appointed. Prior to that, CG had written to AYH's solicitors alleging a failure to exercise all the reasonable skill and care to be expected of a properly and appropriately qualified and competent quantity surveyor. CG then served notice of arbitration on AYH and stated in that notice that they intended to refer this dispute to the same arbitrator.

AYH did not agree that that the same arbitrator should deal with both disputes. The matter came before Mr Justice Jackson. He considered that if material portions of the issues in dispute B are the same as, or are connected with, issues in dispute A, then it makes obvious commercial sense for both disputes to be dealt with together. If the disputes are referred to different arbitrators, both the costs and the management time devoted to dispute resolution will be greatly increased. There was also a substantial chance of inconsistent findings being made. Mr Justice Jackson therefore held that it was not necessary for every single issue in dispute B to be substantially the same or connected with an issue in dispute A.

A more difficult question here was what proportion of the issues in the two arbitrations must converge in order to trigger clause 17.2? The Judge thought it right to have regard to the commercial purpose of the provision. That was obvious: to avoid multiplicity of proceedings. Therefore it would not be right to set the threshold of clause 17.2 too high. It was sufficient if a material portion of the issues in dispute B were connected.

If a material portion of the issues in dispute B are the same as, or are connected with, issues in dispute A, then it made obvious commercial sense for both disputes to be dealt with by the same tribunal.

Dispatch **is produced monthly by Fenwick Elliott LLP, 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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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