



Dispatch

Issue 69
March 2006

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

Adjudication - Who is responsible for the cost?

■ John Roberts Architects Ltd v Parkcare Homes (No.2) Ltd

We reported this decision in Issue 64. The question at issue was whether or not an adjudicator had the power to award costs where a referring party had withdrawn its claim. HHJ Havery QC said that he could not. The case went to appeal and the CA disagreed.

The parties had agreed that any adjudication would be subject to the CIC Model Adjudication Procedure with the following amendment:

“The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision.”

The CA said that although it was possible, or indeed sensible, for a contract to provide that each side in any adjudication dispute should bear its own costs, this was not what the contract here said. The CA also noted that if the first instance decision was followed then either side could abandon its contentions at the last minute with no costs consequences. This was not so sensible.

Looking at the wording of the amendment, the CA said that “as part of his decision” meant no more than “as part of what he may decide”. Accordingly, the adjudicator had power to make an award of costs. There are two key points here. First there was no provision in the contract that each party bear its own costs. Second, it was the contract which made provision for adjudication. There was no statutory right to adjudicate under the HGCRA. This case is therefore more likely than not to be confined to its specific facts.

Adjudication - Successive Adjudications

■ Quietfield Ltd v Vascroft Contractors Ltd

This case relates to two adjudications between Vascroft and Quietfield before the same adjudicator. The first was a dispute about whether Vascroft was entitled to an

extension of time on the basis of matters they had set out in two letters dated 2 September 2004 and 22 April 2005. This claim was dismissed on the basis that Vascroft had failed to discharge the burden of proof necessary to demonstrate that they were entitled to an extension of time.

As a consequence of this decision, Quietfield then began their own adjudication, claiming LAD’s from Vascroft. Quietfield relied upon the adjudicator’s decision the first time round. Vascroft’s defence included a 400 page document which sought to trace the critical path and analyse the delays to completion caused by a number of relevant events. Some of this information had been produced for the adjudicator in the first adjudication, but significant amounts of the information was new.

The adjudicator refused to consider the extension of time defence saying that this matter had already been determined in the first adjudication. He went on to order that Vascroft pay both the liquidated damages and his fees. Vascroft did not pay saying that the adjudicator should have considered their defence. Quietfield commenced enforcement proceedings.

Mr Justice Jackson said that there were four principles which applied when there are successive adjudications about extension of time claims and/or the deduction of damages for delay:

- (i) Where the contract allows the contractor to make successive applications for extensions of time on different grounds, either party, if dissatisfied with the decisions made, can refer those matters to successive adjudications. The difference between the contentions of the aggrieved party and the decision of the contract administrator will constitute the “dispute”;
- (ii) If the contractor makes successive applications for extension of time on the same grounds, the contract administrator will usually reiterate his original decision. The aggrieved party cannot refer this matter to successive adjudications;

- (iii) Subject to paragraph (iv) below, where the contractor is resisting a claim for liquidated and ascertained damages in respect of delay, pursued in adjudication proceedings, the contractor may rely by way of defence upon his entitlement to an extension of time; and
- (iv) However, the contractor cannot rely by way of defence in adjudication proceedings upon an alleged entitlement to extension of time which has been considered and rejected in a previous adjudication.

Accordingly, Mr Justice Jackson held that held that as Vascroft's defence included new evidence, it was on different grounds than those previously considered in the first adjudication. Therefore he refused the enforcement application.

Construction Management - Certification

■ Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd

This case involved a trial of certain preliminary issues before Mr Justice Jackson QC. These included whether the trade contracts provided expressly that the construction manager could be replaced by any other person as notified in writing by the employer and whether the employer was entitled under the trade contracts to appoint itself as the construction manager.

The judgment includes a discussion of the functions and duties of the construction manager under the contract in question. Here, the construction manager had two functions. First to act as the agent of St James and in that capacity give effect to the requirements of St James. Second, the construction manager had to come to decisions on matters where, potentially, the contractor and employer might have opposing interests - for example, the ascertainment and certification of loss and/or expense. Mr Justice Jackson defined these as the "agency function" and the "decision-making function".

Mr Justice Jackson outlined the legal duties in relation to the decision-making function. He said that the duty of the construction manager is not *"simply to implement the instructions of his principal, but rather to hold the balance fairly as between employer and contractor."*

Having reviewed the authorities, Mr Justice Jackson said that three propositions emerged concerning the position of the decision maker:

- (i) The precise role and duties of the decision-maker will be determined by the terms of the contract;
- (ii) Generally the decision-maker is not, and cannot be regarded as, independent of the employer; and

- (iii) The decision-maker is required to act in a manner which is best described as *"independent, impartial, fair and honest"*. These concepts are overlapping but not synonymous. The decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interest of the employer.

This was contrary to the suggestion of St James who had indicated that there was no obligation on the construction manager to act independently and impartially as a quasi-independent certifier.

On the facts, the trade contracts did include provision for St James to replace the construction manager. However, St James, as the employer, was not entitled to appoint itself as construction manager. Amongst the reasons for this decision were the following:

- (i) It is an unusual state of affairs for the employer himself to be the certifier and the decision maker. This can only therefore be achieved by an express term;
- (ii) The whole structure of the trade contracts here was built upon the premise that the employer and construction manager were separate entities; and
- (iii) A contract in which the employer acts as a construction manager, would be very different from the contract which Scheldebouw priced at the tender stage. In every previously known case in which the certifier was a direct employee of the employer, this was known at the outset. The contractor therefore went into the contract with his eyes open. This was not the case here.

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.

Dispatch is a newsletter and does not provide legal advice.



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