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Dispatch

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

Liability under warranties

■ Safeway Stores Ltd v Interserve Project Services Ltd

Chelverton Properties Ltd, property developers, entered into a contract with Safeway under which Chelverton were to design and construct a supermarket which included a two deck car park. Chelverton entered into a building contract with Interserve. Interserve entered into a warranty with Safeway and Chelverton. A dispute arose about the surface of the car park. Chelverton and Interserve entered into a compromise agreement. Chelverton then became insolvent and Safeway having carried out remedial works, sought to recover the costs of those remedial works under the warranty from Interserve. Clause 3.3 of the warranty provided as follows:-

"The Contractor shall owe no duties or have any liability under this deed which are greater or of longer duration in that which it owes to the Developer under the Building Contract."

Mr Justice Ramsey had to consider whether the effect of Clause 3.3 was to prevent Safeway from recovering damages otherwise due from Interserve because Chelverton owed Interserve a debt of a greater sum than under the building contract. As Chelverton were insolvent, they had not paid Interserve the agreed compromise sum of some £1.2 million. Accordingly, it was argued that Interserve would not themselves be liable to pay Chelverton damages, because they would have a set-off claim against that sum which would be a complete defence.

Against this, it was argued that Chelverton had not sought to recover the remedial work costs claimed by Safeway and could not have done so as they had not suffered the loss. Or was it the case that the liability to Safeway under the warranty could not be greater than the liability that Interserve owed to Chelverton under the building contract? The cost of the remedial works afterall were the costs of the remedial works. Alternatively, did the set-off merely prevent Chelverton from enforcing the liability without taking into account the costs claimed?

The Judge noted that the warranty provided an alternative way for Safeway to obtain rights against Interserve. Without Clause 3.3, Safeway could have proceeded against Interserve without any consideration of any parallel liability to Chelverton. However the Judge felt that the purpose of Clause 3.3 was:-

"to restrict Interserve's liability to Safeway to its equivalent liability to Chelverton under the Building Contract. It still provides a direct route for Safeway to bring proceedings against Interserve, but it ensures that the extent of that liability is no greater than the liability of Interserve to Chelverton."

The liability of Interserve to pay damages to Chelverton for breach of contract in relation to the car park defects, was subject to Interserve's right of set-off. Therefore, on the facts here, Interserve had no liability to Chelverton for damages for breach of contract for the car park defects. Clause 3.3 did prevent Safeway from recovering damages from Interserve in respect of the car park defects. The liability of Interserve to Safeway could not be greater than the liability of Interserve to Chelverton under the building contract. The amount to be set-off was greater than the damages claim. Accordingly, Interserve was not liable to Chelverton. Of course, had clause 3.3 not been in the warranty then Safeway would have been able to successfully claim a significant sum from Interserve.

Recovery of management costs

■ R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA and Others

This was an insurance case involving certain issues of principle in relation to quantum. One of the issues was the recoverability of wasted staff costs. Gloster J considered and upheld the usual authorities. The claimant was looking to recover, as damages, internal management and staff time and internal overheads. Whilst the claimant said that it could, if necessary, establish loss of profit, it suggested there was no need for them to embark on such an exercise. To do so would be expensive and artificial.

The claimant said it was seeking to recover management and staff time engaged in remedying and/or mitigating the wrong for which the defendants had been found liable. They further said that but for that wrong, the staff in question would have been engaged on other matters. Hence, it did not need to show any specific loss of profit, merely that those staff had been engaged in investigating and mitigating the losses caused by the wrong. The defendant suggested that it could only recover damages in relation to internal management staff time to the extent that the claimant had suffered a loss due to the diversion of resources as a result of the wrong.

As a matter of principle, the judge decided that the costs of wasted staff time spent on the investigation and/or mitigation of the claim were recoverable. However, it had to be demonstrated with sufficient certainty that the wasted time had been indeed spent on such investigations and that such expenditure was directly attributable to the tort complained of. In other words, to be able to recover, you had to show a significant disruption to your business and that the staff had been deliberately diverted from their usual activities. If you could not do this, then the alleged wasted expenditure on wages could not be said to be directly attributable to the tort.

It was not the purpose of this hearing to decide whether the quantification of such expenditure had been proven with sufficient detail. In coming to this decision, the Judge rejected the suggestion that the claimant would have no claim for damages in respect of salaries paid to its employees during the period when they carried out work made necessary by the wrongs, if those salaries would have been paid in any event.

The reason for this was that the claimant had not incurred any expenditures as a result of the wrongs that it would not have incurred in any event. It would be a strange result if the claimant could recover the costs if he chose to sub-contract the work, but not if he chose his own employees to carry it out.

Adjudication - Economic Duress

■ Capital Structures Plc v Time & Tide Construction Ltd

T&T resisted an enforcement claim on the basis that the adjudicator had no jurisdiction. The reason given was that the agreement between the parties came about as the result of economic duress and that that agreement had been avoided before the adjudicator assumed jurisdiction. Capital were a subcontractor to T&T in respect of the supply, delivery and installation of structural steelwork and cladding. After disputes arose, a settlement agreement was signed. The settlement was in full and final settlement of all existing and/or future claims. It included a clause providing that if a dispute arose under it, then that dispute could be referred to adjudication.

T&T said that they had only agreed to the settlement because they had no choice. The adjudicator rejected the claim of economic duress. A claim of economic duress is a difficult one to make. To demonstrate and prove actual duress, (i) there must be pressure the practical effect of which is that the "victim" is compelled or had no choice but to agree, (ii) that pressure must be illegitimate and (iii) that pressure must be a significant cause in inducing the "victim" to sign the contract. Relevant factors might include whether the victim has any practical alternative, protested at the time and whether the victim affirmed or sought to rely on the contract.

HHJ Wilcox noted that the courts, in adjudication enforcement cases, must be wary of encouraging complex satellite litigation. He therefore cautioned against "*imaginative and strange interpretation of the facts and events arising in the commercial rough and tumble of the construction industry.*" This should not be allowed to found weak challenges to jurisdiction.

The Judge first considered the suggestion that even if economic duress was proven, the adjudications provision of the contract would have survived. He said that where there had never been a contract because it had been avoided on the grounds of duress, it logically followed that any adjudication provision also became void. Here, the Judge felt there was, just, an arguable case as to the economic duress. As this was a claim for summary judgment, this was all T&T had to show. Accordingly, T&T were given leave to defend and summary judgment was refused. If economic duress was proven and if T&T had taken proper steps to avoid the settlement agreement which was the subject of adjudication, then the adjudicator would not have had jurisdiction.

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