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Dispatch

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

Adjudication

■ **McConnell Dowell Constructors (Aust) PTY Ltd v National Grid Gas Plc**

This was an application to enforce the decision of an adjudicator. The claim related to the construction of a gas pipeline in Lancashire. National Grid submitted that the adjudicator had no jurisdiction because the claims advanced by McConnell had been settled by a supplemental agreement. Therefore there was no dispute. Further, the supplemental agreement did not contain an adjudication clause and was not a construction contract within the meaning of the HGCRA.

Mr Justice Jackson said that the relationship between the two agreements was the key issue here. Did the supplemental agreement operate as a variation, for example, to the first agreement? Was it a stand-alone agreement? If it did operate as a variation to the contract, would it be subject to the same adjudication provisions?

The Judge considered that the supplemental agreement here did operate as a variation to the original contract. For example, it served to vary the contract sum as well as the contract completion dates. Accordingly, the contract and the supplemental agreement were mutually intertwined. Therefore using the traditional test, the officious bystander would consider them to be linked. Further, it would not make commercial sense to have one procedure for resolving disputes under one agreement but then to have a different procedure for resolving disputes under the second one.

One of the tasks of the adjudicator was to determine which claims had been settled by the supplemental agreement. In doing so, he reached a decision which was within his jurisdiction.

National Grid applied for a stay of execution on the basis that McConnell was an Australian Company, registered in Victoria. The UK office had closed down. The Judge could see much force in the latter argument. However, McConnell had offered to provide a bond which would protect the National Grid's position if it subsequently obtained a judgment or arbitral award clawing back the money. Therefore the Judge refused the application for a stay.

Repudiatory Breach of contract

■ **South Oxfordshire District Council v SITA UK Ltd**

SODC sought damages from SITA, their former waste management contractors. SITA denied liability on the basis that they were not in repudiatory breach of their contract. One of the issues was whether the admitted failure to provide a performance bond amounted to a repudiatory breach of the contract. It was common ground that a bond ought to have been supplied, but that it was overlooked by both parties at the time that the contract was executed. Mr Justice Steel noted that the requirement was not a condition precedent. It was also not a condition which went to the root of the contract. For example, there was no provision as to the time when the bond should be provided. It was also a performance bond, not one that was enforceable on demand. In addition, the bond was for a modest sum compared with the contract sum. Thus there was no repudiatory breach.

In essence, it was the SODC's case that SITA were in repudiatory breach of contract, having regard to a number of past or continuing breaches. In other words, whilst the breaches if proven, might not have been, if taken individually, repudiatory in nature, taken together they were so as a package. In other words, was the cumulative effect of the breaches which had taken place sufficiently serious to justify the innocent party bringing the contract to a premature end?

SODC relied on the CA case of *Rice v Great Yarmouth Borough Council* where GYBC sought to determine a long running maintenance contract. The CA made it clear that the test was a severe one. The CA also noted that the contract here was like a building contract so the accumulation of past breaches was relevant not only for their own sake but also for what it showed about the future. Could the cumulative breaches be such as to justify an inference that the contractor would continue to deliver a substandard performance? In other words, was the Council deprived of a substantial part of the totality of what it had contracted for? This was not what Mr Justice Steel found here. SITA's actions, taken together or in isolation, did not amount to a repudiatory breach of the contract. Whilst there were a number of default notices, when viewed against the overall scale of performance required under the contract, that number was not significant. In addition, those default notices which did relate to poor performance were generally corrected quickly.

■ **Clerical Medical Investment Group Ltd v Crest Nicholson (Southwest) Ltd and Others**

Disputes arose in relation to the heating and cooling systems in a new building. In particular issues arose as to the true construction of the contract and specification documents. Mr Justice Ramsey, briefly summarised the rules for the construction of contracts:

(i) The object of interpreting a contract is to ascertain what the mutual intentions of the parties were in relation to the legal obligations assumed.

(ii) The intentions of the parties are to be ascertained objectively from the language the parties have used and considered in the light of the surrounding circumstances and the object of the contract.

(iii) Even where a word has a single, primary meaning, the choice between meanings is determined by the context in which the word is used.

Thus, when considering the meaning of a mechanical services specification, its meaning would be ascertained according to the understanding of a reasonable person who has the necessary background knowledge in mechanical services, which was something true of all parties to the contract here.

One issue related to the use of blinds. The specification was silent as to any requirements on the use of the blinds. Thus issues arose relating to both the construction of the agreement and matters of standard practice. The Judge noted that a specification in a D&B contract will contain a mixture of provisions. It will include, as it did here, specific requirements which must be provided. It will also set out requirements which have to be taken into account of generally in carrying out the design. Therefore the party responsible for the design, in carrying out that design, must take into account the provisions of the specification. There will be express requirements and express prohibitions. However, within what was described by the Judge as the "design envelope", defined by the specification, there will be a number of assumptions which the designer has to make. These will be derived from the specification.

With the blinds here, the tenant wanted a blind for solar glare control. This did not provide a limit on the designer's ability to take into account the particular properties of the type of blind being specified, including control of solar glare. The purpose of the reference within the specification to glare control was as a preamble to the obligation to supply a particular type of blind. Thus, in principle the Judge could see no reason why the designer could not take into account the properties of the blind when carrying out a design of the cooling loads for the purpose of the sizing the chilled units.

However, the question before the Court was said to raise a different issue. The Court was being asked to make a declaration about an issue of standard practice. Standard practice, may vary widely and depend on particular factual circumstances. It is a question of fact, not a question of legal right. The issue was also a prelude to a claim based on the specification.

However, the Judge was reluctant to (and indeed did not) make a declaration which would be binding in the circumstances where the declaration would not be firmly grounded upon particular legal obligations. This might have an impact on future proceedings. The Judge suggested that this might be an area where the TCC through early neutral evaluation may be able to assist the parties, but in essence, the Court was being asked to make a declaration which was, if not hypothetical, merely a prelude to further proceedings where issues of negligence may be raised. It was not possible to assess what would be said to be the future legal consequences of a standard practice. Was compliance with the standard practice a defence to a claim for the breach of the terms of the specification or did it give rise to implied obligations or have other consequences?

■ **3DMA (pta) Ltd v 3DM Worldwide Plc**

This was a contractual dispute where the claimant alleged that it had entered into a legally binding contract with the defendant to provide corporate finance advice and project management assistance. Having heard the witness evidence, HHJ Mackie QC found in favour of the defendants. The case is of interest because of the comment made by Judge Mackie QC at the end of his judgment. He found that the defendant was content with the wording as finally negotiated, but that did not mean that the defendant had formally entered into a contract on those terms. The Judge referred to the case of *Sun Life Alliance Company of Canada v CX For Insurance Company Ltd* and the distinction drawn by LJ Potter:

> *"Between a party who indicates his agreement to the wording to be contained in the contract and his assent to be bound by the contract itself once drawn up and executed."*

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