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Dispatch

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

Adjudication - Late Service of Referral

■ **Hart Investments Ltd v Fidler & Anr**

This case before HHJ Coulson QC, was in two parts. In the first part, one of the defendants sought to set aside a judgment in default of an acknowledgement of service. The judgment was duly set aside. However, during that part of the judgment, there was discussion about whether, when calculating the effective date for service of a claim form, you exclude Saturday and Sunday. The conclusion, which was described as "surprising" was that you cannot disregard the weekend. In the instant case, this meant that the deemed date for service was a Sunday.

The second part of the case considered an application to enforce an adjudicator's decision. There were two points of interest. First, the Referral Notice was not served in accordance with the Scheme, being provided 8 days (rather than 7) after the Notice of Intention to Refer. As the Judge noted, there were no reported cases on the consequences of the late service of the Referral Notice. The Judge considered the various decisions dealing with an adjudicator's failure to provide a decision within 28 days. HHJ Coulson QC expressly agreed with the decision of the Inner House of the Scottish Court of Session in Ritchie Brothers v David Phillip (see Issue 59) where the Court held that the 28 day limit meant what it said. Thus, in that case, a decision not provided until a day after the expiry of the 28 days was a nullity.

Here, the Judge's initial reaction was to consider that in the overall scheme of things, it was difficult to say that a delay of one day in the provision of the Referral Notice should be accorded great significance. However, one of the main points of adjudication is that speed is given precedence over accuracy. What matters is a quick decision. Therefore there must be a summary timetable with which everyone must comply. In addition, if *Ritchie* is a correct statement of the position at the end of the adjudication process under the Scheme, it followed that the same principle must also apply to the event which signalled the commencement of the adjudication process. Therefore the Referral Notice was irregular and/or invalid and the adjudicator did not have jurisdiction.

Thus the second point as to whether or not there was an agreement in writing fell away. However, the Judge still considered this point in his judgment. The contract under discussion was a one page letter of intent. First, the Judge questioned whether the LOI constituted a binding/enforceable contract at all. It was not easy to say that it did. All that was being said was that if Hart asked the defendant to carry out the work, they would be paid their reasonable costs. This was a framework of the "loosest and vaguest kind". The clarity of terms envisaged by the CA in the *RJT* case was wholly absent. The biggest difficulty came with the contract work scope. Here, the work scope was work which will, or might be, the subject of future orders, whether written or oral. Whilst that might be sufficient for a binding contract, it was insufficient for an adjudication. The LOI was not designed to be a complete record of the parties' proposed agreement.

The whole point of section 107 of the HGCRA was to ensure that the swift adjudication process is operated, and only operated in circumstances where the underlying contract is clear. The reason for this is so that the adjudication will not become bogged down in arguments about unwritten or unclear contract terms.

Adjudication - Natural Justice

■ **South West Contractors Ltd v Birakos Enterprises Ltd**

This was an application to enforce an adjudication award. SWCL were project managers employed by Birakos. There were two contracts one relating to a management agreement, the other to fees. Birakos said that there had been a breach of the rules of natural justice because a vital part of their case (whether the loss should have been mitigated) was not considered by the adjudicator. As there were two contracts, there had been two adjudications. Birakos highlighted the difference in approach between the adjudicator in the two claims. In the first, the mitigation argument was considered at length. The same consideration was not given in the second claim. SWCL accepted that the adjudicator did not expressly deal with this aspect, but submitted there was no obligation to mitigate a loss of profits claim.

This was not accepted by HHJ Wilcox. However he continued that the Court was not permitted to "minutely examine" the reasons why the adjudicator might have made a mistake. Here, in reality the adjudicator had issued two awards considering aspects of the same transactions with common submissions as to mitigation of damages. It was thus unlikely that he did not consider this in both claims as he was asked to, particularly having regard to the careful way in which he dealt with the case as a whole.

Agreements to Agree
Bell Scaffolding (Aust) PTY LTD v (1) Rekon Ltd & Anr

Bell brought a claim for loss of profits arising from an agreement for sale and purchase of scaffolding products. Alba counter-claimed against Bell for unpaid sums in relation to scaffolding hire charges and damages for breach of contract. In 2000, Alba entered into an oral agreement with Bell UK for the purchase of scaffolding. The agreement was recorded in a memorandum. This provided that the Alba would increase the hire of scaffolding to Bell Scotland under an existing agreement, on the understanding that all future scaffolding products would be purchased from Bell UK at "agreed prices."

Alba did not go ahead with the agreed purchases. Bell Scotland began to off-hire scaffolding before the hire period with Alba ended, then both Bell Scotland and Bell UK ceased trading. A dispute arose between the parties as to the scope of the agreement; particularly whether the agreement was sufficiently certain to be enforceable. Both Rekon and Alba contended that it was only an agreement to agree and, in the absence of any agreement as to price, it was not intended to give rise to legal relations between the parties.

The Court decided that the agreement did give rise to an enforceable obligation to purchase scaffolding. It held that there was nothing in the nature of "an agreement to agree" or any intention not to create legal relations that would render that obligation unenforceable. For example, the phrase "agreed prices" differed from "prices to be agreed". The Court also considered the previous dealings between the parties, which included the submission of a price list by Bell UK.

It is common practice in the building industry for parties to agree to provide products or services (and corresponding payments to be made) at dates well into the future. The Courts are reluctant to enforce an agreement where a crucial part of the agreement, for example the scope of one party's work, is uncertain or where the performance of an obligation is to be subject to a later agreement to be made some time in the future. The critical question is whether parties intended, at the time of the agreement, to create legal relations. Where there is evidence that a contract is already in existence and there is a continuing business relationship, the Courts are reluctant to undermine the bargain struck. One way to approach this problem might be to make provision for a regular review of performance by all parties.

Adjudication - The Cost of Defending Enforcement Applications
■ Gray & Sons Builders (Bedford) Ltd v Essential Box Company Ltd

Essential Box engaged Gray to demolish and rebuild Unit 6, Norse Road Industrial Estate, in Bedford. In two adjudications, the same adjudicator concluded that Essential Box had wrongfully repudiated the contract and that the sum of £101,988.87 plus interest was due to Gray. Essential Box did not pay the sum and so Gray commenced enforcement proceedings.

Although Essential Box filed the acknowledgment for service, and thereby indicated that they were going to defend the claim, they did not submit any evidence in opposition. There was no indication however from Essential Box that the claim was accepted. In addition the solicitors for Essential Box wrote two letters raising a number of technical points.

Essential Box made an offer and a counter offer from Gray followed. Both offers involved the payment of the full sum by instalments but neither offer was accepted. The day before the hearing, Counsel for Essential Box submitted a skeleton argument to the effect that the application of Gray would not be opposed. It followed therefore that Gray was entitled to judgment in the full sum claimed and it fell to the Court to consider the point of costs.

HHJ Coulson QC had to consider what was the right basis for the assessment of costs where a Defendant resists enforcement of an adjudication decision up until the date of the enforcement hearing. The Judge decided that the correct measure was indemnity costs. Essential Box knew or ought to have known that they had no defence to the claim. Their cyclical cash flow was irrelevant when considering the basis for the assessment of costs. Further Grays had beaten the offers made by obtaining judgment in the full amount.

This decision provides further confirmation on the difficulties likely to be encountered by any party seeking to avoid the enforcement of an adjudicator's decision. The Courts are apparently taking an increasing hard-line view as can be seen from the award of indemnity costs made by HHJ Coulson QC here. However as the first judgment made by Judge Coulson set out at the beginning of this month's decision shows, the Courts have not adopted a "blanket-enforcement" approach. If there are genuine grounds to resist, then the Courts will consider them. It is just that those grounds really must be genuine ones.

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