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Dispatch

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

Adjudication - Late decisions

■ **Cubitt Building & Interiors Ltd v Fleetglade Ltd**

Cubitt were engaged as main contractor under a contract incorporating the 1998 JCT Standard Form as amended. On 24 August 2006 a Final Certificate was issued. On 20 September 2006, the last day to challenge the certificate, Cubitt issued an Adjudication Notice relating to the value of the Final Certificate. On 21 September 2006, Cubitt applied for the nomination of an adjudicator. No nomination was made until 5pm on 27 September 2006. The adjudicator accepted the appointment at 5.35pm. Later that day, Cubitt's solicitors offered Fleetglade's solicitors a copy of the Referral, but without the accompanying documents. The offer was refused. Cubitt's solicitors served the Referral the next day accompanied by 12 files of supporting documentation. Fleetglade argued that the Referral was served out of time and, thus that the adjudicator had no jurisdiction. If that was right, Cubitt were out of time to challenge the Final Certificate.

Cubitt had no option other than to continue the adjudication and the time for the decision was extended to 24 November 2006. Having initially argued that, by virtue of his conditions, he had a lien on his Decision pending payment of his fees, the adjudicator sent his decision to the parties' the following day - some 12½ hours late. Fleetglade argued that the decision was late and so invalid. Cubitt commenced enforcement proceedings. The key issues were whether the adjudicator had been validly appointed and was his decision was out of time and, therefore, a nullity.

Judge Coulson was clear that the date of service of the Notice was 20 September 2006. The CPR rules could not be used to claim that, as it was sent out after 4pm, the actual date of service was the next day. As for the events on 27/28 September, the Judge held the words in clause 41A.4.1 were mandatory. However that did not mean that the Referral was not served in accordance with its provisions. Clause 41A had to be operated in a sensible, commercial way. The clause made no provision for what should happen if (as here) through no fault of the referring party, the appointment only took place very late on day 7. A sensible view would be that, if the appointment happens late on day 7, the Referral must be served as soon as possible. If that meant early on day 8, then such service would fall in with clause 41A. Further, as the delay was not Cubitt's fault, it would be contrary to business commonsense to rule that the Referral was out of time.

In respect of the alleged late decision, Judge Coulson made it clear that adjudicators do not have the jurisdiction to extend time without the express consent of both parties. He warned adjudicators that if they failed to provide a decision in the relevant period, then their decision may well be a nullity. The Judge said that there was a two-stage process involved in an adjudicator's decision, which was expressly identified in clause 41A. Stage 1 is the completion of the decision; stage 2 is the communication of that decision to the parties. This must be done forthwith. A decision reached within the correct timescale but not communicated until after the expiry of that period will be valid, if it can be shown that the decision was communicated forthwith.

Here, the Judge agreeing with the case of *St Andrew's Bay Ltd v HBG Management Ltd*, said that the adjudicator was not entitled to a lien on his fees either at contract or law. The critical question, which was principally one of fact, was whether the decision was completed before the end of 24 November 2006. The Judge concluded that on the facts it was. For example, the adjudicator emphasised that but for the lien, he would have sent out the decision late on the 24th. The Judge thought that it was wrong in principle to penalise Cubitt for the adjudicator's mistake. There was a further consideration. The decision was sent out to the parties at 12.30 on the Saturday morning - when according to the evidence, both sides were ready to study it because of other legal steps which needed to be taken.The Judge felt that a practical businessman would not conclude that the completion and communication of the decision within this time-scale was a fundamental breach of the adjudication agreement.

The Judge stressed that these events had nearly caused a serious problem for the adjudicator. If the Judge had reached a different conclusion, then Cubitt might have lost its right to challenge the Final Certificate. In that case, Cubitt's only redress might have been against that adjudicator. Hence the Judge noted:

"*The message I hope is clear. Adjudicators can only accept nomination and appointment if they can complete the task within 28 days or an agreed extended period...Only in exceptional circumstances will the court consider decisions which were not communicated until after that period, and in no circumstances would the court consider a decision that was not even concluded during that period.*"

International Arbitration - A new liberal approach from the CA

■ **Fiona Trust & Holding Corporation & Ors v Privalov & Ors**

This was a CA decision, which is part of a much wider, ongoing dispute between the Russian Sovcomflot group of companies and a Mr Nikitin. It was alleged that a number of charterparty contracts had been procured by bribery. Each of the contracts contained a clause enabling disputes to be referred to arbitration in London. The charterers commenced an arbitration. In response, the owners sought to restrain the proceedings pursuant to section 72 of the 1996 Arbitration Act arguing that as they had rescinded the contracts owing to the bribery, the arbitration agreements contained within the contracts fell as well. At first instance, Morison J granted an injunction restraining the arbitration proceedings pending trial of the court action.

The CA disagreed, ruling that if a contract is said to be invalid for reasons such as bribery, unless that bribery specifically relates to the arbitration clause, the arbitration clause will survive. This would mean here that the validity of the contract as a whole would be determined by the arbitrators, not the court. One of the issues related to the lengthy dispute resolution clause, which referred first to disputes "arising under" the contract, and later to disputes which have "arisen out of" the contract. The CA considered arguments on whether "out of" should have a wider meaning than "under", and if so, which of the two should prevail. In the course of his judgment, LJ Longmore considered the question of the distinction, if any, between disputes arising "under" a contract and disputes arising "out of" a contract. He concluded that arbitration clauses in international commercial contracts should be given a liberal interpretation:

"For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context... If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect … that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of the contract it would be comparatively simple to say so. It seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."

The CA also considered the relationship between sections 9 and 72 of the 1996 Act Although the CA considered that section 72 did not apply here, it held that where the court has conflicting applications before it to stay court proceedings under section 9 and for a declaration under section 72 that there is no valid arbitration agreement, the application under section 9 should be taken first. The CA considered that this was not only the logical approach but would also reflect the UK's obligations under the New York Convention on enforcement of arbitral awards.

Case update - Expert Reports and mediation

■ **Aird & Anr v Prime Meridian Ltd**

We first reported on this case in Issue 76. A dispute between the two parties was stayed to mediation. To assist the mediation process, the Court ordered that the parties' architectural experts meet on a without prejudice basis and prepare a statement of issues. The Judge said that as the report had been specifically prepared for the mediation, it was protected by privilege and no advantage could therefore be made of concessions which had been made in the mediation, but which had subsequently been withdrawn. The CA has taken a different view.

In short the CA considered that the experts had been asked to provide a statement in accordance with CPR 35.12. That is what they duly did. For example, in the final version of the joint statement, the words "without prejudice" were removed. The joint statement thus did not lose the status of privilege by being used in the mediation. Whilst the CA did accept that it would be possible for experts to produce a report solely for use in a mediation, which would be protected by privilege, that was not what had happened here.

Case update - Adjudication Rules - GC/Works

■ **Aveat Heating Ltd v Jerram Falkus Construction Ltd**

In Issue 80 we reported on the case of *Epping v Briggs & Forrester* where HHJ Havery QC ruled that paragraph 25 of the CIC adjudication procedure was inconsistent with the mandatory nature of section 108(2) of the HGCRA which provides a time limit for the reaching of a decision. Accordingly, he decided that the provision was ineffective. This meant that the Scheme would apply in place of the adjudication provisions of the contract, in other words the entire CIC procedure. The same Judge has now reached a similar conclusion here, this time in relation to the adjudication provisions of the government's GC/Works contract.

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