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Dispatch

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

A new Pre Action Protocol

On 6 April 2007, a revised Pre Action Protocol for Construction & Engineering Disputes comes into force. This new protocol will govern all disputes from that date. Disputes which are currently the subject of the existing protocol will continue to be governed by that protocol. The main changes are as follows:

(i) The introduction of a new paragraph 1.5 which specifically provides that costs incurred in the Protocol must be proportionate to the complexity of the case and the amount of money which is at stake. Thus by way of example, parties will not be expected to marshal and disclose all supporting details and evidence that may ultimately be required if the case proceeds to litigation.

(ii) By paragraph 4.3.1, whilst still being obliged to issue the Letter of Response within 28 days of receipt of the Letter of Claim, potential defendants can agree an extension of time up to 3 months to issue their Letter of Response.

(iii) Paragraph 5.1 sets a deadline for the pre-action meeting which should now normally be held within 28 days of receipt of the Letter of Response;

(iv) Paragraph 5.5(1) notes that parties will be asked to agree to define the relevant issues to be considered by experts and how such expert evidence will be dealt with;

(v) Paragraph 5.4 makes it clear that no party shall be forced to mediate or participate in any other alternative form of dispute resolution;

(vi) However, all parties should be aware that by paragraph 5.6(v) the Court may require a party who attended a pre-action meeting to disclose whether or not they considered or agreed an alternative means of resolving the dispute.

These amendments are intended reflect the concerns of those using the Protocol which have arisen in practice since its introduction. It was felt that all too often the Protocol process was being manipulated to prolong the dispute between the parties, rather than to try to resolve that dispute in a constructive manner as envisaged by the Protocol. The changes are designed to help combat this.

Negligence - break in the chain of causation

Pearson Education Ltd v The Chartered Partnership Ltd

CPL designed guttering for a warehouse. When torrential rain fell in 1994, the guttering failed and the warehouse flooded. The cause of the flood was CPL's design - the drainage capacity was too low. No action was, however, taken against CPL. Indeed the loss adjustors did not tell the then warehouse owner. The warehouse was sold to Pearson. A survey was conducted but the defect was not uncovered. There was further torrential rain. The warehouse flooded again. At first instance, CPL were held responsible to Pearson for the damage caused by the flooding.

CPL appealed. The CA had considered a similar question in the 2002 case of *Baxhall Securities v Sheard* where, the architects were held to be not liable. The reason for this was that the claimants had instructed surveyors and it was held that had they exercised reasonable skill and care they would have discovered that the system was defective. CPL relied on this case and argued that it was not reasonably foreseeable that further damage would flow from the defective design after the first flood. In other words, the fact of the flood should have lead to identification of the defect. It was not reasonable that CPL's duty of care should extend beyond the first flood as it broke the chain of causation.

The CA in the *CPL* case summarised *Baxall* in two ways. Either it meant that where it was reasonable to expect an occupier to inspect a property before occupying it, an architect would not owe a duty of care for defects that the inspection should have revealed or that where an occupier could reasonably have been expected to carry out an inspection which would have revealed the defect, but did not do so, the chain of causation was broken.

The CA did not consider either principle to be wholly satisfactory. What concerned the CA was that Pearson had suffered a loss as a result of the negligence of CPL. The drains were a latent defect. It was reasonably foreseeable, if CPL caused the installation of a defective drainage system, that owners of that warehouse might suffer flood damage. Even though Pearson had had a survey carried out and that survey did not discover this latent defect, that did not break the chain of causation. Pearson did not know about the previous flood. In other words, why should Pearson have carried out any investigation into the adequacy of the rainwater system? A latent defect did not become patent when it became known to a third party other than the claimant.

Expert Determination - the provision of reasons

- **Halifax Life Ltd v The Equitable Life Assurance Society**

The Halifax sought a declaration from Mr Justice Cresswell that an expert determination was not final and binding because the Expert had materially departed from the agreed terms of reference by failing to provide any adequate reasons for his decision or alternatively that the decision contained a manifest error. The Halifax said the Expert failed to provide reasons which explained why he rejected their principle contentions and that he failed to provide reasons which explained what he had learned from private meetings with the Defendant's representatives, what documents he had been shown and how this information influenced him in deciding how to deal with the concerns expressed by the Halifax. Hence, the Expert materially departed from his instructions and his decision contained a manifest error. There was no allegation of fraud or partiality.

The Judge referred to the case of *Bernhard Schulte & Others v Knarl Holdings Ltd* where Cooke J said that an expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submission of evidence adduced by the parties themselves. Here, the Expert was appointed to resolve defined issues in accordance with the contract. The parties had to provide to him such information or documentation as he reasonably required and to make available to be questioned any person whom he considered to be able to supply relevant information. In coming to his decision, the Expert was entitled to consider only the matters in dispute and only to take into account such evidence and information as the parties put before him.

The Judge noted that if an expert makes a mistake while carrying out his instructions, the parties are bound by it for the reasons that they have agreed to be bound by his decision. Where the expert departs from instructions in a material respect, the parties have not agreed to be bound. This is because the expert has not done what he was appointed to do. Where the contract provides that a decision should be final and binding save for manifest error, any departure from instructions is material unless it can be properly characterised as minor.

Here, the Judge felt the Expert was required to provide reasons which were intelligible and adequate in the circumstances. Those circumstances included the context, the nature of the issues and fact that he was required to conduct an expert determination leading to a decision. The reasons could be stated briefly but they had to explain the reasoning for his conclusions on key points raised. This was not a case where no reasons were given. The question was whether the reasons were adequate in the circumstances. It should be noted that, as the Judge said, typically a Judge would never receive evidence or hear submissions from one party in the absence of the other. The same would be true of an Adjudicator. Here, with the expert determination process, matters were different and the Halifax did not object to the procedure adopted.

The Halifax had four basic areas of concern which were noted by the Expert. The Judge felt that it was incumbent on the Expert to set out, albeit briefly, his reasons for his conclusions in relation to these four areas. These reasons would include the information taken into account in reaching those conclusions. The Judge found that the Expert did not do this and so he directed the Expert to do so. It was also necessary for him to indicate the extent to which he had checked the relevant underlying figures. However, the Judge did not consider that the expert's failure to give sufficient reasons meant that the determination was not binding.

The Judge decided that if there was a failure to provide sufficient reasons, the appropriate cause was for the court to direct the Expert to provide further reasons. Thereafter, if the Halifax wished, they may be able to pursue their application.

Adjudication - Letters of Intent

- **Bennett (Electrical) Services Ltd v Inviron Ltd**

Here it was held that no contract had come into being as the letter of intent was clearly stated to be “subject to contract”. As part of his judgment, HHJ Wilcox considered the requirements of s.107. He referred to the *RJT* case and confirmed that the whole of the contract had to be evidenced in writing - not merely part of it. The judgment is interesting because the Judge did accept that the reasoning of Auld LJ in *RJT* was attractive at least at subcontractor level and that cash flow difficulties were more likely to occur in the smaller projects, where the paperwork is rarely comprehensive. However he was bound by the majority judgement. It was not sufficient to show that all terms material to the adjudication had been recorded in writing. All the express terms had to be recorded in writing. The letter of intent here referred to a meeting where the material issues were discussed, including working hours, payment, variations and insurance. However these matters were not the subject of a recorded agreement and the contract,such as it was, fell outside of s107.

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