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Dispatch

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

The TCC approach to the Pre Action Protocol

n Orange Personal Communications Services Ltd v Hoare Lea

Mr Justice Akenhead had to consider the approach to take when faced with an application to stay proceedings in order for the Pre Action Protocol for Construction & Engineering Disputes ("the Protocol") to be followed. He decided that the correct approach to take was a pragmatic one.

The dispute arose following a flood at works carried out at the Bristol Data Centre. Kier had been engaged to carry out the fit out works, including the provision of an air conditioning system. Haden Young were responsible for that air conditioning system. Orange issued proceedings against both in relation to the flood. Kier and Haden Young said that they were not to blame for flood, which was, they said, due to failings by Orange and/or its design team. Hoare Lea had been retained in relation to the design of the M&E works. As it was nearly six years after the flood and fearing a possible limitation defence, Orange issued separate proceedings on 15 August 2007 against Hoare Lea. In the first action, a trial date was fixed for October 2008. The directions made provision for ADR in April.

In December 2007, Orange served Particulars of Claim on Hoare Lea. Orange did not actually consider that Hoare Lea had anything to do with the flood. Orange's approach was a belt and braces one, being contingent upon the argument put forward by Kier and Haden Young succeeding. If that happened, Orange intended to assert its claim against Hoare Lea. Hoare Lea then issued an application that the claim be stayed because Orange had not followed the Protocol. Orange responded by offering to provide any particular information which Hoare Lea said they might require. As the Judge noted, that offer was not taken up. The Judge reminded the parties that the purpose of the Protocol is to encourage the exchange of earlier and full information about respective legal claims to enable parties to avoid litigation where possible. Having considered the authorities, Mr Justice Akenhead made the following general observations:

"(a) The overriding objective (in CPR Part 1) is concerned with saving expense, proportionality, expedition and fairness... This objective whilst concerned with justice justifies a pragmatic approach by the Court to achieve the objective...

(c) The Court should avoid the slavish application of individual rules, practice directions or Protocols if such application undermines the overriding objective.

(d) Anecdotal information about the effectiveness of the Pre-Action Protocol process in the TCC is mixed. It is recognised as being effective both in settling disputes before they even arrive in the Court and narrowing issues but also as being costly on occasion and enabling parties to delay matters without taking matters very much further forward.

(e) Whilst the norm must be that parties to litigation do comply with the Protocol requirements, the Court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of costs orders."

Accordingly, having considered the situation as a whole, the Judge dismissed the application. He did not consider that the protocol process would be sufficiently productive to justify a stay because:

(i) Hoare Lea already had the relevant pleadings from the earlier action. Therefore there had already been an exchange of information;

(ii) Bilateral discussions between Hoare Lea and Orange would not narrow issues significantly because Orange's published primary case was not against Hoare Lea;

(iii) A settlement was much more likely if all parties participated in the ADR planned for the spring. A timetable could be set up now to enable that to happen. This chance might be lost if there was a stay;

(iv) Little in terms of time or costs will be saved by embarking upon the protocol process. That said, the Judge reserved any application for additional costs for the future.

Finally, the Judge noted that although Orange had not complied with the Protocol, that failure had not been "contumelious or Machiavellian". The Judge also dealt with the question of the costs of this application. The Judge was concerned about the failings of Orange and thought that Orange could have told Hoare Lea about the potential claim earlier. There were also delays by Orange in relation to the procedural elements of this application. Accordingly, the Judge was of the view that Orange should pay their own costs and one third of the costs of Hoare Lea. This reflected the likely increase in Hoare Lea's costs occasioned by Orange's procedural failings.

Public procurement - European Community Rules

n EMM G Lianakis AE and Others v Municipality of Alexandroupolis

This was a European case about Article 36(2) which provides that:

"Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance".

Here, the Council had invited tenders and had set out in the contract notice the award criteria in the order of priority. The list was (i) proven experience on projects carried out over the last three years (ii) manpower and equipment and (iii) the ability to complete the project by the anticipated deadline. Thirteen consultancies responded. During the evaluation procedure, the committee in charge of the appointment set weightings of 60%, 20% and 20% for each of the three award criteria. It also stipulated that experience should be evaluated by reference to the value of completed projects. It awarded similar ranking points for the other criteria. However, the stipulation of the weighting factors and sub-criteria was only made at a later date.

The Greek court asked the European Court whether Article 36(2) precluded a contracting authority from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or notice. The European Court noted that contractual authorities are required to ensure that there is no discrimination between different service providers. Therefore, where a contract is to be awarded to the economically most advantageous tender, a contracting authority must state in the contract documents the award criteria which intends to apply. Potential tenderers must be in a position to ascertain the existence and scope of the criteria elements when preparing their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria which it has not previously brought to the tenderers' attention. Tenderers must be placed on an equal-footing throughout the procedure which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities. Here, the projects award committee referred only to the award criteria and only later after submission of the tenders stipulated the weighting factors. This did not comply with the Article requirements.

Payment provisions of the HGCRA

n Reinwood Ltd v L Brown & Sons Ltd

On 17 January, the employer issued a withholding notice to deduct LAD's, relying upon a non-completion certificate. On 20 January the employer, paid early the monies due under the relevant payment certificate. Three days later the architect issued an extension of time which cancelled the non-completion certificate upon which the withholding notice was based. The CA held that the employer's right to LAD's crystallised as soon as the withholding notice was given. However once the EOT was given, the monies ought to be re-paid within a reasonable time.

The contractor appealed to the HL as the matter had a bearing on whether or not the contract had been properly terminated. There was no doubt that if the January extension had been granted after the final date for payment, the employer's deduction of the LAD's based on the December non-completion certificate would have been unassailable as that certificate would not have been cancelled by the EOT award. The problem here was the fact that the January extension was granted after the date of issue of the interim certificate, but before the final date for payment.

The HL said that whilst the effect of the January extension was to cancel the non-completion certificate, that cancellation was not retrospective in its effect. Thus, in making a payment before the January extension was granted, the employer was entitled to rely on that certificate. In part this was for policy reasons. Under the HGCRA, the parties are entitled to know in advance where they stand vis a vis payment issues. Otherwise, not merely could neither party rely on a valid withholding notice as being conclusively determinative of any obligations with regard to payment of an interim certificate, neither party could even rely on an actual payment, correct at the time it was made, as being effective. To hold otherwise, would be unfair on an employer who could be deemed to have underpaid due to an event which occurred after payment. The contractor's position was also protected as the other effect of the January extension was that the employer had to repay the amount deducted. In the view of the HL, the HGCRA would apply here, which meant that the amount to be repaid would become due after 7 days, with the final date for payment being 17 days later. Lord Walker said this:

"All these provisions are aimed at letting the parties know where they stand, in order to avoid unpleasant last-minute surprises and disputes. Parties cannot know where they stand if their obligations are liable to be changed at the last moment, with retrospect effect."

***Dispatch* is produced monthly by Fenwick Elliott LLP, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.**
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