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Dispatch

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

Adjudication - same dispute

■ **PT Building Services Ltd v ROK Build Ltd**

[2008] EWHC 3434 (TCC)

ROK resisted enforcement of an adjudicator's decision. When PTB started adjudication proceedings, ROK took a number of points on jurisdiction including that there was no dispute. The adjudicator rejected those arguments and decided that ROK should pay the sum of some £314k. ROK paid the adjudicator his fees. PTB were concerned that ROK's jurisdictional challenge would be the source of considerable argument and expense in the court proceedings. PTB therefore issued a new notice of adjudication and applied for and obtained a new adjudicator. ROK objected on the basis that the exact same dispute had been the subject of a previous adjudication commenced by PTB. The second adjudicator resigned. PTB therefore sought to enforce the first decision. PTB said that by taking the benefit of the adjudicator's decision and using it to persuade the second adjudicator to resign, ROK could no longer assert that the first decision was not valid and binding. PTB also relied on the fact that ROK had paid the adjudicator's fees. ROK said that they had reserved their position in the second adjudication. They said the payment of the adjudicator's fees was made by mistake. That payment could not be said to be taking any benefit from the decision.

In the view of Mr Justice Ramsey, a party cannot both assert that an adjudicator's decision is valid and at the same time seek to challenge the validity of the decision. The party must elect to take one course or the other. The Judge recognised that the commencement of the second adjudication caused a difficulty for ROK in relation to any challenges it wished to make in relation to the first decision. However, ROK had to elect whether to argue that the first decision was unenforceable so that it would not preclude PTB from starting the second adjudication or whether to argue that it was enforceable so that it would preclude a second adjudication. ROK chose the second alternative. In doing so, it meant that ROK had elected to treat the first decision as valid. Therefore, the Judge did not consider that ROK could now seek to challenge the validity of the decision in the enforcement proceedings.

In relation to the payment of the fees, the Judge concluded that in the absence of any circumstances indicated to the contrary, by making the payment of these ROK elected to treat the decision of fees and expenses being a valid decision, at least to that extent.

ROK had also argued that the failure by PTB to provide copies of the relevant construction contracts with the Referral Notice meant that PTB were in breach of the paragraph 7(2) of the Scheme. Mr Justice Ramsey said that it was undesirable that every breach of the terms of the Scheme, no matter how trivial, should be seized upon to "*impeach the process of adjudication*" and that "*to do so would increase the tendency of parties to take a fine tooth-comb to every aspect of the adjudication in the hope of finding some breach of the Scheme …*". Here, the Judge did not consider their failure to include the relevant construction contracts until a day later was so deficient that it effected the validity of the adjudication process.

Case update - was there a contract?

■ **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG**

[2009] EWCA Civ 26

We reported on this case in Issue 96. Here, the parties had, (not untypically), decided to start work before the terms of their contract had been agreed but on a presumption that ultimately terms would be finalised. There was a dispute as to what, if any, those terms were. The Judge at first instance held that there was a contract, but not one which incorporated the standard MF/1 conditions. The CA disagreed.

At first instance, RTS had said that its primary case was that the correct interpretation was that the parties were working under the terms of a Letter of Intent even though the period fixed by that letter had expired. In the CA, the main (and largely new) argument put forward by RTS was that there was simply no contract concluded or if there was a contract, it incorporated the MF/1 conditions, including a cap on their liability equivalent to the price. The CA allowed RTS to make this new case on the basis that before the Judge at first instance could have decided what, if any, contract had come into existence, the Judge would have had to consider whether any contract came into existence at all. In the CA, RTS focused on Clause 48 of the MF/1 conditions which had been agreed between the parties. This stated that the contract would not become effective until each party had executed a counterpart and exchanged with the other. The contract was not executed and no counterparts were exchanged. This meant that there would need to be a full hearing as to whether or not there was any entitlement on a quantum meruit basis, for RTS to be paid.

Adjudication - Company Voluntary Arrangements or CVA's

■ **Mead General Building Ltd v Dartmoor Properties Ltd**

[2009] EWHC 200

Mead sought to enforce an adjudicator's decision of £332k. Dartmoor resisted on the basis that, as Mead was subject to a CVA, a stay should be granted on any judgment otherwise awarded to Mead. Mr Justice Coulson refused. There was no previous authority dealing with the point, but the Judge decided the following principles were relevant:

(i) the fact that a claimant is the subject of a CVA will be a relevant factor for the Court to take into account when deciding whether or not to grant a stay of execution of the judgment;

(ii) however, the mere fact of the CVA will not of itself mean that the Court should automatically infer that the claimant would be unable to repay any sums paid out in accordance with the judgment, such that a stay of execution should be ordered;

(iii) The circumstances of both the CVA and the claimant's current trading position will be relevant to any consideration of a stay of execution;

(iv) It is also relevant as to whether or not the claimant's financial position and/or the CVA is due, either wholly or in significant part, to the defendant's failure to pay the sums awarded by the adjudicator.

In this case, Mead's current financial position was that, despite the difficulties created by the non-payment of the adjudicator's decision, Mead was continuing to trade successfully. There was clear and cogent evidence that Mead's financial difficulties began when Dartmoor started to pay less than what was being claimed and in some instances made no payments at all. The Judge accepted Mead's evidence that Dartmoor's failure to pay was the principle reason for Mead's financial difficulties.

Further, the CVA's supervisor provided evidence that he believed Mead could trade successfully out of their temporary difficulties. Therefore, there was no reason to believe that Mead would not be in a position to pay back any part of the judgment sum if, in a subsequent arbitration, the arbitrator concluded that they had been overpaid. As Mead's financial difficulties had been caused and/or contributed substantially to, by Dartmoor, the court was not prepared to grant a stay of execution on the basis of those financial difficulties.

Arbitration - Part 36 Offers

■ **F Ltd v M Ltd**

[2009] EWHC 275 (TCC)

Here, F challenged an arbitration award on the basis that the Tribunal decided various points against it on grounds of its own devising, without giving F the opportunity to make any submissions on these matters. F said that this was unfair in accordance with Section 68(2)(a) of the 1996 Arbitration Act, which refers to challenging proceedings on the grounds of "serious irregularity". Unusually, one of the three members of the Tribunal disagreed with the majority on three points and delivered a detailed dissenting opinion. Frelied heavily on that opinion.

Mr Justice Coulson noted that whilst the existence of a dissenting opinion was irrelevant to any application under s68, a comment or observation in a dissenting opinion, to the effect that an important point has been decided by the majority without reference to the parties, would be a factor to which the Court would attach weight in dealing with such an application. However, it was unlikely that on its own it could prove determinative. Alternatively, where any argument raised by the dissenting arbitrator is one which is plainly being considered and rejected by the majority, even if it was an argument that the parties did not themselves raise, it may be difficult to say that there was a substantial injustice to the parties. It is not enough that there was a serious irregularity, that irregularity must have caused a substantial injustice.

F had made its claim on three items, one of which went to costs. It succeeded on one, which meant that that point as well as the decision on costs, which was parasitic on the level of F's recovery overall in the arbitration, was remitted back to the Tribunal. The Court then had to consider the costs of the application. First of all, the Judge considered F's degree of success in the hearing. F had been successful, but not entirely. Therefore the Judge indicated that he would have made an Order that M had to pay a percentage of between 50-70% of F's costs. However, pursuant to CPR Part 36, F had made an offer proposing to abandon the point (which ultimately it lost) but seeking agreement from M to remit the other two points (on which it won) to the Tribunal. This offer was reflected in the decision made by the Judge.

Therefore, the Judge said that in those circumstances, F was entitled to say that it had won entirely because of its Part 36 offer. The offer was designed to avoid the Court hearing. Accordingly, F was entitled to the entirety of its costs on an indemnity basis from the last date upon which the Part 36 offer could have been accepted.

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