Fenwick Elliott
Solicitors

Dispatch

Issue 106
April 2009

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

Adjudication - reasons

■ **Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd**

[2009] EWHC 408 (TCC)

We looked previously at the question of an adjudicator having to give reasons, in the *CSC Braehead* case in Issue 99. Here, Thermal was engaged as a sub-contractor by AE&E to carry out mechanical services on a power station project. Thermal alleged that AE&E had failed to pay it for certain works and referred the dispute to adjudication. The sub-contract incorporated the TeCSA adjudication rules. In accordance with paragraph 31, the parties requested the adjudicator to give reasons for his decision.

AE&E raised a defence by way of set-off and/or counterclaim seeking £3.75million arising from Thermal's alleged failure to achieve completion by the agreed date. The adjudicator, in a 23-page decision, found in favour of Thermal in the sum of £905k. AE&E failed to pay, which lead to enforcement proceedings before HHJ Davies QC. AE&E claimed that the adjudicator had failed to give reasons for his decision in relation to its set-off/counterclaim defence. Following the *Carillion v Devonport* case, the Judge noted that the correct test was that AE&E would need to show both that the reasons were absent or unintelligible and that as a result it had suffered substantial prejudice. The Judge said that:

"An adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the adjudicator has decided and why."

Here the Judge noted that there was simply no express reference at all to the set-off defence being one of the issues which the adjudicator recognised he had to decide. This left the question of prejudice. AE&E said that it was unclear whether or not the adjudicator had considered the set-off defence on its merits. Thus it had lost the opportunity of having that defence dealt with, and had lost the prospect of the adjudicator deciding that point in its favour. If AE&E had to start a further adjudication to seek to recover its losses, first it would have have to comply with this decision and second there was a risk that a second adjudicator might decline to act on the basis that the point had already been decided. Therefore there was a substantial injustice and the decision was not enforced.

Arbitration - formalities when commencing a reference

■ **Bulk & Metal Transport (UK) LLP v VOC Bulk Ultra Handymax Pool LLC**

[2009] EWHC 288 (Comm)

Under s14 (4) of the 1996 Arbitration Act, parties are free to agree the method of commencing arbitration but in the absence of agreement, where the arbitrator or arbitrators are to be appointed by the parties, arbitration is commenced when:

" one party serves on the other notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter …".

Here, solicitors for B&M wrote to VOC stating that:

"...there remains an outstanding sum of [$162k] due to our clients...we are instructed to notify you that failing payment ...within 7 days ...we are instructed to commence arbitration against you ....Further in the absence of agreement to settle this outstanding claim we hereby invite you ...to agree one of these following arbitrators... as sole arbitrator."

As VOC did not pay or agree to appoint a sole arbitrator, the solicitors sent a second letter noting that:

" we are now instructed to appoint our client's arbitrator in order to commence arbitration proceedings...we hereby give you notice of our appointment of ...."

The arbitration tribunal ruled that the first letter was a demand for payment and only in default of that demand were the solicitors instructed to commence arbitration proceedings. This meant that it was not a valid notice and, more seriously, that the claim was time-barred. However, on appeal to the Commercial Court, HHJ Mackie took a different view. He said that s14 should be interpreted in a "*broad and flexible way*". What was important was not whether a notice contained a particular form of words but whether it made it clear that the arbitration agreement was being invoked and that a party was required to take steps accordingly. Here the first letter actually made it clear that it was invoking the arbitration agreement. For example, it required VOC to agree to appoint an arbitrator. The Judge did not think that the second letter changed this, as the commencement of arbitration proceedings was to be distinguished from taking steps to constitute the tribunal.

Practical Completion

- **Menolly Investments 3 Sarl & Anr v Cerep Sarl**

[2009] EWHC 516 (Ch)

Menolly and Cerep had entered into a Share Sale Agreement under which Menolly would purchase sales in a company which owned a building at 107 Cheapside, London. However, completion of that agreement was dependent upon practical completion under the building contract. Before Mr Justice Warren, there was brief discussion about the meaning of the words "practical completion". Although the Judge agreed with the comment in Keating on Construction Contracts that *"practical completion is perhaps easier to recognise than to define*", there did appear to be a large measure of agreement between the parties that practical completion meant "*complete for all practical purposes*".

Menolly said that the practical completion certificate in relation to section 1 of the building was invalid because there had been a failure to provide level access to the retail units as required by the provisions of the disability discrimination legislation. The certifier had taken the view that level access was not a requirement of the building contract. However, in the view of the Judge, the works necessary to provide level access were part of the contractor's contractual obligations. As the certifier, under the terms of the contract was not able to make a binding decision, his view was open to challenge, as here, before the courts.

However, that was not an end to the matter as Cerep also claimed that Menolly was estopped from relying on the level access issue certificate. Cerep said that the issue of level access had never been raised until very late in the day in the Court proceedings. Menolly had in fact conducted itself throughout the period on the basis that the relevant section had achieved practical completion. It thereby represented to Cerep that practical completion had in fact been achieved and that the absence of level access did not prevent the issue of a valid certificate. The Judge agreed that the level access point only came to light late in the day. For example, there had been an inspection for the purposes of certifying practical completion. There was nothing to suggest that the question of level access was raised as an objection to the issuing of a certificate at that time. Accordingly, it appeared to the Judge that the certifier was entitled to proceed on the basis that the level access was not an impediment to the issue of a certificate. The parties had conducted on the basis of mutual understanding that practical completion had been achieved.

This was not enough for Cerep's argument to succeed as they also had to demonstrate that they had suffered prejudice through relying on Menolly's failure to raise the level access point. This they clearly did, as Cerep had proceeded on the basis that the first section was "done and dusted". As a consequence, as the building work continued, it was clearly prejudicial to Cerep that they had not had the opportunity to meet the level access point in good time, for example by actually providing the level access themselves or referring the dispute at an earlier stage to adjudication.

As a consequence, Menolly were under an obligation to complete the Share Sale Agreement.

Adjudication - Residential occupier

- **Shaw & Anr v Massey Foundation & Pilings Ltd**

[2009] EWHC 493 (TCC)

The Shaws engaged Massey to carry out building works to their property. They lived in a large country house. The works were carried out to a building known as the East Lodge, a separate building some distance away from the main house. Disputes arose, which were referred to adjudication. The Shaws argued that they were residential occupiers. The adjudicator disagreed, the Shaws refused to pay and the matter ended up before Mr Justice Coulson. Pursuant to s106, the adjudication provisions of the HGCRA, do not apply to a construction contract with a residential occupier. However, that construction contract must principally relate to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence.

Here, it was found that the East Lodge was a separate building. It was not lived in by either of the Shaws. At best, at a date sometime after the contract, one of them may have intended to live there. However, what mattered was the parties' intentions at the time of the contract. The Shaws noted that, in the relevant Land Registry entry, the entirety of the property, including the main house and the East Lodge was referred to as one building. However, what mattered, was not how the Land Registry had registered the Title, but whether the Shaws were residential occupiers of East Lodge. They were not.

Mr Justice Coulson commented that if someone could no longer afford to live in a terraced house, but spent money on a conversion of the house into three small flats, one of which they intended to live in, with the other two being sold or rented, the s106 exemption would not apply here either, because of the commercial element of the works. S106 refers to a single dwelling house or flat and the specific intention to occupy that dwelling or flat as one's residence.

***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.**
***Dispatch* is a newsletter and does not provide legal advice.**

Fenwick Elliott
Solicitors

Aldwych House
71-91 Aldwych
London WC2B 4HN

T +44 (0)20 7421 1986
F +44 (0)20 7421 1987
Editor Jeremy Glover
jglover@fenwickelliott.co.uk
www.fenwickelliott.co.uk