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The construction law specialists

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Dispatch

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

Waiver of condition precedent clauses

City Inn Ltd v Shepherd Construction Ltd - Part 2
[2010] ScotCS CSIH 68

We reviewed the Scottish Court of Appeal's comments about concurrency last month. Another issue which arose in the City Inn case related to clause 13.8 which contained a time bar clause, requiring the contractor to provide details of the estimated effect of an instruction within ten days. The Judge, at first instance, characterised the clause thus:

"I am of opinion that the pursuers' right to invoke clause 13.8 is properly characterized as an immunity; the small defenders have a power to use that clause to claim an extension of time, and the pursuers have an immunity against that power if the defendants do not fulfil the requirements of the clause."

Shepherd had provided a timely, but non-compliant notice. However, the Judge had held that this did not defeat Shepherd's claim. This was because, whilst the employer (in discussions with the contractor) and the architect (by issuing delay notices) had both made it clear that the contractor was not getting an extension of time, neither gave the failure to operate clause 13.8 as a reason. They therefore waived their right to object on this basis at court.

City Inn's appeal was dismissed on this issue as well. As a first point, the Scottish CA agreed that it was possible for City Inn to waive its right to rely on the time bar clause. Under clause 13.8, the employer enjoyed the benefit of a provision which was designed to provide a degree of protection against the (often unforeseen) consequences of a variation.

That said, the CA also decided that the architect did not have implied authority to waive, on behalf of City Inn, the right to rely on the time bar clause. This was because clause 13.8 was more than a procedural provision. The time bar clause was therefore said to have a substantive effect.

The CA then considered what had happened at the meetings in question. The CA was quite clear that the issue of delay was discussed at the meeting and further it was quite clear that although there was discussion about the merits of that claim, there was no discussion about the possible invocation of the time bar clause.

Accordingly, the CA concluded that the representatives of City Inn who attended the meeting would be presumed to be aware of the terms of the contract and their silence in relation to the time bar point could (and did) amount to a waiver of the time bar clause.

Finally the CA had to consider whether Shepherd had acted in reliance on the waiver. The CA held that it was not necessary for a party relying on waiver to show that it had suffered any prejudice; it was sufficient for it to have acted in accordance with the waiver. And that is what had happened here, Shepherd simply continued to maintain their claim in the usual way, despite the fact that had the time bar clause been operated, that claim would have been barred from the outset.

Amongst the other points appealed by City Inn was the suggestion that an architect must generally be deemed to know all the terms and provisions of the contract. The Scottish CA did not find this ground of appeal attractive either. They agreed that an architect is responsible for a wide range of decision making in connection with the administration of the contract, therefore that same architect must generally be presumed to know the terms of a contract for the operation of which they were responsible.

Arbitration - appointment of arbitrators

Jivraj v Hashwani
[2010] EWCA Civ 712

The parties here entered into a joint venture agreement to invest in real estate property in various parts of the world including Canada. The agreement included an arbitration clause stating that any dispute, difference or question arising between the investors would be referred to arbitration. The arbitration was to take place in London. The parties terminated their venture and the matter was referred to arbitration. Mr Hashwani appointed Sir Anthony Coleman as arbitrator and asked Mr Jivraj to appoint an arbitrator. There would then have been a third appointment as chairman of the arbitration panel. However, Mr Jivraj said that Sir Anthony Coleman's appointment was invalid because of the terms of the arbitration agreement. The arbitration agreement required that the dispute would be referred to three arbitrators, one to be appointed by each party and the third to be the president of the H.H. Aga Khan National Counsel for the United Kingdom. However, the clause went on to state in its final sentence:

"All arbitrators shall be respected members of the Ismaili community and holders of high office within the community."

Mr Jivraj sought a declaration that the appointment of Sir Anthony Coleman was not valid because he was not a member of the Ismaili community. The key issue before the CA was whether the agreement (although lawful when it was made) had become unlawful and void because it contravened the Employment Equality (Religion and Belief) Regulations 2003, and the Human Rights Act 1998.

The Regulation arose from an EU Directive concerning discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Regulation was aimed at making void agreements which sought to refuse or deliberately omit to offer employment on the grounds of religion or belief.

The CA considered that the arbitration clause restricted the offer of employment as arbitrator purely on religious grounds. It was therefore void. The second question was whether that final sentence in the arbitration clause could be severed, so leaving the rest of the arbitration clause intact. The Court of Appeal came to the view that if they simply deleted the final sentence then the agreement would be substantially different from that which had been originally intended. As a result, the arbitration clause was void in its entirety.

Tenders - rectification and unilateral mistake

Traditional Structures Ltd v HW Construction Ltd
[2010] EWHC 1530 (TCC)

Traditional Structures submitted a tender for the supply and installation of structural steelwork and roof cladding at a new business centre in Sutton Coalfield. It provided a price for each element. There were two versions of the tender, and they were identical except that one did not contain a reference to the price for cladding. HW Construction accepted all the works for a total of approximately £38k. HW Construction maintained that that was the contract sum whilst Traditional Structures said that it was obvious that the figure related to only one part and that the cost the cladding was a further £32k.

The main issue was whether the subcontract should be rectified on the grounds of a unilateral mistake in order to include the missing reference to the cladding in the quotation. In other words should the price be increased (so rectifying the mistake) or was the subcontractor bound to carry out the work for the price recorded on the face of the subcontract.

The Judge decided that that subcontract should be rectified in order to add in the missing line containing the price for the cladding. The traditional view has been that a party is held to the price that they submit for the works. A unilateral mistake is very rarely invoked in order to try to rectify mistakes. A claimant needs to prove that both parties to the contract clearly knew that the written contract was wrong. Here, the Judge decided that the managing director of the contractor would have known about the mistake because it was obviously inconsistent with the information exchanged between the parties. Consequently, the Judge considered that any reasonable reader of the tender would know that the figure put forward related only to the structural steelwork.

In coming to this decision HHJ Grant considered three possible degrees of knowledge on the part of that contractor - (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; or (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. On the facts, the Judge considered that the contractor "wilfully and recklessly failed to enquire" as to whether the price included the cladding works and any honest and reasonable person would have questioned this.

The contractor clearly shut his eyes to the obvious and so had actual knowledge of the mistake. This was unconscionable and so the contract should be rectified.

In addition, even if the subcontract had not been rectified, the Judge considered that Traditional Structures would have been entitled to be paid a reasonable price for the works under s15 of the Supply in Goods and Services Act 1982. So in any event they would have been paid a reasonable price for the carrying out of the cladding and the structural works.

Adjudication - reserving jurisdiction

Aedifice Partnership Ltd v Shah
EWHC 2106 (TCC)

Here, where there was a dispute about whether a party had adequately reserved its right to object to an adjudicator's jurisdiction, Mr Justice Akenhead set out the following advice:

"(i) An express agreement to give an adjudicator jurisdiction to decide in a binding way whether he has jurisdiction will fall into the normal category of any agreement; it simply has to be shown that there was an express agreement;
(ii) For there to be an implied agreement giving the adjudicator such jurisdiction, one needs to look at everything material that was done and said to determine whether one can say with conviction that the parties must be taken to have agreed that the adjudicator had such jurisdiction…;
(iii) One principal way of determining that there was no such implied agreement is if at any material stage shortly before or, mainly, during the adjudication a clear reservation was made by the party objecting to the jurisdiction of the adjudicator;
(iv) A clear reservation can, and usually will, be made by words expressed by or on behalf of the objecting party. Words such as "I fully reserve my position about your jurisdiction" or "I am only participating in the adjudication under protest" will usually suffice to make an effective reservation; and
(v) A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation of any sort…."

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com

Tel: + 44 (0) 207 421 1986
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London , WC2B 4HN
www.fenwickelliott.com