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Dispatch

Issue 99
September 2008

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

Adjudication

■ **CSC Braehead Leisure Ltd and Anr v Laing O'Rourke Scotland Ltd** **ScotCS CSOH 119**

Braehead claimed that Laing, had caused or contributed to the collapse of a ceiling in an Odeon Cinema. On 23 January 2008, Braehead referred the dispute to adjudication. The time for the issuing of the decision was extended until noon on 7 April 2008. By email timed and dated 11.56am on 7 April, the adjudicator issued his decision. A signed version of the final document was issued on 10 April 2008. Laing said the decision was invalid.

When the adjudicator emailed his decision, in which he held that Laing were in breach of contract, he said that he envisaged some minor further written procedure to take account of a matter touching on overall quantum. In fact, he sought comment from the parties by 11 April in relation to this discrete issue. If there was agreement, so much the better, but if there was not, the adjudicator said he would work further on any submissions received. Laing immediately said that as the adjudicator had failed to issue a proper decision by noon, the mandatory period for a decision had expired and the adjudicator's jurisdiction had come to an end. Laing were not prepared to agree any further extension. In correspondence with Laing, the adjudicator referred to his award being an "interim award". Laing replied that a proper decision should have been issued by the 12noon deadline. An adjudicator has no power to make an interim decision and was obliged to reach his decision within the time limited as extended. The adjudicator did not determine the dispute referred to him but left certain matters to be determined at a later date.

Braehead said that the adjudication procedure was intended to be flexible, and that the adjudicator could make interim directions. Directions might be issued at any stage and were not confined to procedural matters. While it is clear there must be one final decision dealing with all matters, there was no reason why the adjudicator could not issue his decision in part. The adjudicator was clearly aware of the timescale and regarded his decision as final. The adjudicator clearly intended to produce a document which would fulfil the obligations incumbent on him. There was no obvious reason why en route to the final decision, the adjudicator should not make an interim or partial finding. Looking at the decision as a whole, the final document did constitute the adjudicator's final decision as required by the contract.

Where the adjudicator knows that the time limit is about to expire then maybe all that could be done is for him to give the decision his "best shot". The only issue causing the adjudicator concern was whether a particular item should result in any deduction. The actual finding was for the minimum amount which the adjudicator considered to be due. Lord Menzies noted that there were difficulties of expression in the adjudicator's decision. The adjudicator acknowledged that he could not reconcile one figure with another and sought further statements. The adjudicator also delayed apportioning his expenses.This might tend to suggest that this was not a final decision.

However, looking at the document as a whole, the Judge reached a view that the adjudicator intended it to be his final decision. The findings with regard to liability were conclusively stated. The adjudicator noted that he was satisfied he had sufficient information to allow him to make a decision on quantum. He then went on to express a concern about one aspect of quantum, which may have resulted in a deduction. That concern was directed to 10% of the value of the claim. What the adjudicator had done was find in favour of Braehead for the minimum sum which could possibly be due. He was aware of the time limits but offered to refine that decision if the parties agreed to an extension of time to let him do this. The amount which he found in favour of Braehead was the bottom line below which he was not prepared to go. Therefore the decision could be enforced.

There was also a bespoke amendment to the contract which stated that:

"The adjudicator shall determine the matters in dispute in accordance with the law and the terms of the contract, applying the normal standards of proof applicable to civil disputes."

Laing said this imposed an onerous duty on the adjudicator, requiring him to find evidential proof on the balance of probabilities. Laing said that the adjudicator had failed in this duty. Lord Menzies said, that challenges such as this to an adjudicator's decision can only succeed if his reasons are "*so incoherent that it is impossible for the reasonable reader to make sense of them*". Here, the Judge noted that the adjudicator's reasons were at times briefly stated and "*somewhat opaque*" but he did not consider it was impossible to make sense of them. Of course, whether the decision was correct or not, was not and could not be the point of these proceedings.

Adjudication

■ CJP Builders Ltd v William Verry Ltd

[2008] EWHC 2025 (TCC)

Verry engaged CJP under a subcontract to undertake brickwork, blockwork and stonework. The subcontract was based upon an Order issued by Verry incorporating DOM/2 terms and conditions and other "Sub-Contract Documents". CJP submitted an interim application for payment. It was not paid and no payment or withholding notice was issued. CJP brought adjudication proceedings and CJP served its Referral. Under clause 38A of DOM/2, the response is to be served within 7 days of the Referral. Verry requested an extension of time to serve the response. The adjudicator stated that he had no power to go behind clause 38A and that Verry was obliged to enter the response in accordance with the timetable in the contract unless the parties agreed otherwise. CJP agreed an extension of time to 12pm on 14 May 2008. Verry served the Response document at about 5.30pm on 14 May 2008. CJP submitted the adjudicator that he could not consider the response because it had not been served within the timeframe agreed between the parties. Verry disagreed. The adjudicator informed the parties that he had no discretion under the adjudication agreement in clause 38A to extend time for service of the response and would therefore not consider the Response in making his decision.

The adjudicator made his decision awarding CJP the full value of interim application. Meanwhile, Verry had started a second adjudication based upon its defence in the rejected Response concerning defects. Part-way through that adjudication, Verry attempted to abandon that adjudication but the adjudicator went on to make a finding against Verry. Verry did not honour the award in the first adjudication and CJP commenced enforcement proceedings. Verry defended these on the basis that there had been a breach of natural justice in the adjudicator not considering the Response. CJP's position was that there was no such breach but even if there had been a breach of natural justice it was not a material breach because the outcome of the second adjudication showed that Verry's defence in the first adjudication would have failed.

Mr Justice Akenhead disagreed with the adjudicator that clause 38A of the DOM/2 conditions imposed a mandatory timetable on the parties? He found that clause 38.2.5.5 gave the adjudicator an absolute discretion to set his own procedure concluding that:

"One of the entitlements of parties to an adjudication is a right to be heard, that being the rule of natural justice. There is thus a reasonable expectation of parties to an adjudication that, within reason and within the constraints of the overall requirement to secure the giving of a decision within the requisite time period, each party's submissions and evidence will be considered by the Adjudicator. It is a draconian arrangement (which the parties are of course free expressly to agree) that a party is denied its right to be heard unless it has been given a fair and clear opportunity to put its case. Very clear wording would be required to ensure that such a right was to be denied."

International Arbitration - ICSID Proceedings

■ E.T.I. Euro Telecom International NV v The Republic of Bolivia & Anr

[2008] EWCA Civ 880

ETI appealed against a decision setting aside freezing orders granted in its favour against the defendants. ETI, had a 50% holding in a telecommunications company but claimed that Bolivia had taken measures to renationalise the company, which adversely affected the value of its investment without paying fair compensation. ETI submitted its claim to the International Centre for Settlement of Investment Disputes ("ICSID") claiming that Bolivia had breached the Netherlands/Bolivia bilateral -investment treaty ("BIT").

ETI had obtained a freezing order in respect of bank deposits in New York and had sought a similar order, pursuant to s25 of the Civil Jurisdiction and Judgments Act 1982, in respect of about US$50 million held on deposit in London. The CA confirmed that ETI were not entitled to the order sought because on any view, the English proceedings were not related to, any substantive proceedings in New York, (however "liberally" those expressions were interpreted), as required by the 1982 Act. The New York attachment proceedings constituted interim relief to protect assets pending the outcome of the ICSID arbitration. They were directed solely at assets in New York. Further the 1982 Act did not extend to the making an order in support of ICSID arbitrations. Indeed, the nature of the ICSID Convention was that was that it was self-contained and provisional measures might only be sought from the ICSID tribunal itself and not a national court.

Finally, Bolivia argued that it was entitled to state immunity in that subject to limited exceptions, you could not make freezing orders against a State. The CA agreed.

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