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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Injunctions: meaning of "adequate remedy"

AB v CD

[2014] EWHC 1 (QB)

The parties entered into a licensing agreement concerning an eMarketplace – an internet-based electronic platform used internationally to buy and sell goods and services by entities involved in the mining, metals and other natural resources businesses. Clause 11.4 of this agreement limited the damages either party could recover and excluded certain heads of loss altogether, namely loss of profit. On 6 June 2013 the Defendant gave notice that it would terminate the agreement at midnight on 31 December 2013. The Claimant disagreed and expressly reserved its right to seek an injunction to stop this. On 20 December 2013, the Claimant commenced an arbitration under the LCIA Rules and applied to the Court under s.44 of the Arbitration Act 1996 for an injunction to restrain the Defendant from terminating the agreement, pending the outcome of the Arbitration.

When deciding on whether to grant an injunction, Mr Justice Stuart-Smith referred to *American Cyanamid Co v Ethicon Ltd* (1975) in which Lord Diplock had held that the guidelines when making an order for an injunction include:

(i) whether there is a serious question to be tried;

(ii) whether damages would be an adequate remedy;

(iii) what would be the balance of convenience of each of the parties should an order be granted; and

(iv) whether there are any special factors.

The issue in this case principally concerned the meaning of "adequate remedy": does it mean full compensation for what had been lost or something that might be less than this, yet regarded as adequate in the eyes of the law? Lord Diplock said:

"the governing principle is that the court should first consider whether … he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

The Claimant submitted that if the termination went ahead, its business would cease to exist as it would lose its only source of income and therefore it would not be able to fund the costs of the arbitration. It submitted that the fact that the parties had entered into an agreement which limited the recovery of damages should not prevent the Court from looking objectively at whether those recoverable damages amount to full compensation. The Claimant asserted that it would not be able to recover "adequate damages" because its main head of claim would be for loss of profits, which is or may be excluded by clause 11.4. The Claimant urged the Court to follow the CA's approach in *Bath and North East Somerset DC v Mowlem plc* (2004) and grant the injunction.

In *Bath*, the parties had an agreed LADs clause in the contract: £12,000 per week was the genuine pre-estimate of full compensation. The CA upheld the injunction, recognising that it may be difficult to assess the totality of any likely loss before the event and that such an assessment (the agreed LADs rate) *"may prove in the event not to give rise to adequate compensation, so that to leave a party to a claim in damages may mean that it will suffer loss which the grant of an interlocutory injunction would completely avoid".*

Mr Justice Stuart-Smith noted a tension between the decision in *American Cyanamid*, as applied by the CA in *Bath*, and the approach suggested in *Vertex Data Science Ltd v Powergen Retail Ltd* (2006), as applied in *Ericsson AB v Eads Defence and Security Systems Ltd* (2009). In *Ericsson*, there was a limitation of liability clause. Ericsson argued that termination would have a seriously adverse effect on its business. Nevertheless, Mr Justice Akenhead refused the injunction as he *"[could not] see that it is unjust that a party is confined to the recovery of such damages as the contract, which it has entered into freely, permits it to recover".*

Mr Justice Stuart-Smith held that the distinction between the authorities boils down to what the intention of the parties was when they entered into the contract. In *Bath*, the agreement and intention was that the Council's losses should be fully compensated (via the LADs clause) while in *Ericsson*, the agreement and intention was that the relevant heads of damage should not be compensable.

Applying this approach, Mr Justice Stuart-Smith refused the Claimant's application for an injunction on the basis that the commercial expectations of the parties were set by the package of rights and obligations that constituted the agreement (namely clause 11.4). Damages were therefore an adequate remedy. However, he admitted to "a degree of unease at the result" which stemmed from the authorities he considered in his judgment. He had a "nagging doubt" that the approach that he had adopted "may be too inflexible in a case such as the present".

Accordingly, Mr Justice Stuart-Smith awarded permission to appeal as the point potentially had wider implications.

Adjudication: natural justice

Roe Brickwork Ltd v Wates Construction Ltd

[2013] EWHC 3417 (TCC)

Roe was a brickwork subcontractor for the construction of three blocks of flats on the Ocean Estate in Tower Hamlets, East London. Roe claimed that its work had been delayed by about six months and that, as a result, it had suffered significant loss and expense. The claim included, amongst others items the following:

(i) additional preliminaries and loss of overheads and profit ("OHP") in the sums of £52k and £121k;

(ii) loss of productivity, broken down by various causes in the sum of £465k;

(iii) additional supervision and management costs of £122k.

The adjudicator did not decide that a particular sum was due to the Claimant. What he did was to assess the value of the claims referred to him, which he valued at £381,459.75, plus interest. He assessed the OHP by increasing the amounts awarded in respect of the other heads of loss by 13%. Wates said that the adjudicator did not have jurisdiction to assess the OHP in the way that he did or alternatively that to adopt the approach he did without allowing the parties an opportunity to make submissions on it was a breach of natural justice which had a significant or material impact on his finding as to the value of the claim. As Mr Justice Edwards-Stuart said of adjudication enforcement cases:

"It is, I think, fairly obvious that a conclusion as to whether or not there has been a breach of natural justice is one that in the great majority of cases will be very fact specific."

This case is a further example. Here Wates accepted that there was a dispute as to whether or not Roe was entitled to recover loss and/or expense on the basis of the contracted Daywork rates. The parties agreed (contractually and within the adjudication) that the contracted Daywork rates were "all-inclusive" and that included OHP. Wates said that this meant that the adjudicator had the following options:

(i) he could determine the number of hours for which Roe was entitled to recover loss and/or expense, decide that the Claimant should recover overhead and profit and apply the all inclusive contractual Daywork rates;

(ii) he could determine that Roe was entitled to recover its actual costs only and ascertain what those costs were; or

(iii) he could decide that Roe was entitled to recover its costs together with a contribution to OHP and identify the costs and make an allowance for that OHP.

Wates said that what the adjudicator was not entitled to do was to identify the number of hours, apply the contractual all inclusive Daywork rates and then add an allowance for overhead and profit. He did not have the jurisdiction to take such an approach.

Roe's answer was that it had claimed OHP in addition to its losses calculated by reference to the Daywork rates, and its entitlement to do so had been very much in issue. All that happened was that the adjudicator decided that Roe was entitled to recover OHP in addition to the losses based on the Daywork rates and then he calculated it in a slightly different way and in an amount which was actually considerably less than the sum claimed by the Claimant. Instead of using the Hudson formula, the application of which Wates had disputed, the adjudicator applied an uplift to the losses that he considered Roe had suffered.

The Judge noted that it was clear that issues relating to the validity of using Daywork Rates at all and the duplication between the Daywork Rates (if used) and the separate claim for OHP based on the "Hudson formula" were addressed in the adjudication. He agreed that the fact that the Daywork Rates were described as "all-inclusive" meant that they included an allowance for OHP.

On reflection, the Judge considered that what the adjudicator did here fell within the scope of his jurisdiction. In the adjudication, Roe had made a separate claim for OHP in addition to its claim for loss of productivity based on the Daywork Rates. The adjudicator then assessed the loss of productivity by reference to Roe's costs and added an allowance for OHP. Whilst the adjudicator did not produce a calculation that was consistent with the approach that had been adopted by Roe, his methodology differed in only one minor respect from the way the case had been presented to him. The figure of 13% was derived from material put forward by Roe and the adjudicator had substituted his figure for the 22.5% put forward by Roe. The difference in the approach adopted by the adjudicator was that he applied the 13% uplift for OHP to the figure representing the total loss of productivity, rather than to the figure arrived at by multiplying the weekly value of the total contract by the number of weeks extension of time following the Hudson formula.

The effect of the adjudicator's approach was to produce a lower figure for OHP than the sum that would have been produced using Roe's methodology. So, the result of the adjudicator consulting the parties before adopting his approach, would in the view of the Judge "probably" have been the award of a greater amount for OHP than that actually made in the Decision. Therefore Mr Justice Edwards-Stuart held that the adjudicator neither exceeded his jurisdiction nor acted in breach of the rules of natural justice but, even if he did, it had no effect on the quantum of the claim that was adverse to Wates' position. This meant that the breach - if there was one - was not a material one.

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