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The construction & energy law specialists

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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.

Compliance with procedural orders: Mitchell continued

Chambers v Buckinghamshire Healthcare NHS Trust

[2013] EWHC (QB)

In this clinical negligence case, Chambers made an application seeking an order debarring the NHS Trust from relying upon an expert's report served late on 25 November 2013, any further expert evidence and a counter-schedule of loss. The NHS Trust issued its own application seeking variation of an order for directions made on 31 May 2013, namely that:

(i) the Trust's experts reports be served by 20 December 2013;

(ii) the counter-schedule be served by 20 December 2013; and

(iii) that the time for discussions between the experts be extended.

The 31 May 2013 order for directions had provided that Chambers serve its expert reports on 19 July and 9 August 2013 respectively and the NHS Trust reports were to be served by 25 October 2013. The order also provided for experts' discussions to take place, in the case of liability experts by 27 September 2013, and in relation to condition and prognosis experts by 6 December 2013. Finally, the order required the parties to consider by 31 December 2013 whether the claim was capable of resolution by ADR and to conclude any form of ADR not less than 35 days prior to trial, that is by 27 January 2014 (assuming a trial date 3 March 2014).

On 28 August 2013 and 20 September 2013 respectively on the application of the defendant and without a hearing, orders were made varying the dates such that the time for exchange of liability expert evidence was extended to 21 October 2013 and the time for the service of the defendant's condition and prognosis otolaryngology report to 21 October 2013. The order was silent in relation to the time for experts' discussions and in relation to the service of the defendant's counter-schedule. Chambers was given permission to apply to set aside or vary that order within seven days, but no application to apply to set aside or vary was made.

The NHS Trust failed to comply with the provisions of the order of 20 September 2013 and it did not serve its evidence as required on 21 October 2013. It seems that Chambers application seeking a debarring order spurred the Trust into making its own application although it was made over a month after the deadline for the service of expert evidence.

Unsurprisingly, the Court was referred to the robust approach adopted in the recent case of *Mitchell v News Group Newspapers Ltd* (see Issue 162) and Chambers submitted that there was no good reason given by the Trust for failing to comply with the order, or alternatively no good reason for making the application over a month after the deadline for service of the evidence expired. The NHS Trust made essentially five points:

i) It pointed to an apology made by the Trust's solicitor in her witness statement;

ii) There had been difficulty in obtaining the accident and emergency records which resulted in the deadline for the exchange of expert evidence being put back which was a good explanation for the delay;

iii) There was no prejudice or jeopardy to Chambers in the late service of the Trust's evidence or in permitting late service of the Trust's evidence as the procedural timetable still had enough room to enable the consequences of the late service to be addressed;

iv) If the Trust were to be deprived of the opportunity to rely upon the expert evidence in support of its case on causation, the result would be disproportionate;

v) A distinction could be drawn on the facts of this case between a situation where a claimant felt it necessary, because of the conduct of the claim on the other side, to come to court and obtain an unless order with a clearly specified sanction. This was not the case here. The Trust had not been in breach of an "unless order" or a "final order".

Whilst Master Cook acknowledged that certain parts of the application were finely balanced, in relation to the third point the court held that the procedural timetable, following exchange of expert evidence, was designed to enable settlement meetings or ADR to take place and the possibility of effective part 36 offers to be made before trial. In these circumstances there may well be prejudice to a claimant if this period is unnecessarily foreshortened.

In response to the fourth point, the Court stated that this was "a fact of life in the post-Jackson world". Similarly, the Court was not impressed with the last submission, emphasising that the deadline had already been extended three times and the application for relief was made after expiry of the deadline, both important and relevant considerations for the Court. Finally, the Trust referred to the concept of proportionality which remains at the heart of the Court's consideration. However, here the Court, concluded that unless the Court is robust in relation to its process, the culture of delay and non-compliance with orders, will continue.

Accordingly it was Chambers' application that succeeded.

Fees and bespoke consultants' appointments

Pickard Finlason Partnership Ltd v Lock & Anr

[2014] EWHC 25 (TCC)

Here Pickard Finlason Partnership ("PFP") was employed to provide a full professional service in relation to the design and construction of a development in Cheshire. In return, they would receive 10% of the final cost of the project. The parties did not contract on the RIBA standard form of appointment – bespoke terms were created and tailored to the particular client and project. The fee was payable in four stages and included terms entitling them to 40% of the total fee upon planning permission being obtained and the development cost accurately established.

PFP was aware that the client required funding for the project and agreed to keep their fees low until planning was achieved and further funds raised. Accordingly, the following terms were agreed which specifically concerned the planning period:

- *"In accordance with RIBA guidelines we are entitled to 40% of our overall fee for the work up to planning determination, however for your project we recognise the need to be flexible and we therefore offer to reduce our invoicing to 20%."*

- *"Our fee entitlement remains at 40% but this proposal keeps our fee payments low during the early stages of a project. Once planning is obtained a more accurate cost of the building and contract works can be established and the professional fee entitlement and overall fee is recalculated and the balance of our fees due becomes payable. At that stage we would agree a lump sum for the remainder of our fees."*

- *"We will recalculate and re-advise you of our fee entitlement when the development area and cost become firm."*

By the time planning permission was granted, the relationship between the parties had broken down. PFP raised their invoice but the Locks did not pay. The Locks were unable to obtain funding for the revised scheme which ultimately had been granted permission. They considered that PFP had failed to give them proper advice at the relevant times about the risks and costs of this revised scheme. In addition, the Locks claimed that PFP had failed to obtain firm costs from contractors which would have enabled them to move the development forward. Ultimately, PFP commenced proceedings claiming the balance of their 40% fee.

HHJ Davies held that, on proper construction of their bespoke terms, PFP's claim failed – they were not entitled to their invoiced amount of approximately £182k. They had not established, post-planning permission, a firm and accurate cost for the building works – which was a condition precedent to rendering their invoice. The express wording of their appointment made it clear that the cost only became "firm" once the cost estimates were refined and the contract sum was known and once "*a more accurate cost of the building and contract works can be established*". It was not enough to simply revisit the cost plan and undertake any recalculation required. As PFP had not procured a tender from a contractor which the Locks were willing and able to accept, they were not entitled to present their invoice. Finally, the Judge also held that PFP had failed to comply with their obligation to provide an indication of the magnitude of the cost of the revised scheme at any time during the feasibility stage.

Case update: bonds and guarantees

Wuhan Guoyu Logistics Group Co Ltd and another v Emporiki Bank of Greece SA

[2013] EWCA Civ 1679

We have discussed this case before in Issues 145 and 150. The central question then was whether a payment guarantee was a guarantee or an "on demand bond". The CA held that it was an on-demand bond, which meant that the liability of the Bank to pay did not depend on any breach of the underlying contract. At the same time as these court proceedings were taking place, an arbitration was on foot between the Buyer and Seller (the underlying contract being in relation to shipbuilding). As the Award was not final, the Bank paid the amount due into an escrow account in the joint names of the Bank's and the Sellers' solicitors. When the Tribunal's findings did become final, prior to releasing the funds, the Bank issued an application for a declaration that following payment, the Sellers would hold the money on trust either for the Bank or for the Buyer who would in turn hold it in trust for the Bank. The Bank argued that once the Award became final, the Sellers knew that they were not entitled to the money paid. The CA held that in the case of an on-demand bond, the general principle is that the position crystallises when the relevant demand is presented and the payer can only resist payment against an apparently conforming demand if there is a clear case of fraud. The implication of a trust, impressed upon the monies received by the Sellers here under the on-demand bond, would be contrary to this general principle.

It is implicit in the nature of a performance bond that, in the absence of clear words to the contrary, when the bond is called, there will at some stage in the future be an "accounting" between the parties where the rights and obligations will finally be determined. The bond is a guarantee of due performance; not a pre-estimate of the amount of damages to which the beneficiary may be entitled in respect of the breach of contract which gave rise to the right to call the bond. If the amount of the bond was not enough to satisfy the claim for damages, the Buyer would be liable to the Seller for damages in excess of the amount of the bond. On the other hand, if the amount of the bond is more than enough to satisfy the Seller's claim for damages, the Buyer can recover from the Seller the amount of the bond that exceeds the Seller's damages.

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