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

Dispatch

Adjudication: enforcement and fraud

Gosvenor London Ltd v Aygun Aluminium UK Ltd

[2018] EWHC 227 (TCC)

Gosvenor agreed to perform certain cladding works for Aygun. Disputes arose and Gosvenor applied to enforce an adjudicator's decision in the sum of £555k. Aygun accepted that adjudicators' decisions will be enforced by the courts, regardless of errors of fact or law, but alleged fraud on the part of Gosvenor. No allegations of fraud were raised in the adjudication proceedings.

However, in the defence to the enforcement proceedings Aygun said that following enquiries "a substantial proportion" of the adjudication award was based on sums which had been fraudulently invoiced. The sums invoiced by Gosvenor for operatives simply could not reflect the amounts due, because of an "enormous discrepancy" in sums invoiced to Aygun and works actually done or labour actually provided. A valuation assessment had been performed by Aygun that showed that the very maximum of £100k of labour costs could and/or should have been invoiced, rather than the figure of over five times that. Aygun also said that they "simply" did not have the evidence to hand at the time of the adjudication to make such a serious allegation.

The Aygun claims were supported by witness statements. There was no evidence at all served by Gosvenor in response to these witness statements until after submission of the draft judgment. As Mr Justice Fraser said, not only was it far too late, it was "extraordinary". The Judge considered the principles that arise on enforcement when fraud is alleged. If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution, it must be supported by clear and unambiguous evidence and argument. Further, a distinction has to be made between fraudulent acts that could have been raised as a defence in the adjudication and those which neither were nor could reasonably have been raised but which emerged afterwards.

The Judge recognised that a particular issue for Aygun was why they had not raised some of these issues in the adjudication. For example, the valuation evidence showing the large discrepancy could have been, and the Judge thought should have been, deployed in the adjudication: "Parties to construction contracts who do not manage their own projects properly are not granted some sort of immunity in terms of adjudications, or the enforcement of adjudicators' decisions."

Therefore, the Judge granted the application for summary judgment. However, Aygun also brought an application for a stay of execution, relying on the fraud issue and the lack of financial viability on the part of Gosvenor. The Judge considered the basic principles as outlined in the *Wimbledon v Vago* case (Dispatch, issue 61) and held that there were the following "special circumstances" to justify the grant of a stay of execution:

(i) Facts relating to the alleged fraudulent acts which should have been deployed before the adjudicator.

(ii) Facts relating to the behaviour in January 2018 of Gosvenor's employees, including threats and intimidation, in relation to the enforcement proceedings.

(iii) Facts relating to the unsatisfactory and contradictory accounts of Gosvenor.

These represented an extension to the points listed in the *Wimbledon v Vago* case. However, as Mr Justice Fraser said, there was no question of fraud in that case. The Judge therefore added the further following principle:

"(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

The Judge made it clear that this item was only likely to arise in a very small number of cases, and in exceptional factual circumstances. A high test was to be applied as to whether the evidence reached the standard necessary for this principle to apply. Further, it was not intended to re-open the whole issue of the basis upon which stays of execution will be ordered in adjudication enforcement cases. Here the evidence was that Gosvenor (or those who control it) "would specifically organise its financial affairs, other than in the ordinary course of business, to ensure that the adjudication sum paid to it would be dissipated or disposed of so that any future judgment against it would go unsatisfied".

Accordingly it was appropriate to stay the execution of the adjudication decision.

Contract formation: agreeing terms

Cleveland Bridge UK Ltd v Sarens (UK) Ltd

[2018] EWHC 751 (TCC)

Here, the parties were seeking a final determination, following an adjudicator's decision, of a dispute over the terms and interpretation of a subcontract. Sarens had been engaged by CBUK to provide cranes and other equipment for the installation of six bridges along the M6 link road. CBUK was engaged as subcontractor to Costain under a modified NEC3 contract. More specifically, the dispute was about what, if anything, CBUK and Sarens had agreed about the provision of liquidated damages.

CBUK said that the parties had had discussions about the imposition of a 10% cap on liquidated damages but that no agreement was reached. Sarens said that the parties had agreed a term that Sarens' liability would be capped at 10% of the subcontract price. It was agreed that there was a contract, although there was disagreement about some of the terms and when and how it was formed. Shortly before trial, Sarens sought permission to amend its Amended Defence and Counterclaim, to say that the Subcontract was formed at a meeting on 30 September 2014.

This was a new case, backed up by documents not previously relied upon. It was also inconsistent with the case Sarens put forward in the adjudication. The application to amend was refused on the grounds that the proposed amendment was *"a material change in case"*. Further, the new case would cause prejudice to CBUK who would have to produce new witness statements for a trial starting in two and a half weeks' time. The trial date may have had to be vacated and the trial length increased. Further, no proper explanation was provided as to why this change was being introduced so late in the day.

The result of this refusal was that the court could not take into account what happened at the September meeting. The meeting notes suggested that "*important and relevant*" discussions took place including about a cap on damages. However, as Deputy Judge Smith noted, the notes were "inadmissible" and she had to pass over them, albeit "with some reluctance" as to do so brought "an element of artificiality" to the exercise being undertaken. The Judge approached the case in the following way:

(i) In determining whether the parties have reached agreement at all, it is necessary to look at the whole course of the parties' negotiations.
(ii) In looking at the chronological documents what matters is not the subjective state of mind of the parties, but arriving at an objective conclusion as to whether the parties intended to create legal relations.
(iii) To do this, the court must place itself into the same factual matrix as that occupied by the parties. This will involve asking how a reasonable man, versed in the business, would have understood the exchanges between the parties.
(iv) In examining the exchanges to see what, if anything, has been agreed, the court should be looking for a proposal (or offer) from one party which is capable of being accepted by the other and acceptance by that other party.
(v) A contractual acceptance has to be a final and unqualified expression of assent to the terms of the offer. Conduct may amount to an acceptance if it is clear that the offeree did the act in question with the intention of accepting the offer.
(vi) The court can decide that a contract was formed in a way that is not contended for by either party.
(vii) Events occurring after an agreement was made are admissible in the context of the objective exercise of determining whether a particular term was agreed, despite not being admissible for the different exercise of construing the terms of an acknowledged agreement.

With this in mind, the Judge then turned to the negotiations, concentrating on the exchanges passing between the parties rather than the internal communications. In June 2014, there were email exchanges. An email from Sarens which ended with the words "*as soon as we are free from our current commitments we will contact you in more detail to arrange discussions*" was plainly a "preliminary response to the proposed Subcontract terms" and did not set out in full all of the points in the Subcontract with which Sarens disagreed or wanted to discuss further. The problem with the 30 September meeting can be illustrated by the fact that when, in October 2014, a second version of the Subcontract Agreement was sent out, the covering letter referred to "*recent agreements*" including in regard to liquidated damage. The Judge suspected that the reference to "*recent agreements*" was a reference to the September Meeting, but she could have no regard to this.

Negotiations continued, for example Sarens sent through a list of numbered comments including proposed amendments to the wording of the Subcontract. These comments amounted to a rejection by Sarens of the draft Subcontract and a counter-offer in the terms of the numbered comments. A further version of the Subcontract was put forward on 11 November 2014. CBUK recognised at this point that there was now agreement on most major issues and that all that remained was for Sarens to confirm its agreement to the outstanding matters, including liquidated damages.

CBUK said that the Subcontract between the parties was in the terms of the Subcontract sent out on 11 November 2014. Sarens suggested that the Subcontract was formed when they started work on or before 10 November 2014. CBUK had made an offer of a cap (in a June email, but the court could not consider what was said at the September meeting) and this offer was accepted by conduct by Sarens in going on site on 10 November 2014.

This was rejected. It could not be said that in June there was "*really no disagreement*" between the parties and that this amounted to a final and unqualified statement that everything was now agreed. Further, the commencement of work on site was just not referable to any offer made in the June emails.

Sarens also tried to rely on an email of 18 November 2014 in which CBUK acknowledged a pre-existing agreement of a 10% cap. The suggestion that a 10% cap had already been agreed was *"consistent with the fact that a general 10% cap on delay damages had been agreed"*. However, the email did not expressly record to what the 10% cap in fact related. For the email to assist, it would need clearly to refer to an agreement for a 10% cap on delay damages – which it did not.

Ultimately, the Judge accepted CBUK's case that the subcontract was formed by 17 November 2014.The offer, as set out in the third draft Subcontract, was accepted when Sarens continued to carry out the works on 17 November 2014 or when they sent an email indicating acceptance of all of the terms set out in the Subcontract with the exception of the damages provision; or after 17 November 2014 when Sarens continued with the works thereby indicating by its conduct its acceptance.

The Judge noted that it was "*not easy*" to identify a clear acceptance from the exchanges and conduct identified above. Thus, for example, the email of 17 November made it clear that "to be able to sign the contract" the additional provision was required. However, whilst it was not really possible here to analyse the formation of the contract by reference to a clear offer and acceptance, nevertheless, standing back and having regard to the fact that this transaction was performed by both parties, the right approach would be for the court to assess which terms and conditions the parties were in fact in agreement about. Therefore, the Subcontract was formed between the parties on the terms of the third version of the Subcontract document provided on 11 November 2014, signed by CBUK (but not Sarens). The parties had reached agreement on all elements of the Subcontract with the exception of the one about delay damages.

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.

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