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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.

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Dispatch

Settlement agreements

Aqua Leisure International Ltd v Benchmark Leisure Ltd

[2020] EWHC 3511 (TCC)

This was an adjudication enforcement application to enforce a decision dating back to July 2017. The adjudicator had ordered that Benchmark pay £200,537.35 within 7 days. Payments of £94,139 had been made, leaving a balance of £119,288.25. Benchmark said that the relevant dispute had been determined "*by agreement*" so that the adjudication was no longer binding.

The adjudication followed the failure of Benchmark to serve a pay less notice against Aqua's final interim payment application. The sum awarded did not represent the full amount due to the claimant as there was a retention payment of £48k to consider following completion of warranty works. The parties started discussions about a final settlement in August 2017. The negotiations included the following steps:

- Benchmark offered to pay a "*fixed and final*" payment of £120,000 plus VAT on or before 22 August 2018 "*underwritten by a guarantee…to wording written by [Aqua's] advisers*";
- Aqua proposed by email a "*payment resolution*" for the total sum over a longer period, with a guarantee. The "*payment resolution*" was expressed to be "*without prejudice and subject to contract*" and the email ended with the words "*please confirm your agreement to this settlement by return*".
- Benchmark sent a reply saying: "*agreed*".
- Aqua replied noting that they would "*contact our lawyer to draft the settlement and guarantee wording*" and that they would forward this "*as the binding agreement once signed by all the parties*".

Benchmark made payment of three parts of the agreed sum, but not the final amount, some £110k. In the interim, Aqua sent a "*deed of settlement and payment guarantee*" to Benchmark for "*review and completion*". Whilst payments were made, between December 2017 and May 2018, Aqua chased Benchmark asking it to sign the written agreement on no fewer than six occasions. The issue seems to have been that no guarantee would be provided.

The final position was this. The sums due under the adjudication had not been paid in full and neither had the sums set out in the "*payment resolution*". The "*payment resolution*" itself was never committed to writing and no guarantee was ever signed. Aqua said that the compromise arrangement was expressly made in the context that it would not become binding until it was reduced to writing. That never happened and so it was never binding. It did not matter that payments were made under the non-binding arrangement or that works were done. If the arrangement was not "subject to contract" it was in any event at best conditionally binding, the condition being the provision of a guarantee. No guarantee was ever given. HHJ Bird said that the key question was whether the parties had agreed to enter into a binding contract without the need for all terms to be reduced to writing.

The Judge agreed that the parties reached an agreement (in the sense that there was meeting of minds) at the end of August 2017. In the normal course of events the agreement would have been treated as binding. That agreement was made on the basis of a common understanding that the agreement would not be binding until reduced into writing and signed as a contract.

Benchmark said that both parties "*obviously considered themselves bound by the [payment resolution] Agreement and conducted themselves in reliance on that common understanding being that the Decision was no longer "in play"*". The reduction to writing was a mere formality and it was always intended that the payment resolution agreement would be acted upon. Performance of the warranty works itself is good evidence that the agreement was seen as binding. Aqua banked the payments made and gave credit for them when the deed of settlement was prepared.

HHJ Bird disagreed. In the absence of a compromise, sums were still due under the 2015 contract and under the terms of the binding adjudication award. The fact that monies were paid and "banked" was not evidence that there was a new contract. It was evidence that the parties were working together to try to settle debts that had arisen and move forward.

The evidence strongly pointed to the conclusion that Aqua wanted the original compromise agreement (albeit on slightly different terms) to be finalised. The parties agreed that there would be no binding contract until the terms were reduced to writing and signed off. The Judge therefore entered judgment for Aqua on the adjudication sums.

Adjudication: legal costs

Aqua Leisure International Ltd v Benchmark Leisure Ltd

[2020] EWHC 3351 (TCC)

The adjudication decision had included £12,500 in respect of legal costs under section 5A of the Late Payment of Commercial Debts (Interest) Act 1998. Before HHJ Bird, both parties accepted that the adjudicator had no power (jurisdiction) to award these costs (see *Enviroflow v Redhill, Dispatch* 207). Here, Mrs Justice O'Farrell had made it clear that the HGCRA required that any contractual provision dealing with the costs of the adjudication process must (i) be made in writing, contained in the construction contract and confer power on the adjudicator to allocate its fees and expenses as between the parties or (ii) made in writing after the giving of notice of intention to refer the dispute to adjudication.

There was no such agreement here, and Benchmark said that the adjudicator was therefore wrong in law to award costs and invited the Judge to make a declaration that the costs were not payable. Aqua focussed on "jurisdiction" saying that the costs issue was referred to the adjudicator and Benchmark engaged with it, without any general or specific reservation of the

position. Therefore Benchmark could not now argue they were not liable for this part of the adjudicator's decision.

HHJ Bird considered that the question here was one of jurisdiction in the most fundamental sense. The adjudicator had no jurisdiction to make the award at all because the statute under which the adjudicator purported to act, the Late Payment Act, had no application. It was not surprising that there had been no reservation of rights. Back in 2017, pre-Enviroflow, the parties and the adjudicator applied what had perhaps been a common approach. Enviroflow did not change the law, it explained what had always been the position. Therefore the issues raised by Aqua did not arise and HHJ Bird declined to enter judgment for the costs.

Adjudication: failure to consider defence

Barhale Ltd v SP Transmission plc

[2021] ScotCS CSOH

This was another adjudication enforcement case. SP said that the adjudicator had failed to address one of the critical issues referred to it for determination, and had therefore failed to exhaust their jurisdiction, with the result that the decision was unenforceable. Specifically, SP said that the decision had failed to consider their argument as to the proper contractual basis for assessment and payment for the excavation and associated disposal and filling works, and the operation and effect of rules M6 and M16 in the Civil Engineering Standard Method of Measurement, 3rd edition ("CESMM3"). The adjudicator had simply determined that a bulk excavation was required by the contract, and then awarded the claim in full, dismissing SP's counterclaim and failing to address points in the SP response.

It was not the case that the measurement argument had been considered and impliedly rejected. The two issues were discrete: the first was a question of contractual interpretation; the second concerned the measurement of the sum due to the pursuer on the assumption that its argument on interpretation was preferred (as it was).

It should be noted that, unusually, there is a distinction between Scottish and English cases here. Under English case law a failure by an adjudicator to address a question referred to him might render the decision unenforceable, but only if the failure was deliberate. The usual Scottish approach was arguing that there had been a failure to exhaust jurisdiction which did not distinguish between deliberate and inadvertent failure.

Barhale noted that if the court was in any doubt as to whether the CESMM3 argument had been considered and rejected, regard should be had (i) to the presumption of regularity; (ii) to it being inherently unlikely that the adjudicator would fail to consider an argument that featured prominently in SP's submissions, which the adjudicator had summarised in the Decision; and (iii) to the nature of adjudication, which could be a "rough and ready" process that did not demand the same level of reasoning as a judicial decision.

Lord Tyre said that there was no requirement for an adjudicator expressly to address every point taken by the parties in their submissions. A court should not put a fine tooth comb through the adjudicator's decision, seeking to ensure that every single point has been addressed. It is necessary to take a broad-based approach, looking at the dispute referred and the result.

If an adjudicator wrongly failed to have regard to the responding party's defence to the claim, because they erroneously thought that they could not do so, then they were not addressing the question that had been asked. An adjudicator could not engage with the dispute that had been referred if they failed to consider the defence to the claim. That said, such a conclusion could only be reached by the court 'in the plainest cases'. There was also a significant difference in law between, on the one hand, not answering the right question at all and, on the other, answering the right question but in the wrong way.

Here the dispute before the adjudicator raised four issues for determination. One of these was, if the Works Information required Barhale to carry out a bulk excavation disposal and fill, then how was that work to be measured in terms of CESMM3? The Judge was of the view that the adjudicator did not address this issue effectively or indeed address it at all. The issue was a critical one raised by SP in its response to the referral and rejoinder and in a subsequent email. SP's primary contention was that even if Barhale was correct that the Works Information required a bulk excavation, disposal and filling, CESMM3 was applicable and restricted the volume measured for both the excavation and the filling to the volume occupied by (including beneath) or vertically above any part of the foundation. The adjudicator simply did not address that argument. In this way, the adjudicator failed to exhaust their jurisdiction, and the decision could not be enforced.

Reading the decision as a whole it is obvious that the adjudicator did not engage with the CESMM3 argument at all. Further, although the Judge was not persuaded that it was necessary to characterise the adjudicator's failure to exhaust jurisdiction as deliberate before it could be held to be unenforceable, here the failure could fairly be characterised as deliberate. On two separate occasions the adjudicator put it to the parties that they considered that the decision that had to be made was whether the Works Information instructed the pursuer to undertake bulk earthworks, or not. On both occasions, SP replied by insisting that the adjudicator also had to decide the issue of the applicable contractual method of measurement. The Decision was not enforced.

Settlements: meaning of subject to contract

Joanne Properties Ltd v Moneything Capital Ltd & Anr

[2020] EWCA Civ 1541

The issue on this appeal was whether the parties had entered into a binding contract of compromise set out in written communications passing between their respective solicitors. Both parties exchanged offers that were said to be either "subject to contract" or "without prejudice and subject to contract". An offer was "agreed" and the solicitors said that they would "put a proposal to you to achieve the desired end". A consent order was emailed across and comments were chased. Then a reply came that there had been no binding settlement because the negotiations had been conducted "subject to contract".

Given that the alleged offer and acceptance were each headed "without prejudice and subject to contract" and that it was also plainly contemplated that a consent order was needed to embody the compromise, LJ Lewison concluded that:

"where negotiations are carried out "subject to contract", the mere fact that the parties are of one mind is not enough. There must be a formal contract, or a clear factual basis for inferring that the parties must have intended to expunge the ["subject to contract"] qualification. In this case there was neither."

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.

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