Fenwick Elliott
Solicitors, Adjudicators and Mediators

DISPATCH

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" Constructive Law for the Construction Industry "

Adjudication Update

In ***Gibson v Imperial Homes***, HHJ Toulmin CMG QC had to consider a jurisdictional challenge to an adjudication. Imperial alleged that the parties named in the contract were not the parties to the adjudication.

There was considerable confusion about the names of the contracting parties. By the letter of appointment, written by CN Associates (who were acting as agent for Imperial Homes), Gibson Construction Ltd were appointed as contractor. There was no Gibson Construction Ltd as at the date of the letter. Later, Mr Gibson registered a company in the name of Gibson Construction (UK) Ltd. However, Mr Gibson commenced the adjudication in his own name.

The key question was whether the claimant could have been anyone other than Mr Gibson suing on his own behalf or as agent for Gibson Construction (UK) Ltd, a company in the course of formation at the time the contract was made. As the company had not been formed at the time the contract was made, Mr Gibson was personally liable on the contract, but equally was entitled to sue on that contract. Here, therefore, it did not matter whether the referring party was Gibson himself or Gibson, the limited company.

The Judge also made some interesting comments about the course adjudication itself seems to be taking:

"This is not the first dispute which has come before me relating to an adjudication commenced after the contract has been completed. If instead of starting the adjudication process an ordinary action had been started in this Court in March 2001, even allowing time for a mediation which might well have been successful, the trial on the merits would already have taken place and the parties will now have a final decision…Instead, I am considering a provisional decision by the Adjudicator which the losing party will have an opportunity to overturn at a later stage on the merits…the Claimants are entitled to…adjudication, but I am not sure that it is appropriate to do so when forms of final dispute resolution are immediately available."

Cases from the TCC

The case of ***Impresa Castelli SPA v Cola Holdings Limited***, illustrates the care parties need to take if an employer wishes to make use of a commercial property prior to completion taking place. Impresa contracted with Cola to build a hotel on terms which incorporated the JCT 81 With Contractor's Design contract.

A number of disputes arose. Indeed, we reported on an adjudication enforcement case between the parties in Issue 23. Here, the problem principally related to delay. There were a series of agreements setting revised completion dates, culminating in one, which provided for Cola to access parts of the Hotel to enable it to be fully operational even though not all of the works were complete.

Cola claimed liquidated damages for late completion. Impresa argued that the giving of access to Cola over a large part of the Hotel was the equivalent of providing partial possession pursuant to clause 17.1. The consequence of this would have been to reduce substantially the amount of liquidated damages payable to Cola.

HHJ Thornton QC held that the access given to Cola amounted to no more than the use or occupation of the building pursuant to clause 23.3.2. Therefore the liability of Impresa was not reduced.

The crucial distinction here was the nature of the access offered to Cola. The nature of partial possession involves exclusivity. The contractor having given up possession has no right to enter the part of the works taken possession of, save for the express purpose of making good defects.

However, the nature of use or occupation is for the contractor to allow the employer to use or occupy the particular area to the extent necessary for the particular purpose which the employer has in mind. Here, this was simply operating the Hotel.

Exclusive possession was not possible, partly because of the nature of the agreement between the parties and partly because the air conditioning remained incomplete.

The Late Payment of Commercial Debts

As from 7 August 2002 this Act now applies to all commercial contracts for the supply of goods and services entered into after that date and no longer only where small businesses (of 50 or fewer employees) had entered into contracts as the supplier.

In the absence of express contractual provisions to the contrary, the Act provides that a creditor can recover statutory interest on unpaid debts under a commercial contract. Interest will start to accrue the day after the final date for payment.

If no such date has been agreed, then the Act provides for a 30-day interest free period (from the date of delivery or the invoice whichever is the later) after which interest will accrue on a daily basis. If payment is to be by instalments then interest will accrue on each instalment from the date after it is due.

The rate of interest has been set at 8% above the Bank of England base rate – i.e.12%. This has been fixed until December 2002 when it will be fixed for a further six-month period.

Any term seeking to exclude the right to statutory interest is void unless there is a substantial contractual remedy for late payment of the debt. However, that remedy does not necessarily have to be in line with the interest rate fixed in the Act.

It must be a "substantial remedy". The fact that most of the construction industry works on the principle of 5% above base is likely to mean that this rate will be deemed acceptable by the Courts. However, the point is yet to be tested.

Equally, the rate must not be "penal", so care must be exercised if an attempt is made to seek interest at a rate higher than the statutory limit.

In addition to statutory interest, a creditor is also entitled to a fixed sum of compensation on top of the debt. This compensation is only available as part of a claim for statutory interest and not where the parties include an express debt interest remedy or clause in their contract, for example clause 30 of the JCT 98.

For a debt of less than £1,000 the fixed additional compensation is £40, for debts of between £1,000 and less than £10,000 it is £70 and for debts of £10,000 or over it is £100. If a debt is successfully pursued at court then the compensation sum is payable in addition to the award of any legal costs.

Finally, you cannot exclude the right to interest as the Act provides that where a purchaser's standard terms of contract attempts to exclude or vary the right to statutory interest then an appropriate representative body may challenge these terms in the High Court, which, if it considers it appropriate to do so, may then grant an injunction restraining the use of the term.

Other Cases of Interest

By section 14(2) of the Sale of Goods Act (as amended), goods supplied in the course of business must be of "satisfactory" quality. Until 1995, the test was one of "merchantable" quality. There have been very few cases which discuss the exact meaning of the new test.

Recently, Deputy Judge Foskett QC had to consider this concept in ***Jewson Ltd v Kelly.*** The test to be applied is whether the reasonable person would consider the goods to be satisfactory taking into account the circumstances of the sale, including the price and any description of the goods themselves.

Here Mr Kelly had bought 12 electric boilers, which he intended to install for use in some flats he was converting. Jewson knew this. Intrinsically the boilers worked satisfactorily. They were reliable, safe and complied with the relevant regulations.

However, this was not enough since it failed to take into account the circumstances of the purchase. The boilers had been sold by a builder's merchant to a developer who intended to incorporate those boilers into a residential development for financial gain. The boilers had a low SAP rating (i.e. a rating designed to give guidance on the energy efficiency of the heating system in question). This at the relevant time had an adverse effect on the ability of potential purchasers to obtain a mortgage.

As a consequence, the Judge found that the reasonable person would not have found that the boilers were of satisfactory quality. Of course, the question of whether the boilers were reasonably fit for their intended purpose was one which the Judge was able to answer more easily in the negative.

Other News of Interest

In Issue 19 of *Dispatch* we reported on the SCL Extension of Time Protocol. The SCL has just announced that the revised protocol will be launched and published on 16 October 2002.

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