Fenwick Elliott
Solicitors, Adjudicators and Mediators

DISPATCH

ISSUE: 30

Dec 2002

" Constructive Law for the Construction Industry "

Adjudication Update

In the Scottish case of ***Skanska Construction UK Ltd v ERDC,*** Skanska recently sought to have an adjudication suspended by challenging the adjudicator's jurisdiction to hear the dispute. The adjudication was the second adjudication brought by ERDC against Skanska, who claimed it centred on a dispute, which was "the same or substantially the same" as the first dispute. Accordingly, Skanska said that it could not be adjudicated and invited the adjudicator to step down. He refused.

The first adjudication had arisen from a dispute over an interim application, whilst the second arose following ERDC's final account submission. Skanska argued that in essence both disputes concerned the quantification of the loss and expense element of ERDC's claim. ERDC argued that it was quite different to the interim valuation dispute, albeit that it did concern similar claims and sums. Since the first adjudication, significant further information and supporting documentation had both come to light and been exchanged. Further the second adjudication centred on different sub-contract clauses and so would proceed upon a different basis. ERDC relied on the case *Holt Insulation Ltd v Colt International Ltd* as authority for whether a dispute was the same or not and *Sherwood & Casson Ltd v Mackenzie*, where HHJ Thornton QC had held that an interim valuation that had already lead to a dispute and an adjudication is capable of reconsideration within a final valuation dispute.

Both the second adjudicator (deciding his own jurisdiction) and the judge hearing the petition agreed with ERDC's arguments. Lady Paton, agreeing with the *Sherwood* decision refused Skanska's petition stating, that in the second adjudication "*a different stage in the contract has been reached; different contractual provisions apply; considerably more information may be available by the date of issue of the final account; and different considerations and perspectives may apply.*" Thus the fundamental nature of the dispute would be fundamentally different.

Skanska also raised a side argument that the sub-contract had required that documentary evidence and details of any loss and expense be provided within 6 months of Practical Completion date and as such ERDC had been out of time in supplying this information. Lady Paton again agreed with ERDC and held that for such a stringent time bar to apply, the sub-contract would have had to be expressed in clear and unambiguous language. Here, the sub-contract only set out a timetable. In any event, Skanska's conduct during the first adjudication had been such as to have waived any right to maintain the time bar argument.

Guardi Shoes Ltd v Datum Contracts provides a further example of an adjudication decision ending up in the Companies Courts. Following the completion of refurbishment and refitting works, there were a number of defects. Guardi took the view that the defects were substantial and did not allow Datum to return to remedy the defective work. Guardi also withheld payment from Datum who accordingly sought redress through adjudication. Guardi had not served any section 111 notice and the adjudicator decided in favour of Datum. Since Guardi refused to pay, Datum issued enforcement proceedings and obtained judgment in its favour.

Guardi made some payment by way of instalments, but following repeated non-payment, Datum served a statutory demand. Guardi continued to make reference in correspondence to its claim in respect of defects, but did nothing further.

Datum then issued a winding-up petition. In response, Guardi provided draft particulars of claim. Guardi then sought an order restraining the advertisement of the winding-up petition. Mr Justice Ferris refused the application. Guardi had had the opportunity to serve a section 111 notice in relation to its claims, but had failed to do so. In these circumstances, the presentation of the petition was not an abuse. Had Guardi been serious about its cross-claim, then it should have provided the appropriate section 111 notice. This case demonstrates a difference of opinion within the Companies Court, since in the case of *George Park v Fenton Gretton* (see Issue 8) Judge Boggis held that the existence of a genuine cross-claim was sufficient to defeat a statutory demand served on the basis of non-payment of an adjudicator's decision.

Adjudication (continued)

The Construction Contracts Act was passed in New Zealand on 21 November 2002. It becomes law on 1 April 2003. Like the HGCRA, the NZ adjudication act does not apply to the supply of goods to be used in a construction project. However, there are a number of significant differences including that the CCA:

- applies to every construction contract (whether or not governed by NZ law) that relates to the carrying out of construction work in NZ and that is entered into after the date of commencement of the Act and is written or oral or partly written and partly oral;
- specifically outlaws 'Pay if Paid' and 'Pay when Paid' clauses even where the owner is insolvent;
- expressly renders ineffective clauses which require one party to bear all the adjudication costs regardless of fault or outcome; and
- requires a decision to be reached within 20 working days (which can be extended by the adjudicator to 30 working days or longer with the consent of all parties).

Taxation

In ***Shaw v Vicky Construction Ltd***, Ferris J had to consider whether Vicky, a sub-contractor, was entitled to have its statutory certificate renewed under section 561 of the Income and Corporation Taxes Act 1998. If a sub-contractor holds such a certificate then contractors do not have to deduct and pay over to the Revenue a proportion of all payment made to the sub-contractor. Thus a sub-contractor who holds such a certificate will be in a more advantageous position than one who does not.

During the latter part of the period 1997-2001, Vicky had a poor payment record in respect of PAYE tax deducted by it from the pay of its employees. In the year 2000/2001 payment was consistently late. There was also a problem with the timely filing of a corporation tax return.

As a result of this, the Revenue refused to renew Vicky's certificate, saying that it was not enough to bring a company's affairs up to date at the last minute. On appeal to the General Commissioners, Vicky's suggestion that the lateness was of a minor or technical nature was upheld. The Revenue appealed and the Judge agreed with the Revenue. Taking into account the fact that the late payment had continued (and even worsened) over a period of some 17 months and the fact that the Revenue had provided Vicky with a serious written warning meant that its failure to remedy the situation could not be considered either minor or technical.

Cases From the TCC

In ***HOK Sport Ltd v Aintree Racecourse Company Ltd***, HHJ Thornton QC had to consider the measure of damages following the decision of an arbitrator that HOK had breached its duty of care to Aintree in failing to warn it of the fact that a new stand when completed would have a capacity of 2000 spectators against the required minimum of 2800.

The Judge held that in circumstances such as these, the principles outlined by Lord Hoffman in the HL case of *South Australia Asset Management Co Ltd v York Montague Ltd* should be followed. Although the *South Australia* case arose out of the flood of claims against surveyors which were made following the collapse of the property market in 1990, the Judge thought the situation was analogous to any situation where a professional was engaged to provide information on a specific transaction or project and where the client would then rely upon that advice in deciding whether or not to proceed. Finally, the professional who gave the advice should not actually be part of the decision making process.

Thus the extent of any award of damages would be limited by the scope and/or purpose of the duty. Here the duty on HOK was a specific one to warn Aintree that the required number of spectators could not be accommodated. It was not part of HOK's duty to advise Aintree whether or not to postpone the construction project.

The loss would be calculated as follows. First the direct loss attributable to the failure to warn that the stand capacity had been reduced should be identified. For that loss to be recoverable, it had to be a foreseeable consequence of the failure to warn that the capacity had been reduced to below Aintree's needs, (i.e. Aintree deciding to proceed on the basis that the stand met its requirements). Further, the identified loss had to be within the scope of HOK's duty to warn such that it deprived Aintree of the opportunity to postpone the building of the new stand and reconsider its chosen course of conduct.

Fenwick Elliott
Solicitors, Adjudicators and Mediators

353 Strand
London
WC2R OHT

Tel: 020 7956 9354
Fax: 020 7956 9355

www.fenwickelliott.co.uk

Editor: jglover@fenwickelliott.co.uk