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Dispatch

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Dispatch highlights a selection of the important legal developments during the last month.

Adjudication

Consultation In Scotland

The Scottish Executive has issued a consultation document aimed at improving adjudication. The report focuses on the issues raised by the Construction Industry Board review and reaches similar conclusions. One suggestion is that the Adjudication Task Group Guidance be published in Scotland. As in England, the Executive is looking for views on the question of whether provision should be made for the parties to bear their own costs. For further details see www.scotland.gov.uk/consultations/industry/iaci-00.asp

Picardi v Mr & Mrs Cuniberti

HHJ Toulmin CMG QC had to consider a fee claim made by the Claimant Architects following the refurbishment of a private dwelling house in London. Picardi had an Adjudicator's decision in their favour. Picardi claimed that the contract between the parties incorporated the RIBA Conditions and the CIC model adjudication procedure. The Judge found that no such agreement was made. Therefore, the Adjudication was invalid.

The Judge also considered whether Picardi should have drawn the Cuniberti's attention to specific clauses of the RIBA conditions as required under the RIBA Notes of Guidance. He commented that, (particularly because Parliament had specifically excluded private dwelling houses from the adjudication legislation) a provision including adjudication as part of a contract, was an unusual provision which therefore ought to be brought to the specific attention of a lay party if it is later to be validly invoked.

Debeck v T&E

HHJ Kirkham applied the CA decision in *RJT Consulting Engineers Ltd v DM Engineering Ltd* in deciding that for an oral agreement to fall within section 107 of the HGCRA, all the relevant terms of the agreement must be clearly recorded in writing. Debeck had applied for summary judgment arguing amongst other things that the contract was a construction contract falling within the HGCRA and that in the absence of any section 110 or section 111 notices, summary judgment should be granted.

Although there was a fax from Debeck which it said contained all the relevant terms of the agreement, the Judge rejected this argument for two reasons. The fax did not set out or record all of those matters on which Debeck itself had relied upon in pursuing its claim. For example, the fax did not explain even in summary terms the scope of the work (or the programming and sequencing) to be undertaken. Equally, it was unclear from the fax whether materials were to be supplied or not. In addition, a director of T&E gave evidence that there were further terms of the contract between the parties which were not recorded in the fax. These matters included references to the quality of the work and the time within which the work was to be undertaken.

Thus, HHJ Kirkham concluded that Debeck could not rely upon the fax to bring the oral agreement within section 107. A claimant cannot cherry pick and identify those parts of an agreement upon which it relies and ignore matters which the defendant says were agreed between the parties. The Judge suggested that one way for a party to obtain the benefit of the HGCRA, would be for that party to seek to clarify the terms which he believes have been orally agreed and invite the other contracting party to agree that those are indeed the terms of the agreement.

Baldwins Industrial Services plc v v Barr Ltd

Here it was held that a contract for the supply of a mobile crane plus driver was a contract for construction operations. The provision of the driver made the significant difference. Although the contract did not make any direct reference to the work to be carried out, taken together the crane and driver were to be used for building operations. This specific point is unlikely to crop up again since the latest version of the CPA Model Conditions, in effect from July 2001, includes an express provision that the Scheme for Construction Contracts applies.

Although judgment was given in favour of Baldwins, Her Honour Judge Kirkham followed the principles laid down in the cases of *Herschel Engineering v Breen Property*, in deciding to grant a stay of execution. Where there is a potential counterclaim and the strong possibility that a claimant will be unable to repay any monies which are found to be have been wrongly paid over, then discretion will be exercised in favour of granting a stay. Here Barr were required to pay the adjudicator's award into court and commence proceedings within one month, failing which the money was to be paid out to Baldwins. The stay of execution did not apply to the costs and fees of the adjudication.

Cowlin Construction Limited v CFW Architects

CFW resisted enforcement on the grounds that the Adjudicator did not have jurisdiction because there was no construction contract between the parties and/or that there was no dispute capable of being referred to adjudication.

In a previous adjudication, the Adjudicator had decided on the form of contract entered into between the parties. In the adjudication which was the subject of this case, the second Adjudicator applied that contract and decided that CFW should pay Cowlin the sum of £275,211.51 plus VAT. Cowlin said that the decision by the first Adjudicator on the contract was binding. CFW had initially accepted that the first Adjudicator had jurisdiction to decide the contract position and had issued a Counter Notice, they then changed their mind. However, HHJ Kirkham found that CFW had submitted to jurisdiction in the first adjudication. When they made their election, they had been represented by solicitors. Even though CFW had swiftly changed their position, this was not sufficient.

CFW then said that they (and their insurers) had not had sufficient opportunity to consider the issues referred to the Adjudicator and hence there was no dispute. On 3 May 2002, when Cowlin made a peremptory demand which required a substantive response by 17 May, CFW had already been in possession of the claim since 27 February and further details since 11 March - some 8 weeks. Therefore, the Judge adopting the *Halki v Solpex* analysis concluded that CFW should have known broadly whether they admitted some or all of Cowlin's claim or rejected it totally. Thus they had had sufficient opportunity to indicate their response. By not responding to the ultimatum in these circumstances, a dispute had arisen.

Try Construction Ltd v Eton Town House Group Ltd

Try was the main contractor on a London bank conversion project. The project fell into delay and Try commenced two consecutive adjudications against Eton, dealing with different EOT and L&E claims and the repayment of LADS. Try brought enforcement proceedings on the second adjudication decision.

Eton claimed that the appointment of a programming expert by the adjudicator was outside his powers and that Eton had not been given the opportunity to consider the methodology used by the adjudicator to determine the delay issue. Eton thus was claiming that the issue on which the decision was based was not one that had been properly referred, and that it had been denied the opportunity to make appropriate representations something which breached the rules of natural justice.

However, at a meeting during the adjudication, the parties had agreed to the appointment of the expert and had conferred extensive authority on him to analyse the EOT claim and if necessary had given the expert the authority to *"go beyond the strict confines of the arguments put forward by the parties"*.

Try argued that Eton's failure to raise any objection during the adjudication process, to question the adjudicator's final decision or to reserve its position with regard to the adjudicator's jurisdiction contemporaneously, meant Eton could not now contest the agreement to appoint the expert or the authority of the adjudicator to reach his decision based on the expert's findings.

HHJ Wilcox following *Balfour Beatty v London Borough of Lambeth* (see Dispatch Issue 23) agreed. When considering natural justice, transparency is an important factor. In the Balfour Beatty case, there was deemed to be an apparent lack of fairness as the parties had not been given the opportunity to consider the adjudicator's approach in establishing whether there had been delay. Here both parties had agreed to the adjudicator appointing the expert and had agreed that the expert should have a degree of autonomy to decide his own methodology. The delay analysis (and thus the adjudicator's decision) was the consequence of that agreement.

Expert Evidence

In Issue 18 we reported on the decision of Pearce v Ove Arup where the Judge had criticised the Claimant's expert saying that the evidence fell far short of the standards of objectivity required. Such were the Judge's criticisms of the expert that he asked the disciplinary board of the RIBA to consider the matter. That Tribunal has now done so and it has recently been reported in The Lawyer that the Tribunal has disagreed with the trial Judge and found in favour of the expert, stating that the criticisms had been based on a series of incorrect and inaccurate conclusions.

Construction Industry Law Letter

CILL, edited by Tony Francis and John Denis-Smith of Fenwick Elliott and published by Informa UK Ltd, provides an in-depth insight into these and similar cases. For a free sample copy please email your details to eleanor.slade@informa.com, quoting Ref: The Dispatch.

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