Fenwick Elliott
Solicitors

Dispatch

Issue 48
June 2004

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

Adjudication

Alstom Signalling Ltd v Jarvis Facilities Ltd

There have recently been two TCC decisions arising out of the arrangement between Alstom and Railtrack to carry out works to extend the Tyne and Wear Metro and in particular the appointment by Alstom of Jarvis to provide the signalling and other works. The main contract between Alstom and Jarvis provided for Alstom to be paid on a qualified cost reimbursable basis. It also contained provisions whereby if the final cost of the project came in below the target cost then Alstom and Railtrack would share any net gain. However, if the project came in above the target cost then the parties would share the net pain.

The sub-contract between Alstom and Jarvis was never signed. Alstom said that the sub-contract was agreed in terms whereby Jarvis would similarly share any pain or gain. Jarvis said that there was nothing more than an agreement to agree in relation to the pain/gain issue, and as there was no agreement, that was the end of the matter. After the main contract was completed, Alstom accepted a deduction of the maximum pain agreed beforehand with Railtrack. Alstom sought to recover some of this from Jarvis. The case came before Mr Recorder Reece QC. Liability only was at issue.

The Recorder found that Alstom and Jarvis, although the negotiations were protracted, had agreed to contract in terms of what was known as the Issue 3 documents. He agreed that whilst Jarvis agreed that the sub-contract should include a mechanism by which it would participate in pain/gain sharing, no agreement had been reached as to that mechanism. However, when agreeing to be bound by the Issue 3 documents, the parties undertook implied primary obligations to make reasonable endeavours to agree on the pain/gain provisions. Neither party could try and thwart this agreement by refusing in good faith to negotiate or to allow the Court or an adjudicator to resolve the difference between them over this issue. Accordingly Alstom was entitled to ask the Court to determine this difference, although further submissions were invited first.

The second case arose out of an adjudication where Alstom were ordered to pay Jarvis some £1.5m following an interim application. Jarvis had successfully argued that as Alstom had not served any withholding notice, Alstom had to pay Jarvis what it had applied for.

Alstom submitted that the absence of a withholding notice was irrelevant. Following *Morgan v Jervis* (See Issue 41), HHJ LLoyd QC agreed. Under the sub-contract here a withholding notice was not necessary unless, for example, the amount due was overstated by the paying party. Even though a notice was not given, the party making the payment can still establish what was truly due to be paid, by the use of the appropriate contractual procedures. Jarvis' remedy was to seek to have the relevant certificate opened up, revised or reviewed, as provided by the contract, but it had not done so.

The Judge also criticised the approach of Jarvis in making its interim applications. Noting the size of the material Alstom had to digest and the failure by Jarvis to send that material to the office Alstom had requested (which shortened the time Alstom had to respond), HHJ LLoyd QC characterised Jarvis' approach as an ambush. Alstom, in accordance with the contract, had raised various queries of the application. In the absence of a response, it ultimately issued a certificate of nil value, indicating that there had been an overpayment.

The Judge found that Jarvis was not entitled to ignore Alstom's questions altogether. Jarvis suggested that Alstom had failed to ask sufficiently specific and focused questions within the time specified. However, the material submitted was voluminous. Thus whilst Alstom had to be specific, it did not have the time to be too specific as it only had the week to turn round the application and, assuming prompt and usable replies, a further week to issue a certificate. At this stage of the contract the application was really the final account, Alstom thus was entitled to a meticulous account from Jarvis. There was therefore substance in Alstom's complaint about the approach adopted by Jarvis. The information provided was partial, late and had had to be dragged out of them.

Contractor's All-Risks Insurance Policies

■ BP Exploration Operating Co Ltd v Kvaerner Oil Field Products Ltd

Kvaerner entered into contracts with BP for the design, engineering and procurement of sub-sea control modules required to recover oil from fields west of the Shetlands. After completion of the installation of equipment, faults were discovered. BP suffered losses including the costs of recovering, repairing and replacing equipment from the seabed. BP brought a claim which was pursued by Insurers who had exercised their rights of subrogation.

The question the Court had to decide was whether BP under its contract with Kvaerner undertook to procure insurance cover for Kvaerner which was sufficiently extensive in scope to cover the loss and damage claimed by BP. The key clause was 10.5 which provided that without prejudice to Kvaerner's liabilities, BP would take out and maintain, from the commencement of the development of the contract, an insurance policy to provide protection against physical loss or damage and general third-party liability. Any contractor engaged in the installation works would be covered as "other insureds" and would have similar benefits under the policy to BP.

BP argued that the cover which it was obliged to obtain for Kvaerner was in respect of loss or damage arising from performance after the manufacture and installation. Here, the losses and damage flowed from events occurring during the manufacture.

Kvaerner disagreed and pointed out that their prices did not take account of the cost of specifically obtaining construction all-risks insurance to cover the project. Had they understood that the major part of Kvaerner's involvement with the project was not going to be insured under the policy, Kvaerner would have taken necessary steps to protect themselves and would have discussed with BP the impact of doing this on the construction cost.

Mr Justice Colman concluded, after hearing expert evidence, that whilst it was widespread practice in the field of oil and gas for provision to be made for main contractors to have the benefit of cover for damage under the operator's policy, this was not an invariable practice. He then took into consideration the following points:

(i) The overriding function of the exercise of constructing the meaning of a document is to identify the sense in which the words used would be mutually understood by the partiesto the contracts, having the information possessed by the parties and bearing in mind the relevant surrounding circumstances known to both.

(ii) The whole basis of contractual certainty is the words actually used in their ordinary meaning.

(iii) English commercial law does not permit any other inference to be drawn unless, on the evidence before it, there are cogent grounds for concluding that although the ordinary meaning can be identified as x, the parties could only have mutually intended y.

(iv) However, such occasions will be rare.

(v) Departure from the ordinary meaning cannot normally be justified merely because another construction would have produced a more reasonable result commercially for the parties. It is not the function of the Court to substitute one-sided bargains for other bargains simply because it would be more reasonable commercially.

(vi) The exercise in construction which is called for is to identify the meaning which it is inferred that the parties mutually intended.

The agreement here, on the BP construction, did not flout business common sense. Although the lack of co-extensiveness of cover was not commonplace, it was not so abnormal as to be outside of the possible mutual intention of the parties. That said, Mr Justice Colman did recognise that something had gone wrong with the layout of the clause.

However, in the circumstances here, he did on balance conclude that BP was obliged to provide Kvaerner with the benefit of an all-risks policy which was entirely co-extensive with that which was available to BP. The insurance therefore covered the performance of the entirety of Kvaerner's obligations. Hence, the subrogated claim against Kvaerner would fail.

Dispatch **is produced monthly by Fenwick Elliott LLP, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.**
Dispatch **is a newsletter and does not provide legal advice.**

Fenwick Elliott
Solicitors

353 Strand
London WC2R 0HT

T +44 (0)20 7956 9354
F +44 (0)20 7956 9355
Editor Jeremy Glover
jglover@fenwickelliott.co.uk
www.fenwickelliott.co.uk