Fenwick Elliott
Solicitors

Dispatch

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

Arbitration

Amec Civil Engineering Ltd v The Secretary of State for Transport

This is one of the first decisions of the Honourable Mr Justice Jackson, the new Head of the TCC. Amec brought proceedings to challenge the jurisdiction of an arbitrator. The parties had entered into a contract incorporating the ICE Conditions, 5th Edition, and the engineer had made a decision in relation to a dispute pursuant to clause 66 of those Conditions.

One of the issues to be decided was whether there was a dispute for the purposes of clause 66 of the ICE Conditions. Reviewing the arbitration and adjudication judicial authorities, the Judge set out seven propositions:

1) The word dispute should be given its normal meaning;
2) Despite the number of cases, there are no hard-edged legal rules as to what is and what is not a dispute. The accumulating judicial decisions have merely produced helpful guidance;
3) The mere fact that one party notifies the other of a claim does not automatically and immediately give rise to dispute. A dispute does not arise until it emerges that the claim is not admitted;
4) There are many circumstances from which it may emerge that a claim is not admitted. There may be an express rejection, there may be discussions from which objectively it can be said that the claim is not admitted, or a party may prevaricate thus giving rise to the suggestion that it has not admitted the claim. Silence may well also give rise to the same inference;
5) The period of time for which a party may remain silent depends upon the facts of the case and the contract. Where the gist of the claim is well known, a short period may suffice. Where the claim is notified to an agent of a respondent who has an independent duty to consider the claim, a longer period of time may be required;
6) If a party imposes a deadline for responding to the claim, the deadline does not have the automatic effect of curtailing what otherwise would be a reasonable time for responding. However, it is something for a court to consider;
7) If the claim as presented is so nebulous and ill-defined that a party cannot sensibly respond to it, neither silence, nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

Here, following a meeting on 20 September, where certain defects were discussed, a letter was sent on 2 October setting out the nature of the defects. The fact that no immediate response was required did not prevent this letter being a claim. In fact by this date, Amec had decided to notify its insurers.

A further letter was sent on 6 December, this time not only imposing a deadline for a response of 11 December, but in addition seeking an admission of liability. By this time, the general positions for all parties had been well canvassed such that in the view of the Judge it was inconceivable that such admission would be made.

Therefore, perhaps surprisingly at first blush, the letter of 6 December requiring a response by 11 December, did in fact set a reasonable deadline. The deadline was imposed for a good reason, namely that the limitation period was about to end. The fact that the deadline would not cause Amec any difficulty was clear. It was self-evident that Amec would not be prepared to admit liability for massively expensive defects on a viaduct.

Amec went on to argue that an engineer making a decision under clause 66 is required to abide by the principles of natural justice. The Judge disagreed. He felt there was a great difference between an engineer's decision under clause 66 and an adjudicator's decision under the HGCRA. The duty on the engineer was slightly different, namely to act independently and honestly and here he had. Interestingly on this point, the Judge gave leave to appeal.

Insurance

Lumbermens Mutual Casualty Co v Bovis Lend Lease Ltd

Bovis entered into a contract with Braehead in respect of the construction of a retail and leisure facility in Glasgow. Disputes arose and Bovis issued a claim in the TCC for £37m for preliminaries, additional design and management fees, and loss and/or expense. Braehead counter-claimed in respect of defective works and late completion, seeking around £103m or alternatively £75m. A settlement was agreed whereby Braehead paid Bovis £15m in full and final settlement of all disputes. The method of calculation of that global sum was not identified. Thus the agreement did not specify which parts of the claim or counter-claim had been viewed as valid.

Bovis then claimed some £19m from its insurers, Lumbermens, pursuant to a construction, engineering and design professional liability policy and a commercial excess liability policy. The claim was made on the basis that £19m had been the amount of the valid counter-claim and that the £15m settlement figure was the result of setting off that £19m against Bovis' entitlement to £37m from Braehead. Lumbermens said that the settlement agreement did not identify any loss caused to Bovis by any legal liability in respect of Braehead's counter-claim nor did it quantify any such loss. Accordingly,, in the absence of such ascertainment, there was no basis for recovery as under the policy: there was simply no cause of action.

Bovis said that there is no rule of law that it must be possible, in order for an entitlement to indemnity to be triggered, to discern the extent of an insured's liability for insured matters from the terms of the settlement itself. It was in fact rare for settlements to break down component parts. It would therefore be contrary to public policy (and indeed commonsense) to impose a requirement that any settlement should in fact identify any amount that might be covered by insurance. For the purposes of a claim pursuant to an indemnity the key question was had Bovis' liability to Braehead been sufficiently ascertained by the settlement agreement? Bovis relied on advice given to them about the strength of the Braehead counter-claim.

The court disagreed with Bovis. Whilst it might be possible to ascertain a loss by reference to an agreement, an insured must prove by extrinsic evidence that he was insured for a particular liability under the policy and that what he paid by way of settlement of that liability was reasonable. This global settlement agreement did not satisfy that requirement. It did not impose any identifiable loss in respect of any identifiable insured eventuality. It merely identified the overall price paid as consideration for a contract which conferred on Bovis various different benefits including the dropping by Braehead of all claims in respect of the project.

Expert Evidence

Phillips and Others v Symes and Others

Here, Peter Smith J had to consider whether it was possible for a court to make an order for costs against an expert witness. In this case, the expert in question had given psychiatric evidence on whether a party had been incapable of managing their affairs or not. It is believed this is the first time the courts have been asked to consider this particular point.

In short, although he stressed that he was making no decision against the expert in question, the Judge held that in light of the clearly defined duties set out in CPR 35, the court did have the power to make a costs order against an expert who, by his evidence, caused significant and unnecessary expense to be incurred by the parties and who did so in (reckless) disregard of his duties to the court.

The Judge made it clear that a high level of proof would be required to establish any breach. The standard proposed by the Judge, was that there must be a gross dereliction of duty. The Judge, in his judgment, discussed the nature of the duties of an expert as first set out in the *Ikarian Reefer* case and as amplified in Part 35 of the civil procedure rules.

In particular, the Judge referred to CPR 35.10, whereby an expert must sign a statement confirming that he understands his duty to the court and that he has complied with that duty. If there is any doubt as to that duty, by virtue of CPR 35.14, an expert can, independently of his retainer, file a written request to the court for directions to assist him.

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