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Dispatch

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

Adjudication - Agency/Ostensible Authority
GPN Ltd (In receivership) v O2 (UK) Ltd

O2 resisted adjudication enforcement proceedings on the basis that there was no concluded contract between the parties. No contract was ever signed by either party. GPN said that there was in fact a concluded contract between the parties. This had been negotiated by a firm of quantity surveyors engaged by O2 in connection with the works. GPN said that the QS had authority to bind O2 to a contract through ostensible (or apparent) authority.

A key element of ostensible authority is the representation by the principal (here O2) that the agent (here the QS) had authority to bind the principal. It is necessary for the principal through words or conduct to represent to a third party (here GPN) that the agent had authority to act on its behalf.

O2 denied the QS had authority to conclude the contract on its behalf. The QS had authority to be involved in the preparation of draft contract documents and to negotiate terms. However, they did not have authority to bind O2 to a contract and at no time did O2 represent to GPN that it would be bound by any agreement reached between the QS and GPN. O2 fully accepted that it had engaged the QS to negotiate the term of the contract on its behalf. The question at issue was whether the QS had the power to bind O2 to the terms of the contract which they had negotiated.

GPN alleged that the representation here was made by conduct. The behaviour of the QS gave the impression that they had the authority to bind O2. However, the difficulty the Judge had with this argument was that GPN was relying on the conduct by the QS (i.e. the agent) and not by O2. What mattered was the conduct of O2 itself. There is a significant difference between negotiating terms on the one hand and entering into a formal contract whose terms have been agreed. Silence by itself was not, in the view of the Judge, sufficient to constitute conduct by O2 amounting to a representation that the QS had authority to bind O2 to a contract.

GPN said that the QS was able to and agreed a number of terms on behalf of O2 without reference to O2. This gave the impression they had the authority to bind O2. However, GPN accepted that the QS did in fact have to refer back to O2 on some matters. This suggested there was an indication there was a limit on the extent of the QS's authority. The Judge found that the QS did not have ostensible authority to bind O2 to a contract. There was a two-stage process. First, the parties were to agree terms and as a separate stage there was to be a formal execution of the contract. There is a distinction to be made between the authority of an agent to negotiate agreed terms and the authority of an agent to bind the principal to a concluded contract. Here, the QS had the authority to negotiate but not to bind O2 to a contract.

Agency/Ostensible Authority
Tube Tech International Ltd v Techni -Coflexip SA and others

Tube Tech specialise in the cleaning of industrial pipe-work. The claim arose out of work at a natural gas plant in Nigeria. At issue was the identity of the party or parties Tube Tech contracted with. The contract was signed by the 5th defendant. However, Tube Tech said that it had entered into a contract with a consortium of the 1st to 4th defendants known as TSKJ. They in turn said that Tube Tech had contracted with the 5th defendant.

After considering the evidence of a number of witnesses, HHJ Havery QC, decided that the 5th defendant did not have actual authority to sign the agreement. That said, the evidence here included that the consortium had allowed the 5th defendant to trade in their name and had held the 5th defendant out as being authorised to enter into contracts on their behalf. Thus the consortium had held out that authorised signatories of the 5th defendant could sign the contract on their behalf. This happened. Those who signed the contract therefore had ostensible authority to sign that contract. The 5th defendant had been held out as being authorised to sign the contract on the consortium's behalf. Accordingly, Tube Tech was found to have contracted with the 1st to 4th defendants.

Arbitration - Application for a Stay

Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd

The parties entered into an agreement based on the JCT Agreement for minor works formed, as amended, whereby Collins would carry out repairs and other works to premises at Baltic Quay. Disputes arose and Collins issued a claim form in the TCC.

Article 4 of the contract said that if any dispute or difference should arise between the parties then it was to be referred to adjudication or arbitration. Baltic therefore sought to stay the action under section 9(1) of the 1996 Arbitration Act. The Judge in the first instance granted the stay. He did so following the reasoning of the case of *Halki* v *Sopex*.

Collins said that the Judge's decision was wrong. The dispute in part involved section 111 of the HGCRA. Collins submitted that the effect of section 111 was that where an employer has not given a Notice of Intent to Withhold, then the employer is not entitled to withhold payment and the contractor is accordingly entitled to judgment of the amount wrongfully withheld. Thus the claim would be not unlike that on a bill of exchange such as a cheque and there could not be said to be any dispute. Baltic argued that there was a dispute in relation to the sum claimed by Collins. For example, there had been pre-action correspondence in which Baltic had rejected the claim.

The CA agreed with Baltic and granted a stay. Following *Halki*, it is no answer to an application for a stay under section 9 of the Arbitration Act that the defendant has no arguable defence to the claim. It is not enough to say there is no real dispute because the defendant has no defence to the claim. The CA suggested that taking Collins' argument to its full extent, a contractor, in these or similar circumstances, could never ask an adjudicator or arbitrator to make an order in its favour.

The CA also noted the difference between a claim under an interim certificate, where an argument relating to the failure to issue a certificate may be appropriate, and in respect of a final account, where no reliance on a certificate is possible and the contractor has to establish the amount that is properly due.

The CA also carried out a whistle-stop review of relevant cases about what a dispute was. In particular, the CA referred to the seven propositions put forward by Mr Justice Jackson in the *Amec* v *Secretary of State for Transport* case (see *Dispatch* 54). In endorsing that general approach, LJ Clarke noted that negotiations and discussion are more likely to be consistent with the existence of a dispute, albeit an unresolved one, than the absence of a dispute.

Vicarious Liability

Hawley v Luminar Leisure plc and Others

Luminar ran a nightclub, and contracted with ASE Security Services Ltd ("ASE") to provide bouncers. Mr Hawley a customer was punched by one of the bouncers and seriously injured. He sought damages against both parties on the basis that each was liable for the acts of the bouncer. If the bouncer was a temporary employee of Luminar, they would be vicariously liable for the punch.

The HL referred to the 1947 case of *Mersey Docks Harbour Board* v *Coggins and Anr*. Here, a Harbour Authority let a crane and provided a craneman who was employed by the Authority, although the hiring conditions said that the craneman should be a servant of the hirers. The craneman injured a third person. The hirers had immediate control of the operation as to how the crane was used but had no power to direct how the crane controls should be manipulated. The test turned on where the power lay to direct how the crane was driven. The HL held that the Authority as the permanent employer was liable.

Here, the key test was the nature and extent of control which Luminar had over the bouncers supplied by ASE. The fact that the contract specified that all stewards provided by ASE would be employees of ASE was held by the court to be "neither here nor there". Luminar exercised detailed control over what the bouncers were to do. The only freedom which ASE had was to nominate who should work on a particular night, and who should replace somebody who did not turn up. Thus the court held that the control that Luminar had over ASE's employees was such as to make them temporary deemed employees of Luminar and Luminar was thus liable for the conduct of the bouncer.

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