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Dispatch

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

Adjudication - Withholding Payment Against Decisions
■ Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd

Can a losing party in an adjudication withhold payment on the basis that it expects to recover an equivalent or larger sum in a subsequent adjudication?

The parties were engaged on works to refurbish and strengthen the Tinsley viaduct. Disputes arose and there were a series of adjudications carried out in accordance with the CIC Model Adjudication procedure. Adjudication number 2 lasted for some 21 weeks. On 24 November 2005, the adjudicator held that Interserve's works had been delayed for 38.8 weeks. Of this, 12.8 weeks was attributable to Interserve and 26 weeks to Cleveland. In addition, the adjudicator ordered that Cleveland pay Interserve the sum of £1.35 million.

Cleveland did not pay. As the extension of time award expired on 27 April 2005, it claimed substantial loss and expense and/or damages for the period 1 May to 31 October 2005. Interserve brought enforcement proceedings commencing on 6 December 2005. The application for summary judgment was held on 3 February 2006. Judgment was given on 6 February 2006. However, in the interim, on 22 December 2005, Interserve sent a letter of claim to Cleveland claiming further extensions of time and additional loss/or expense. In addition, on 6 January 2006, Cleveland served its own adjudication notice. The Interserve claims were not part of this adjudication.

At midday on 3 February 2005, midway through the enforcement application, the adjudicator's decision in adjudication number 3 was delivered. Interserve was entitled to a further extension of time until 1 June 2005 but was held to be responsible for any delays which occurred after that. Therefore Interserve's liability to Cleveland was held to be some £1.4 million. This was due to be paid by 17 February 2006. Notwithstanding this, Interserve submitted they were entitled to an immediate judgment on the sums awarded in adjudication number 2 which ought to have been paid by 28 November 2005.

Cleveland said that the sums awarded in adjudication number 3 ought to be set off against the Interserve award. Alternatively, there should be a stay of execution pending enforcement of the third adjudication.

Mr Justice Jackson specifically agreed with the conclusions of HHJ Gilliland QC in *Gleeson v Devonshire Green* and *McLean v The Albany Building* where the Judge held that payment ordered by an adjudicator could not be withheld on the basis of a claim which accrued after the adjudication had commenced and that a party could not set off a claim for damages against an adjudication decision.

Here, a decision had been given in the second adjudication in November 2005. At the end of every adjudication, unless the contract says otherwise or there are some other special circumstances, the losing party must comply with the adjudicator's decision. The losing party cannot withhold payment on the basis of an anticipated recovery in a future adjudication based upon different issues. Cleveland should have paid on 28 November 2005. That situation had not been changed by the decision in the third adjudication. Payment in that adjudication was required on or before 17 February 2005. There was no obligation to pay at the time the enforcement decision was given.

Mr Justice Jackson said that if the existence of a claim could be relied upon as a reason to withhold payment, then you may have a situation where there would be a series of consecutive adjudications with the result that no adjudicator's decision is implemented. Each award would take its place in the running balance between the parties.

Accordingly the answer to the question as to whether a losing party could withhold payment on the basis that it expected to recover an equivalent or larger sum in a subsequent adjudication was no.

Therefore, if you do think you have a cross-claim, you must start you own adjudication as quickly as possible.

Adjudication - Late Decisions

■ **M. Rohde Construction v Nicholas Markham-David**

As we reported in Issue 59 there is a divergence between the English and Scottish authorities on the effect of a late decision. This was confirmed by Mr Justice Jackson here, when in referring to the decisions of *Barnes & Elliott Ltd v Taylor Woodrow Holdings Ltd* and *Simons Construction Ltd v Aardvark Developments Ltd*, he noted that a slight delay in the issuing of a decision was not fatal to that decision.

Adjudication - New Evidence

■ **Kier Regional Ltd (t/a Wallace) v City & General (Holborn)Ltd**

This adjudication enforcement case centred on the decision of an adjudicator to disregard two expert reports submitted by the responding party. The adjudicator's reasoning was that the reports were not before the contract administrator when he produced the valuation which was the subject of the adjudication. They were not therefore relevant to the way in which that valuation was prepared. C&G took the view that this meant the adjudicator's decision was unlawful and refused to pay the sums ordered. C&G said that the refusal to consider the reports led to a decision which was manifestly unfair.

In the course of his judgment, Mr Justice Jackson considered the relevant authorities. One of those cases was *Carillion v Devonport Royal Dockyard* (see issue 60). One line of defence there was that the adjudicator had failed to consider relevant evidence submitted to him. The position adopted by the TCC and the CA was that if an adjudicator declines to consider evidence which, on his analysis of the facts or law, is irrelevant, this is not necessarily a breach of the rules of natural justice. It may be that the adjudicator's analysis in reaching that conclusion was wrong. However the making of a mistake by an adjudicator was not enough to overturn a decision. Unless it was plain that the question which the adjudicator answered was not the question referred to him or that the manner in which he had gone about his tasks was obviously unfair, then the courts should not intervene.

Mr Justice Jackson did see considerable force in the contention that the adjudicator here ought to have taken the two expert reports into account. However, he thought that it was not necessary finally to decide this point for one reason. This was because the error allegedly made by the adjudicator was not one which could be said to invalidate his decision. The adjudicator considered each of the arguments advised by C&G. At worst, and the Judge did not say this actually happened, the adjudicator made an error of law which caused him to disregard the two expert reports. Following the CA decision in Carillion, that error would not render the decision invalid as it could not be said that the facts here represented a plain case of a breach of natural justice.

Letters of Intent - Quantum Meruit

■ **ERDC Group Ltd v Brunel University**

ERDC submitted a tender for works to provide sporting facilities which were to be carried out on the basis of the JCT Standard WCD Contract, 1998 Edition. Brunel decided to appoint ERDC, although the formal execution of the contract documents was deferred until after the grant of full planning permission. ERDC agreed to progress the works under a letter of intent. Four further letters of intent were issued and the authority under the final letter of intent expired on 1 September 2002. ERDC continued with the works after that date. The majority of the works were completed by November 2002 but the contract was not executed. ERDC said that the work content of the project had changed significantly and that accordingly they were not prepared to sign the contract documents and they were entitled to be paid upon a quantum meruit basis. Brunel said that the work executed both prior to and post 1 September 2002 was to be valued according to the JCT contract as provided for by the letters of intent.

HHJ LLoyd QC held that from the wording of the letters of intent, there had been a clear intention to create legal relations. Accordingly, the letters created a contract, one term of which was, that the works carried out by 1 September 2002 were to be valued in accordance with the JCT contract. However, for the works carried out after the letters of intent expired, ERDC was entitled to be paid on a quantum meruit basis. That said, as the conditions under which this latter work had been carried out did not differ materially from the conditions under which the rest of the work had been carried out, the appropriate way to value this work was by reference to the original ERDC contract rates and not on a cost plus profits basis.

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