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Dispatch

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

Adjudication - is it compulsory at first instance?

■ DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd

It is well known that, following the case of *Hershel Engineering Ltd v Breen Property Ltd*, s108 of the HGCRA means exactly what it says. An adjudication can be commenced at any time, even if there are court proceedings already in progress. However, until now, the reverse question had not come before the courts. DGT were engaged by Cubitt to carry out external cladding works under a sub contract, based on Cubitt's standard terms, which contained adjudication provisions. Clause 19.1 provided that:

"Any dispute, question or difference arising under or in connection with the sub contract shall, in the first instance, be submitted to adjudication …"

DGT duly referred a claim for some £193k to adjudication. This claim was rejected. DGT then commenced court proceedings for some £242k. Cubitt said that this claim was very different to that brought in the adjudication and that as a result of there being a binding adjudication agreement in the contract, the claim should be stayed until the new claim had been adjudicated. DGT said there was no mandatory adjudication provision and even if there was, the new claim was essentially the same as that which had already been adjudicated. Alternatively, DGT said the Court should exercise its discretion against exercising a stay.

HHJ Coulson QC noted that if the parties have agreed on a particular method to resolve their disputes, then the Court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. He referred, by way of example, to the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* where proceedings had been commenced despite there being a term in the contract providing for an initial reference of disputes to a panel of experts. Further, in the case of *Cable & Wireless Plc v IBM UK Ltd*, the Court exercised its own inherent jurisdiction to grant a stay where the contract merely stated that if disputes or claims arising out of the contract were not resolved by negotiations, the parties would attempt in good faith to resolve the dispute through ADR. Judge Coulson summarised the law as follows:

"(a) The court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings, even if there is already court or arbitration proceedings in respect of the same dispute…
(b) The court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate …just as it has with any other enforceable agreement for ADR…
(c) The court's discretion as to whether or not to grant a stay should be exercised in accordance with the principles noted above. If a binding adjudication agreement has been identified then the persuasive burden is on the party seeking to resist the stay to justify that stance;"

The Judge held that the adjudication clause, because of the use of the word "shall," was mandatory. The right to submit any dispute to adjudication in the first instance, was just that; it was not discretionary. And it is important to remember that the right to adjudicate was a contractual one. Thus the provisions of the HGCRA were irrelevant. Having decided this, the Judge had to consider whether he should exercise his discretion to order a stay to enable the adjudication to be concluded.

The original adjudication brought by DGT was a technical one based on the alleged failure by Cubitt to operate the contractual mechanism correctly. It was not based upon any detailed evaluation of the work done by DGT. The Court claim was a valuation dispute. Therefore the two claims were substantially different. In considering whether or not to exercise his discretion and order a stay, Judge Coulson identified two important factors:

(i) Failure to comply with the TCC pre-action protocol; and
(ii) Suitability of the Tribunal

DGT had not complied with the TCC pre-action protocol. Thus, even if there had been no adjudication agreement, the Judge would have ordered a stay. This was a valuation dispute. Therefore in the view of the Judge, a construction professional would be a better placed to consider it, at least in the first instance, than a Judge. Further, it was only cheaper to litigate than to adjudicate, if there was an early settlement of the litigation. Finally DGT were not debarred from pursuing their claim. There would simply be a temporary stay which would last for a few weeks until after the adjudication. Accordingly, the Judge held that there was no reason not to exercise his inherent jurisdiction to stay the proceedings whilst the adjudication took place.

What did the HL mean in the *Melville Dundas* case?

■ **Pierce Design International Ltd v Johnston & Anr**

In issue 83, we reported on the first HGCRA case to reach the House of Lords, *Melville Dundas v George Wimpey*. It has not taken long for that case to be considered in the TCC. Here, the dispute was whether an employer, who had not paid sums due to the contractor under the contract, could prevent the contractor from enforcing its rights to payment of those sums by relying on its subsequent determination of the contractor's employment under that contract. In *Melville* the determination had been for insolvency; here it was alleged contractor default.

The Johnstons engaged Pierce under the 1998 JCT contract with Contractor's Design as amended to carry out building works to a property they owned. Interim payments were valued by the employer's agent and became due subject to the issuing of a valid withholding notice. During the contract, the Johnstons failed to make interim payments in accordance with the contract in total of £93k. This sum was made up of underpayments from five interim valuations where no withholding notice had been served.

Pierce sought summary judgment. There was no adjudication. However, the works were not completed by the completion date. The Defendants served a notice of default saying that Pierce was not proceeding regularly and diligently. They said the default was not remedied and purported to determine the contract. The Johnstons' claims, including for the costs of completing the works and for LAD's, exceeded the sums claimed by Pierce.

To begin with, the Judge considered the *Melville Dundas* case. He accepted Pierce's submission that there were two particular factors in that case, namely the particular problems caused by the insolvency of the contractor and the fact that it was impossible for the employer to issue a withholding notice in time because the insolvency took place after the final day for issue of the withholding notice. The Judge felt bound to follow the majority of the House of Lords and say that the operation of clause 27.6.5.1 was not limited to cases involving the insolvency of the contractor and/or the impossibility of serving withholding notices. In other words, the clause complied with s111 of the HGCRA. This meant that there were three questions for the Judge to consider in relation to the application for summary judgment:-

(i) Were/are there amounts properly due to be paid by the employer to the contractor?

(ii) Did the contractor's rights to those amounts accrue 28 days or more before the date of determination?

(iii) Has the employer "unreasonably not paid" those amounts?

The Judge considered that these sums were properly due. Further, those sums had accrued more than 28 days before the determination. Finally, the Judge said that if there was a withholding notice the sum identified no longer becomes due under the contract. It is reduced and/or extinguished. Therefore, a sum would reasonably not have been paid by the employer only if there was a valid withholding notice. The Johnstons submitted that what was unreasonable had to be looked at now, not when these sums became payable. Therefore, all their cross claims had to be taken into account before the Court could decide if the sums due were unreasonably not paid.

The Judge disagreed. It would be "*unusual and unattractive*" for a party to say that they were in breach of contract but the other side did nothing about it, but now there was a clause in the contract which allowed them to ignore this earlier default. There would always be cross claims for the costs consequences of a determination, usually the costs of completing the work. If the Johnstons succeeded, an employer would be able to rely on cross claims to justify non payment of sums that should have been paid months earlier. In particular, the Judge said that his approach:-

"... has the additional benefit of meeting head-on many of the concerns which have been expressed about the approach adopted in Melville Dundas, to the effect that the decision might allow an unscrupulous employer to use determination as a way of avoiding his responsibility to make interim payments. Indeed, provided that the sum has been due and 'unreasonably not paid' more than twenty-eight days before the determination then, on my interpretation of the proviso, it would satisfy precisely Lord Hoffmann's point, at paragraph 13 of his speech, that employers should be "discouraged from retaining interim payments against the possibility that a contractor who is performing the contract might become insolvent at some future date (which may well be self-fulfilling)"... Furthermore, ...where there is no evidence whatsoever to suggest that the Claimant/contractor is or might be insolvent, my construction of the proviso does not and cannot cause any permanent prejudice to the Defendants. It is not a determination of their rights. All it does is to require them to pay, on an interim basis, the sums which, pursuant to the contract, they ought to have paid months ago."

Accordingly, the Judge granted Pierce summary judgment.

***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.**

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