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Dispatch

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

Global Claims

■ **London Underground Ltd v Citylink Telecommunications Ltd**

This case involved the Connect Project, a PFI project which involves the replacement of the entire communication system throughout London's Underground rail network. The project fell into delay. Citylink said that the delays had been caused by the late completion of preparatory works. Following an arbitration, the dispute came before the TCC. Under section 68 of the 1996 Arbitration Act, a party may challenge an award on the grounds of serious irregularity. In such circumstances, the court must consider whether there was an irregularity and whether there was or will be a substantial injustice to one of the parties.

Mr Justice Ramsey noted that under section 33 of the Act, an Arbitral Tribunal must act fairly and impartially between the parties, giving each a reasonable opportunity of putting their own case and dealing with that of their opponent. He noted that there must be a sensible balance between the finality of an award and the residual power of a Court to protect parties against unfair conduct. It is the duty of the Tribunal to determine an arbitration on the basis of the cases which have been advanced by each party and of which each has notice. Where a Tribunal has been appointed because of its legal, commercial or technical experience, the parties take the risk that, in spite of that expertise, findings of fact may be made or invalid inferences drawn without prior warning.

LUL challenged the arbitrator's findings on the CTL extension of time claim. CTL's claim was a "global" one. The overall extension of time was based on a large number of alleged breaches of contract which CTL said had caused delay. LUL accepted that the arbitrator had dealt with the claim correctly by rejecting CTL's evidence on causation. However, in awarding an EOT of 48 weeks, the arbitrator indicated that he was following the rationale in relation to global claims contemplated by the Scottish Courts in the case of *Laing v John Doyle*. LUL said the arbitrator had determined the claim based on a case which was not pleaded nor addressed in evidence. However, during the course of the hearing, the arbitrator had raised certain questions including asking whether the *Laing v John Doyle* case offered any assistance. CTL tried to convince the arbitrator to take a broad view of the evidence and submissions in coming to the conclusion on the appropriate extension of time; LUL took the opposite stance.

The Judge said that:

The essence of a global claim is that, whilst the breaches and the relief claimed are specified, the question of causation linking the breaches and the relief claimed is based substantially on inference, usually derived from factual and expert evidence.

In other words a tribunal must decide whether on the basis of the evidence provided, there is a sufficient link between cause and effect. Here, the CTL claim was made on the basis that a large number of breaches of LUL's obligations had caused delay to individual locations and to the various lines. CTL relied on expert evidence and various exercises to establish causation. The arbitrator on the facts rejected these approaches holding that the project did not lend itself to such a critical path analysis. As the Judge noted, causation was thus a matter which, if at all, could only be established from the facts by drawing such inferences as were appropriate. The facts were limited to those in evidence and so the ability to draw such inferences would depend on the clarity and persuasive nature of CTL's pleaded case.

The Judge then looked at those issues upon which the arbitrator's finding of 48 weeks was based. He thought that the finding of delay was fully comprehended within the pleadings, arguments and evidence. The Award showed the arbitrator was conscious that the award had to be based on the pleadings, submissions, and evidence and it was. Although as a consequence of his findings, the Judge did not have to deal with the substantial injustice question, he noted that the claim here was for an interim extension of time not a final one. Therefore any injustice that may have arisen from the interim extension of time could be cured by the process laid down under the Connect Contract.

One question raised by this decision is whether it means that the *Laing v John Doyle* approach to global claims will be adopted by the TCC. The answer is that we must wait and see. Mr Justice Ramsey said this:

The approach set out in the decision in Laing v. Doyle is not challenged on this application and I accept that approach.

Whilst it might be argued that it was open to Mr Justice Ramsey to comment either way on the applicability of *Laing v Doyle*, he was careful to proceed on the basis of the case as put forward in the arbitration itself.

Collateral Warranties

- **Glasgow Airport Ltd v Messrs Kirkman & Bradford**

GAL sought £2m with interest as damages for breach of a collateral warranty provided by K&B, who had been the consulting engineers in relation to the design of a floor slab at the cargo centre at Glasgow airport. The main contractor was now insolvent. The liability under the warranty was limited to £2m. GAL sought damages of £2m plus interest to cover sums relating to the replacement of the floor slab and sums in respect of their liability to meet claims by the tenants for losses sustained due to remedial works. The floor slab had to be replaced and the tenants sought losses in respect of disruption to their business and loss of profits. K&B had warranted in the usual way to exercise reasonable skill and care. Clause 1(a) of the warranty stated:

"The Sub-Consultant's liability for costs under this Agreement shall be limited to that proportion of such costs which it would be just and equitable to require the Sub-Consultant to pay having regard to the extent of the Sub-Consultant's responsibility for the same and on the basis that the Contractor and its Sub-Consultants and Sub-Contractors shall be deemed to have provided a contractual undertaking on terms no less onerous than this clause 1 to the Employer in respect of the performance of their obligations in connection with the Works (other than those obligations which relate to the Services) and shall be deemed to have paid to the Employer such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility."

K&B claimed that the costs recoverable under the collateral warranty were limited to the costs of repair, renewal and/or reinstatement of any part or parts of the works. Their liability did not extend to consequential losses. It was accepted by K&B that the word "costs" was wide enough, depending on the context, to cover a payment of damages. However, K&B argued that it was reasonably clear that the opening part of Clause 1(a) served the purpose of limiting, restricting or defining their liability under the warranty with the rest of the clause serving as a net contribution clause. K&B said that the consequential losses were not in contemplation of the parties at the time the warranty was signed. It was reasonable to suppose that K&B would undertake liability only for expenditure and repair or reinstatement directly incurred by GAL themselves and by the tenants.

GAL argued that there were no such limits in the language of the warranty. The liability undertaken in clause 1 was unrestricted and unless restricted elsewhere would entitle GAL to recover all losses caused by breach of that warranty subject to tests of remoteness. The only purpose of clause 1a was to provide for a net apportionment. It was not there to restrict losses. The broad aim of the warranty was to give GAL directly enforceable rights against K&B which they would not otherwise have had. The words "liability for costs" must describe K&B's whole liability under the warranty. At first instance, the court found for GAL. The clear purpose of the warranty was that it would put GAL in the position of the main contractor in relation to any claims that that contractor might have against K&B.

The Scottish Court of Session agreed noting that the wording of the warranty did not say that the liability of K&B was restricted to costs. The court also agreed that it would make commercial sense for K&B to try and restrict their liability so far as could be reasonably negotiated (and this is something which is usually done in conjunction with PI insurers). However, the warranty was granted in general in unqualified terms and would, unless there were clear words to the contrary, entitle GAL to recover all losses directly caused by any breach subject to the principles set out in *Hadley v Baxendale* and other cases. That liability was then made subject to a net apportionment having regard to responsibility of others, any defences K&B would have against the main contractor and a 12 year limitation period. Therefore, K&B's liability for costs did include consequential losses suffered by GAL as a direct result of K&B's breach.

Parent Company Guarantees

- **Wittmann (UK) Ltd v Willdav Engineers S.A.**

Here, Willdav said that Wittmann was not entitled to recover amounts outstanding under a guarantee because the contract under which Wittmann was claiming an entitlement was not that to which the guarantee related. The CA noted that both parties were aware at the time the guarantee was given that arrangements were on foot to put in place new financing arrangements. It was therefore difficult to accept that the parties intended that the new arrangements should entirely discharge the original contract, which was the subject of the guarantee. On the facts, the CA did not think that the original obligation had been swept away. A distinction should be drawn between a variation of the principal contract and its discharge and replacement by a new contract. Of course, the terms of the guarantee would not extend to new obligations. For this to happen, it would have been necessary for Wittmann to obtain Willdav's agreement and any such agreement would have had to have been evidenced in writing to satisfy the 1677 Statute of Frauds.

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