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Dispatch

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

Failure to comply with the Pre Action Protocol

■ **Cundall Johnson and Partners LLP v Whipps University Hospital NHS Trust**

We have raised the importance of complying with the Pre Action Protocol (the "Protocol") on many occasions, (for example see the *Charles Church* case in Issue 84). This was the issue before Mr Justice Jackson here. CJP agreed to provide engineering services to the Trust in respect of two preliminary projects. The first was for enabling works and the second was for the construction of a new energy centre ("the EC Works"). CJP claimed that it was owed outstanding professional fees on both projects.

In respect of the enabling works, in March 2006 CJP sent a letter to the Trust requesting payment of five invoices totalling some £305k. The parties' solicitors entered into correspondence and the Trust requested details of CJP's appointment documentation to verify the unpaid invoices. CJP did not produce any documents and subsequently alleged that there was an oral contract. CJP also requested a meeting. The Trust unsurprisingly requested proper details of the oral contract and added that they did not think a meeting could sensibly take place until proper details had been provided, and they had been given an opportunity to investigate them. In August 2007 CJP commenced proceedings to recover the fees.

In respect of the EC works, in July 2006 the Trust made a claim against CJP intimating negligent design, for some £4million. In October 2006, CJP responded with a claim for outstanding fees of £153k. After further correspondence including on whether there was an entitlement to adjudicate, CJP commenced proceedings to recover the outstanding fees. The Trust applied for an order that the action be stayed to enable the parties to attempt settlement, on the ground that CJP had failed to comply with the Protocol. A key issue was the amount of detail that needs to be provided in the Protocol correspondence. In a comment of some importance, Mr Justice Jackson noted that:

"The Protocol sets out a procedure for the exchange of information between the parties followed by a meeting. Neither the letter of claim nor the defendant's response are required to resemble pleadings either in their length or in their detail. What is required from each side is a clear and concise summary of their respective cases."

He reinforced this by noting that as a consequence of the concern that had been expressed in some quarters that the Protocol could be used in an oppressive manner, a new paragraph 1.5 had been added to the Protocol which made it clear that both parties must take a proportionate approach. Mr Justice Jackson stressed that the intention of the changes to the Protocol was this:

"If both the letter and the spirit of the Protocol are complied with, many disputes can be resolved at proportionate cost without the need for proceedings. Furthermore, disputes which are litigated can be more sharply focused at the outset."

The Judge made it clear that claims for professional fees fell within the Protocol. The claim made by CJP was a substantial one, and one that the Trust, as a public authority, was entitled and obliged to seek to verify. The Judge concluded that CJP had not complied with the requirements of the Protocol. In particular, in relation to the enabling works, the contractual basis of CJP's claim remained "*obscure until proceedings were issued*". In other words, CJP's lawyers had not sent out a claim which complied with the requirements of paragraph 3 of the Protocol. Had they done so, the basis of the contractual claim would have been clear. With the EC project, CJP's solicitors had forwarded a copy of their expert report to the Trust's solicitors. The Judge accepted that this was "helpful" but said that this in itself was not sufficient to comply with the requirements of paragraph 3 of the Protocol.

The Trust could not be criticised for refusing to meet as a defendant's obligations are only triggered once it has received a proper letter of claim. A meeting is not required until there has been a proper exchange of information between the parties. Mr Justice Jackson concluded that there would be a real possibility of an early settlement if the parties went through the Protocol process. Finally, he remarked that it was unfair to proceed with litigation, when a proper summary of the claim had not been notified in advance. Accordingly, he ordered that the action be stayed for 10 weeks. Whilst Mr Justice Jackson has made it clear that he does not expect that letters of claim and responses be so detailed as to resemble pleadings, the courts will still expect parties to set out their positions clearly. If they do not, the Court may well exercise its discretion to stay proceedings in order that the parties comply. And do not forget that this may, in the end, result in adverse cost consequences for the party in default.

International Arbitration

■ **Premium Nafta Products Ltd & Others v Fili Shipping Company Ltd & Others**

In issue 81 we highlighted the comments of Longmore LJ in the *Fiona Trust* case. The Judge said that a new approach needed to be taken by the English courts when considering questions relating to the jurisdiction of arbitration clauses in international commercial contracts. Longmore LJ indicated that:

"It seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed."

The case, albeit with a new name, has now reached the House of Lords, who unanimously approved the CA decision and the comments of Longmore LJ. The key issue related to the lengthy dispute resolution clause, which referred first to disputes "arising under" the contract, and later to disputes which have "arisen out of" the contract. The CA was asked to consider lengthy arguments about whether or not there was any difference in meaning between the two. Should "out of" have a wider meaning than "under", and if so, given the wording of this particular clause, which of the two should prevail? This lead the CA firstly to review the authorities and then to rule that the time had come to take a fresh approach. That approach was that the English Courts should not spend time considering the fine distinctions and minutiae of the wording of arbitration clauses. If a businessman did want to exclude disputes about the validity of the contract it would be comparatively simple to say so. This was a point taken up in the HL. In particular Lord Hope of Craighead, having expressly noted that the arbitration clause here was taken from a standard form, said this:

"The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contracts decided by one Tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single Tribunal for the resolution of all such disputes."

This HL decision is important because of the strong support given to the comments of the CA. In their view, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship which they have entered into be decided by the same tribunal. Any dispute resolution clause should be construed in accordance with this presumption unless the language made it clear that certain questions were intended to be excluded from (in this case) the arbitrator's jurisdiction. In the view of the HL the attempt to draw out differences between the meanings of the words "arising under" and "arising out of" was inappropriate. The distinction was at best a "fussy" one. This is something which is not without interest to the construction industry given the wording of the HGCRA which says that *"a party to a construction contract has the right to refer a dispute arising under the contract for adjudication"*.

Here the wording of the arbitration agreement made it clear arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes. Lord Craig referred to the "simplicity of the wording". Taken overall, the purpose of the arbitration clause in question was to provide for the determination of disputes of all kinds, whether or not they were foreseen at the time when the contract was entered into. Lord Craig also noted that experience shows that as soon as a dispute of any kind arises from a contract, objections are very often immediately also raised against its validity. If the parties were operating in an international market, it is unlikely that they would intend that possible disputes arising from their transaction could be heard in two places. The rationale behind this judgment was clearly expressed by Lord Hoffman who said this:

"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship to which they have entered or purported to have entered to be decided by the same Tribunal."

By stressing that the English Courts are not to become, in effect, bogged down in the detail of the wording of arbitration clauses, the HL have sent a clear message to parties to international commercial contracts that they can be much more certain that arbitration clauses will be upheld. Parties will know that, if arbitration is their chosen course, then it is the arbitrators who will be left to decide all the disputes which may arise, which is why Lord Craig referred to the "one stop method" of dispute resolution in his judgment. Thus taken with their decision in the *Lesotho Highland Development Authority v Impregilo* case, where it was held that an error of law does not necessarily mean that the arbitrators had exceeded their powers, it seems clear that this judgment of the HL can only serve to confirm the attractiveness of London and England as an arbitration centre.

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