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Dispatch

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

Security for costs - mediation

n Lobster Group Ltd v Heidelberg Graphic Equipment Ltd & Anr

It is well known that, where a claiming party is a limited company, under section 726(1) of the 1985 Companies Act, if it appears by credible testimony that there is a reasonable belief that the company will be unable to pay the defending party's costs if its claim fails, then it may be required to provide security for the defending party's costs. Mr Justice Coulson here was asked to consider whether a party seeking security for costs can include within those costs, the costs of pre-action activities including mediation.

The dispute between the parties related to the purchase of an alleged defective printing press. In January 2005, a mediation took place which failed to produce a settlement. Over two years later, in May 2007, proceedings were issued. As the claimant had been placed in administration, it was agreed that it was appropriate to provide security. However the amount of that security was not agreed. There was a difference in approach between the two defendants. The second defendant sought security up until the exchange of witness statements in the agreed sum of £37k. Heidelberg sought in the region of £160k. The reason for this difference was that Heidelberg, sought to recover security in respect of the costs incurred during the pre action proceedings.

Mr Justice Coulson noted that, as a matter of principle, the costs incurred by a party prior to commencement of court proceedings can be recovered as costs. Following the case of McGlynn v Waltham Contractors, see Issue 62, that is provided those costs could be said to be either the costs of or costs incidental to the proceedings. Lobster put forward four reasons as to why the application for security in respect of the pre action costs was misconceived:

(i) a considerable part of the pre-action costs were incurred in relation to the detailed mediation and those were not recoverable in any event;

(ii) a large proportion of those costs were incurred before the administration, so that any order for security would be an unfair preference;

(iii) to the extent that the security ordered was in respect of pre-action costs, the claimant would be unable to obtain "After The Event" insurance or, if they did so, would have to pay prohibitive premiums, and that therefore a genuine claim would be stifled;

(iv) the length of the pre-action period was such that these costs should not form the subject of an order for security.

Of these points the Judge thought that the first and fourth were the most important. The mediation was carried out under the CEDR model form and the parties agreed to bear their own costs and share the costs of the mediator. Accordingly, the mediation costs should not form part of the security ordered. The only way in which such costs would be recoverable would be if the parties had agreed that the specific costs could be the subject of any subsequent application.

In relation to the preference, the Judge did not give a concluded view, saying it was only of minor relevance to the application. It was an argument available to Lobster and one which the Judge had to bear in mind. In relation to the insurance issue, this would be dependent on it being impossible for Lobster to obtain the actual insurance. There was no such evidence before the court.

The Judge did take into account the delay. He thought that a Court would be slow to exercise its discretion to award security in respect of costs incurred two years before proceedings were commenced. The longer the delay between the incurring of the pre-action cost and the application for security based on that item of cost, the more reluctant the Court would be to make such an order. Here, the pre-action period was very prolonged being nearly 2.5 years. The Judge said he would be very reluctant to decide that after all this time, Lobster should provide security to Heidelberg for the costs incurred during this period. That would be "unnecessarily draconian".

The Judge duly disallowed the pre-action costs incurred by Heidelberg. However Lobster was required to provide suitable security up to the exchange of witness statements in the sum of £70k, being £50k to reflect the period from the application to the exchange of witness statements and an assessed figure of £20k to reflect the costs incurred from the commencement of the proceedings to the making the application for security for costs.

Arbitration - LAD'S

n Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd

The parties entered into an EPC contract in connection with the provision of 36 wind turbine generators in Stirling. Proceedings were brought to challenge an arbitrator's decision about LAD's. Braes said that the seat of the arbitration was Scotland which would mean that the English courts had no jurisdiction to entertain the application. There was a difference between the approach of the two courts in that the Scottish courts' powers of intervention was said to be limited to cases involving extreme circumstances such as the dishonest procurement of an award. The EPC contract was governed by laws of England and Wales and gave the English courts exclusive jurisdiction to settle disputes arising out of the contract subject to arbitration conducted in accordance with the CIMAR rules. The arbitration agreement was said to be subject to English law and the seat of the arbitration was to be at Glasgow.

Mr Justice Akenhead referred to the case of *C v D*, see Issue 92, where Mr Justice Cook had noted that the seat of the arbitration and the choice of procedural law will almost invariably coincide. That was not the case here and Mr Justice Akenhead decided that the court did have jurisdiction for the following reasons:

(i) the need to consider what, in substance, the parties agreed was the law of the country which judicially controlled the arbitration - here it was the English courts. The 1996 Arbitration Act permits and requires the court to entertain applications under section 69 for leave to appeal against all arbitration awards. Thus the parties were agreeing that the dispute resolution process was arbitration but that the English courts retained such jurisdiction as necessary to address any disputes that may arise.

(iii) the express agreement that the seat of the arbitration was to be Glasgow related solely to the place in which the parties agreed that the hearings should take place. All the other references to the law which governed the arbitral proceedings were to that of England and Wales.

The application for leave to appeal related to an argument that the LAD's clauses were unenforceable. To succeed under s69, the decision of the tribunal had to be obviously wrong or the question had to be one of general public importance with the decision being open to serious doubt. The Judge considered that the clause here was very much a one off, so the question of law was not one of general importance. Further just because a Judge has come to a view that a decision was wrong, that does not mean that it is necessarily "obviously wrong". For example, the Judge's view may be one that is reached "on balance". In fact, here, the Judge on the contrary thought the arbitrator's decision was ultimately right. The Judge also said that the fact that the arbitrator was a "highly experienced and well known construction law QC" was a relevant factor to take into account under section 69 of the Arbitration Act.

Bonds

n Spiersbridge Property Developments Ltd v Muir Construction Ltd

Spiersbridge made a demand under a Bond and the bank made payment in full. In proceedings as to whether Muir was in breach of contract, Muir raised a counterclaim saying that the grounds upon which the bond was called were erroneous and without foundation. Arguing that Spiersbridge was obliged to account for the sums received under the bond, Muir said that you could imply a term into the contract that:

"*in the event that … the employer should make a call on the bond it would account to the contractor for the proceeds of the bond, retaining only the amount equivalent to any loss suffered as a result of the breach of contract, if any.*"

Obviously, the bond conferred a considerable commercial advantage on Spiersbridge, by providing a solvent source from which it could claim monies for an alleged breach of the contract. The money could be obtained without proof of breach or damage and without prejudice to any further claims that Spiersbridge may have. Therefore, the obligation to account to Muir was said to be necessary to maintain a balance of commercial fairness.

Both sides agreed that under the contractual arrangements in place, Spiersbridge was not able to retain any more than it was ultimately found to be entitled to under the building contract. Spiersbridge argued that its duty to account was owed to the bank. If it made payment of the excess to Muir, it would run the risk of being sued for the same amount by the bank. However, the Judge agreed with Muir. Implying the term would mean that the bank was not involved in the merits of the disputes. Thus the issue of what loss, if any, had been suffered as a result of the alleged breach of the contract could be determined between those parties who had actual knowledge of the contract.

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