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Dispatch

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

Adjudication - natural justice

■ **The Dorchester Hotel Ltd v Vivid Interiors Ltd**

[2009] EWHC 70 (TCC)

The Dorchester engaged Vivid under the JCT98 Standard Form of Building Contract to carry out the refurbishment of its hotel. The works were completed in September 2007 and Vivid provided its draft final account at the end of March 2008. On 19 December 2008, just before the Christmas holiday, Vivid commenced adjudication proceedings with respect to its final account claim. The 92-page Referral Notice was accompanied by 37 lever arch files, including five entirely new files containing six substantial witness statements, two experts' reports, a remeasurement exercise and further new information previously requested by the Dorchester. Further many of the individual claim figures within the final account had been revised, albeit by a modest amount, from those claimed in March 2008.

The adjudicator accepted the reference on the condition that the holiday period from 24 December 2008 to 4 January 2009 would not be included within the calculation of the 28 day adjudication period. Vivid agreed to this and the time for completion of the adjudication was extended to 28 January 2009. Although the adjudicator appeared to accept that this timetable was sufficient, Vivid agreed with the Dorchester to extend the timetable, allowing the response to the claim to be served by 28 January 2008 with the decision to be provided by 28 February 2008.

The Dorchester maintained throughout that the timetable was too tight and that there was a very real risk of a breach of natural justice. It therefore sought declarations from the court through Part 8 proceedings. The date for its response of 28 January 2008 was only 18 working days after 5 January and was simply not long enough to respond to the detailed claim submitted given the new evidence and revised figures. Vivid argued that the court had no jurisdiction to grant the declarations sought as this would interfere with the adjudicator's discretion and right to set his own timetable. Vivid also argued that the extended timetable was more than sufficient given that the Dorchester had had the majority of the final account details since March 2008.

The question before Mr Justice Coulson was, in an ongoing adjudication, to what extent should the TCC intervene in connection with potential breaches of the rules of natural justice?

The Judge dealt first with the issue of jurisdiction and held that the aim of the TCC was to provide assistance in ongoing adjudications. Accordingly, the court had the jurisdiction to consider applications for declarations, as was the case here:

"If an ongoing adjudication is fundamentally flawed in some way, or may be just about to go off the rails irretrievably, than it seems to me that it must be sensible and appropriate for the parties to be able to have recourse to the TCC; otherwise a good deal of time and money will be spent on an adjudication which will ultimately be wasted."

However, Mr Justice Coulson also confirmed that it would only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication and would only do so in clear-cut cases. He then went on to conclude that the declarations sought in this case should not be granted for four separate reasons. First, the adjudicator had clearly stated that he was able to fairly determine the adjudication by 28 January (or of course the extended date of 28 February). Mr Justice Coulson noted that HHJ Toulmin CMG QC in *CIB v Birse* (see Issue 55) had concluded that it was up to the adjudicator to decide whether or not he could reach a fair decision within the timetable.

Secondly, Mr Justice Coulson stated that he did not believe that such a timetable as that here was incapable of giving rise to a fair result. Thirdly, he considered that he was not in a position to be able to say whether or not the new material would lead to a breach of natural justice. And finally he noted that by refusing to grant the declarations sought, the Dorchester would not be left without a remedy. If a claimant is not happy with an adjudicator's decision, it is of course always open for it to attempt to resist enforcement in the future with the allegation that there has been a breach of natural justice.

So although the court is prepared to intervene in an ongoing adjudication, it will only do so in the rarest of situations. Mr Justice Coulson noted that:

"The concepts of natural justice … are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process".

Adjudication - ambush

- **Bovis Lend Lease Ltd v The Trustees of the London Clinic**

[2009] EWHC 64 (TCC)

Bovis served a Referral Notice running to 53 pages. It was accompanied by three expert reports, five witness statements and 31 files of contemporaneous documentation. The claim included a claim for loss and expense, made under clause 26 of the JCT Conditions. The Clinic said that there was not sufficient evidence to support the claim and took the point that Bovis was not entitled to loss and expense because clause 30.1.1 of the Contract provided that "*as a condition precedent to the issue of any such interim certificate, the Contractor shall have submitted to the Architect and to the Quantity Surveyor a claim for payment in respect of amounts eligible for inclusion in an interim certificate in accordance with the provisions of Clause 30.2. Such claims shall be supported by a detailed valuation*". The Clinic said that Bovis had not complied with these provisions.

The adjudicator ordered that the Clinic should pay loss and expense in the sum of £1.878 million as against the £3.28 million claimed. At enforcement proceedings before Mr Justice Akenhead, the Clinic further said it had not had sufficient time to consider the new claim. In relation to the loss and expense claim, the Judge noted that there were a number of applications by Bovis for payment. Until late 2006, these claims were for monies on account rather than by way of a substantiated claim for loss and expense. However, more detail was provided following the service of a report in early December 2006. In the report, the claim was put forward on the basis of estimated costs and losses with actual cost to be provided at a later stage. The Judge had no doubt that this was disputed. On 7 July 2008, Bovis submitted an updated claim for an extension of time, recovery of liquidated damages and loss and expense. Bovis included a draft referral Notice and an updated quantum report. The second report now provided (alleged) actual cost and loss figures. There was a substantial amount of new information and evidence in terms of witness statements and accounting documentation. However, the Judge noted that the heads of loss and expense were effectively the same, albeit that the figures were substantially different. The main difference was that in the new report there was a more detailed breakdown of the heads of sub-contractors' claims for loss and expense. The Clinic responded on 18 August 2008.

The Judge, after considering that response, decided that the whole of the contents of the draft Referral were in dispute. The Judge said this for the following reasons:

(i) It was clear on the face of the Clinic's letter of response that the Clinic and its professional advisers had given detailed consideration to the matters raised;

(ii) Further, the Clinic provided that detailed consideration with the time limit which they themselves had sought;

(iii) In its response, the Clinic rejected the claims noting that there was not sufficient evidence to support them;

(iv) A further challenge was put forward in relation to the "condition precedent" point and this was an argument made in response to the draft Referral.

Thus, the Clinic had asked for a period of six weeks to respond and were given six weeks. Therefore there was not any ambush by Bovis. Although originally it called for a response within two weeks, Bovis was prepared to agree to the following extension sought. Further the argument put forward by the Clinic was not that no dispute had arisen because of the condition precedent point but that there could be no claim until more information was provided. The Judge gave no view as to whether this was a good defence or not, but noted that it became part of the dispute that was referred to the adjudication. Finally, in relation to the lack of time point, the Judge noted that not once during the course of the adjudication did the Clinic complain that it had had insufficient time to prepare its Response. Whenever the Clinic asked for more time, it was granted by the adjudicator and Bovis agreed. Accordingly, the Decision was enforced.

Adjudication - the slip rule

- **YCMS Ltd v Grabiner & Grabiner**

[2009] EWHC 127 (TCC)

An adjudicator awarded YCMS £26k. On the same day YCMS wrote to the adjudicator pointing out an apparent arithmetical error, namely that the sum awarded should have been £41k. Two days later, having re-checked his decision the adjudicator amended his decision to award YCMS £60k. YCMS sought enforcement of the £60k. This was refused by Mr Justice Akenhead who only granted enforcement in the sum of £26k. Whilst the Judge agreed that the correction was made in time, 2 days was "*reasonably prompt*", he did not agree that the correction could be allowed. In the first decision, the adjudicator had made an "*inexplicable arithmetical error*" the correction of which would have left a figure of £41k. What the adjudicator did here was to reject the correction of the simple arithmetical error in favour of a further re-calculation, which included bringing in the sum due and paid under another certificate into the equation. Thus it was not simply the correction of a slip and further the Grabiners were materially prejudiced because the adjudicator got it wrong a second time.

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