Fenwick Elliott
The construction law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Mediation - costs

Corby Group Litigation v Corby District Council
[2009] EWHC 2109

You may remember the publicity given to the decision of Mr Justice Akenhead in this case when he found that the Council's control and management of steel work sites had been deficient leading to birth defects in local children. The same Judge has recently handed down a decision in relation to the costs of that case. One of the issues he had to consider was whether the Council should be liable to pay costs on an indemnity basis on the grounds that it unreasonably turned down a request for ADR. The Judge formed the clear view that the Council had not acted unreasonably. He did so by considering the time in which the request was made. The first time the possibility of mediation was being discussed, the Council's solicitors suggested with, in the view of the Judge, "some justification" that it would be better to defer any decision on this point until the exchange of expert evidence. Once expert evidence had been exchanged, the Council's team declined mediation because in their view it was "highly unlikely to be productive in reaching a conclusion" given the lack of common ground between the parties. In the view of Mr Justice Akenhead, given the nature of the claimants' expert evidence at the time, he did not consider that that position was unreasonable. He noted that:

"Hindsight shows that CBC [the council] was wrong but one must judge the decision to refuse ADR at the time that it was under consideration. CBC had expert evidence which supported its stance on every material aspect of the Group Litigation issues and the Claimants were adopting what I have described as a "scatter gun approach". It was not unreasonable to form the view that mediation would not have produced a settlement".

Indeed, the Judge went on to consider the consider so called "scatter gun" approach of the claimants (and by this he meant they did not seek properly to analyse what breaches of duty occurred on what projects and contracts and how such projects led to the dispersal of mud and dust and thus contaminants) but also the fact that there had been time wasted at trial because the claimants did not have enough witnesses available on a day to day basis to enable full days hearing to take place. A calculation was carried out as to the amount of time that was lost amounting to some two days. As a consequence of these two factors, the Judge formed the view as a reduction of the claimants' costs of 10% would be an adequate and fair reflection.

Adjudication - an adjudicator's jurisdiction

Camillin Denny Architects Ltd v Adelaide Jones & Co Ltd
[2009] EWHC 2110

This was an adjudication enforcement case which came before Mr Justice Akenhead. CDA were seeking to enforce the decision of an adjudicator in the sum of some £77k. One of the issues that had arisen was whether or not there was a novation whereby Adelaide Jones was replaced by another company, Euro Constructions & Building Ltd, thus rendering the decision of the adjudicator unenforceable.

In coming to his decision, the Judge referred to the case of Air Design (Kent) Ltd v Deerglen (Jersey) Ltd (see Issue 103) where the court had to consider the circumstances where the substance of the dispute overlapped with the possible jurisdictional challenge. In particular, an issue had arisen as to whether or not the adjudicator had jurisdiction to resolve disputes arising in one adjudication but in relation to four contracts said to exist between the parties. In that case, the Judge was of the view that the adjudicator was properly appointed under the first contract and that there could be no argument that, in that capacity, he had (binding) jurisdiction to decide whether the later "contracts" were simply variations or stood on their own entirely separately as contracts in their own right.

Mr Justice Akenhead here did not think that the Air Design case was authority for any proposition other than that there may be cases in which adjudicators properly appointed have jurisdiction to resolve jurisdictional issues if and to the extent coincidently those issues are part of the substantive dispute referred to adjudication. These words were probably a response to the suggestions that had been made in some quarters that the Air Design case might be a sign that the TCC might have opened a small window to give adjudicators jurisdiction to decide their own jurisdiction at least in cases where substance and jurisdiction overlap.

The Judge here noted that where there has been a clear unqualified and fully retrospective novation by which a new party is substituted for an original party to a contract, it is the new party which can itself seek adjudication and it is against the new party that the other party must seek adjudication or, later arbitration. That was not the case here. Indeed, on the evidence here, there was no realistic prospect of Adelaide Jones establishing that there had been an effective novation. The novation had been mooted, but there is no evidence as to whether any of the proposals had been accepted. The adjudicator's decision was duly enforced.

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Withholding notices

Windglass Windows Ltd v Capital Skyline Construction Ltd & Anr

[2009] EWHC 2022(TCC)

Capital engaged Windglass to supply and install windows. The sub-contract did not contain an adequate mechanism, in accordance with the HGCRA, for determining what payments were due and when. Accordingly the relevant provisions of the Scheme were implied into the sub-contract. A dispute arose between the parties concerning unpaid interim valuations. Capital who had only replied to these valuations on two occasions, said that they would not process the applications because they were not in the appropriate format and had not been signed by Capital's site manager. The withholding notices were in the following form:

"Our financial director has returned this application and is not willing to process this amount due to insufficient supporting information. Please note that our company policy is such that each sub-contractor valuation must be presented in a standard format, copy attached, and authorised by the appropriate site manager before your application can be processed. Could you kindly re-present your application with the correct supporting information….."

Windglass referred the dispute to adjudication, where they were awarded £152k. Capital did not pay and Windglass sought to enforce the decision. Capital argued that the adjudicator had exceeded his jurisdiction in deciding that the withholding notices were invalid because they did not include valid grounds for withholding. Capital argued that the HGCRA does not require the grounds for withholding to be valid for the notice to be effective. Mr Justice Coulson held that Capital were wrong for four reasons:

(i) In deciding that the notices were invalid, and that any cross claims raised as defences to the notices must fail as a consequence, the adjudicator had answered the issues put to him. This was within his jurisdiction and the Judge queried whether this was a jurisdictional point in any event;

(ii) The argument that the HGCRA did not require the grounds for withholding to be valid was wrong. The Judge disagreed that, as long as there was something which purports to be a withholding notice, then that is sufficient to justify withholding, regardless of content.. There was no meaningful distinction between a 'valid' or an 'effective' notice in s111;

(iii) The adjudicator provided reasons as to why the withholding notices were not effective: neither the amount proposed to be withheld nor the grounds for doing so were set out; and

(iv) Even if the adjudicator should have taken the alleged counterclaim into account, it was so vague, unparticularised and unlinked to the terms of the subcontract that it could not operate as a valid set-off to the withholding notices.

Capital also submitted that their withholding notices could act as a 'gateway' through which they could gain an entitlement to raise defences in the adjudication not previously raised. The Judge disagreed on the basis that the HGCRA does not permit someone to put in an ineffective withholding notice to get around the requirements of the HGCRA, and to then introduce entirely different arguments at a later date. The decision was duly enforced.

Arbitration - excluding the right of appeal

Shell Egypt West Manzala GmbH & Others v Dana Gas Egypt Ltd

[2009] EWHC 2097 (Comm)

Centurion argued that the parties had agreed to exclude the jurisdiction of the court under section 69 of the 1996 Arbitration Act to consider appeals from an arbitration award. The contract stated that:

"… and the decision of the majority of the arbitrators...shall be final, conclusive and binding on the parties, and the judgment upon such decision may be entered in any court of a country having jurisdiction..."

Centurion argued that the combination of words "final, conclusive and binding" showed that the parties had agreed in unequivocal terms that there should be no ability to appeal against the award. The plain intent and meaning of that wording was that any award should be final and binding on the parties, and conclude all matters in issue between them without further argument.

Mrs Justice Gloster asked what those words would mean to "a reasonable person having all the background knowledge which would reasonably have been available to the parties." Here the relevant background included the fact that the expression "final and binding", in the context of arbitration, has a traditional meaning as expressed by Mr Justice Ramsey in the case of Essex County Council v Premier Recycling:

"...I conclude that the use of the words 'final and binding', in terms of reference of the arbitration are of themselves insufficient to amount to an exclusion of appeal. Such a phrase is just as appropriate, in my judgment, to mean final and binding subject to the provisions of the Arbitration Act 1996."

The addition of the word "conclusive" was insufficient by itself to demonstrate that the parties specifically intended to forgo their right of appeal. To amount to an agreement to exclude those rights, sufficiently clear and express wording was necessary.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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