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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.

Adjudication - successive adjudications and withholding notices

Hart t/a D W Hart & Son v Smith & Smith

[2009] EWHC 2223 TCC

The Smiths engaged Hart to convert three barns into four houses under a JCT Standard Building Contract 2005 without Quantities. In November 2008, Hart issued application 21, of which the Smiths paid all but £9.5k, and in March 2009 Hart issued application 24 for £70k, of which the Smiths paid none. The Smiths issued a withholding notice after the relevant date set by the contract but did not specify to which of the applications the notice referred. On 26 May 2009, the contract administrator issued certificate 25 ordering a repayment of £7.5k by Hart to the Smiths. Three days later the Smiths issued a further notice of withholding for £138k referring to LADs, damage to a collapsed wall, refinancing charges and legal costs.

On 20 May 2009, Hart started an adjudication in respect of applications 21 and 24. On 16 June, the Smiths commenced an adjudication seeking repayment of certificate 25, payment of the £138k and a declaration that they were entitled to a certificate of non-completion in respect of each barn. Hart were awarded the full amount claimed. The Smiths were awarded the amount of certificate 25 and a payment of £4k for the collapsed wall. The adjudicator also made a declaration that the Smiths were entitled to certificates of non-completion in respect of all three barns, but did not allow the claims for LADs, refinancing charges or legal costs. Until the certificates of non-completion were issued, and therefore any delays were confirmed, Hart could not be required to pay LADs or the refinancing charges. The contract administrator then issued certificates of non-completion stating that the deduction of LADs was at the Smiths' discretion. The Smiths duly wrote to Hart claiming £71k in LADs but in doing so differentiated between this claim and the amounts awarded in the second adjudication.

Hart then commenced enforcement proceedings and offered to set-off the specific sums awarded against Hart in the second adjudication of £11k. However the Smiths contended that they were entitled to set-off their claim for LADs against the decision in the first adjudication, which they submitted was a natural consequence of:

1. The declaration made by the adjudicator that they were entitled to non-completion certificates;
2. The issuance of non-completion certificates by the contract administrator; and
3. The notification of the claim for LADs made by the Smiths to Hart.

HHJ Toulmin CMG QC decided that there were two key questions:

1. Did the specific sum of £71k follow logically from the decision of the adjudicator in the second adjudication? and
2. Can that sum be set-off against the adjudicator's award in the first adjudication?

In relation to the first question the Judge decided that the sum claimed did not follow logically from the adjudicator's decision and consequently could not be set-off. The only issue that did logically flow was the issue of the non-completion certificates. The Judge also thought it relevant that the sum now claimed for LADs was different to the amount claimed for LADs in the second adjudication. Accordingly, the decision in the first adjudication was enforced, subject to the deduction of the specific sum awarded in the second adjudication.

Procurement - clarification of tenders

Deane Public Works Ltd v Northern Ireland Water Ltd

[2009] NICh 8

NIW sought tenders for a sewer replacement project. The pre-qualification questionnaire ("PQQ") asked bidders to provide details of projects from within the past 5 years that best demonstrated their ability to undertake the works. When Deane submitted its bid on 27 August 2007, one of the projects it identified related to a project in Enniskillen carried out between November 2001 and April 2002.

NIW told Deane that it had been unsuccessful. In a debrief session, NIW further told Deane that, although it had scored highly on all other sections of the PQQ, it had not received any marks for the Enniskillen project because it fell outside the five year period. Had Dean received marks for this then it would have been successful. In response, Deane said that it had been mistaken and that the final works were not completed until October 2002 and the final account was not paid until October 2003. Therefore the project fell within the five year period. Deane claimed that it had been unfairly excluded from the tender process. This was especially as NIW had sought and obtained clarification from two other companies, who reached the short list.

Given the value of the contract, being £2.5million, the Utilities Contracts Regulations 2006 did not apply. However, NIW said that the tender process was conducted in accordance with public procurement principles. It was also conducted in accordance with guiding principles of the "Government Accounting Northern Ireland" procedures, which include transparency and treating suppliers fairly and with consistency.

The court noted that NIW had put in place "highly formal" arrangement for the tender process. Further Morgan LCJ also held that a contractual relationship had come into existence between NIW and all those who responded to the tender by way of submitting a PQQ. The court therefore considered the nature of the implied contractual obligations to which this relationship gave rise. In short the court concluded that it was appropriate to imply obligations of non-discrimination and equal treatment.

Morgan LCJ then considered the terms of the PQQ. He held that the term "within the last five years" was straightforward and identified a period of five years exactly. Therefore, any project which was completed prior to 29 August 2002 would not count. The key word was completed. In the context, it could not refer to contractual periods where a contractor was no longer on site nor to the defects period. NIW had said that the works were completed when the contractor has finished its work on the site and handed the project back to a client. Indeed, as the court pointed out, this was the approach Deane had taken at the time when the PQQ was compiled. Therefore, the Enniskillen project was completed outside the five year period and NIW had been justified in their decision to exclude any consideration of it.

The court did consider the circumstances of the clarification sought by NIW from the other two contractors. In one case it was clear that the answer given was incorrect (values of £0 had been provided for costs) and the bidder had misunderstood the question. In the second, the bidder had failed to provide a health and safety policy, although it clearly had one. These situations were different from that where the bidder had provided information on an out-of-date project and so there was no unequal treatment of Deane.

There was a difference between cases where the principle of good administration required an employer to exercise its power to obtain clarification (i.e. where clarification was clearly both practically possible and necessary) and the position of Deane here.

Guarantees - choice of law and courts

Commercial Marine Piling Ltd v Pierse Contracting Ltd

[2009] EWHC 224 (TCC)

Marine was engaged by the UK arm of Pierse to perform piling work at the new ferry terminal being constructed at the Port of Belfast. Pierse UK's parent company, Pierse Ireland, provided Marine with a parent company guarantee. A dispute arose between Marine and Pierse UK and six months later Pierse UK went into creditors' voluntary liquidation. Marine commenced proceedings against Pierse Ireland seeking the sums due under the guarantee. The guarantee did not contain a choice of law or jurisdiction clause and so Pierse Ireland disputed that the English courts had jurisdiction to hear the claim.

Pierse Ireland argued that following Article 1 of Council Regulation 44/2001 the presumption should be that Pierse should be sued in its country of domicile; i.e. Ireland. Under article 5(1) a person may be sued in the place of performance of the contractual obligation in question, and the obligation here was the defendant's obligation to pay under the guarantee.

The place of performance was to be decided in accordance with conflict of law rules of the court seized, which is the English court. Article 4(1) of the Rome Convention provides that the contract shall be governed by the law of the country with which it is most closely connected. Further, article 4(2), states that it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has its central administration. Here, Pierse Ireland argued this was was Dublin. Therefore Irish law applied.

Marine claimed that the guarantee contained two obligations:

1. For Marine to trade with Pierse UK;, and
2. For Pierse Ireland to pay monies due in default of payment by its subsidiary.

Maine said that neither obligation had anything to do with Ireland; the performance of both took place in England. Additionally, article 4(2) should be disregarded by operation of article 4(5) which looks at the "circumstances as a whole" to see if "the contract is more closely connected with another country." Mr Justice Ramsey agreed with Maine, holding that the contract on the whole was more closely connected with England and Wales than Ireland and that article 4(5) could displace the article 4(2) presumption:

"The relationship under the Guarantee had, in my judgment, a geographical centre of gravity in England. The only connection with Ireland was that it was an Irish Company which was providing the Guarantee but it was doing so in relation to the English company."

Accordingly the laws of England and Wales applied. In deciding the jurisdiction point the Judge followed previous lines of authority dating back to the Victorian era, that stated where an obligation to pay under a guarantee arises under a default of a party (rather than by operation of a written demand from the creditor), the actual location of the operation of the obligation is the key to establishing where payment is to be made. Here, the contractual obligation was to be performed in England.

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