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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: same dispute

Brown & Anr v Complete Building Solutions Ltd

[2016] EWCA Civ 1

This was an appeal against summary judgment enforcing an adjudicator's decision. Mr and Mrs Brown (the "Employer") argued that an adjudicator had no jurisdiction because he had been asked to adjudicate the same or substantially the same dispute as had been decided by another adjudicator in an earlier adjudication. The Contractor contended – as HHJ Raynor QC had found in the TCC – that the adjudicator did have jurisdiction.

The Employer had in December 2011 engaged the Contractor under a JCT Minor Works Building Contract (2011 edition) (the "Contract") to demolish a dwelling house and build a new house. On 31 October 2013, the Architect issued a Final Certificate under the Contract, and on 20 December 2013, the Contractor sent a letter to the Employer claiming that a final payment of just over £115,000 was due. The Employer did not pay this sum, and the Contractor sent a Notice of Adjudication on 7 February 2014 (the "First Adjudication Notice"). The first adjudicator, A1, was subsequently appointed.

A1 issued his decision (the "First Adjudication") on 1 April 2014, concluding that the Final Certificate issued by the Architect on 31 October 2013 was ineffective, but also that the Contractor's letter of 20 December 2013 was not a valid payment notice for the purposes of the relevant clause of the Contract, Clause 4.8.4.1. Therefore, as no payment notice had been served, no sum was payable.

On that same day, 1 April 2014, the Contractor sent a new payment notice, and on 24 April 2014, the Contractor issued another Notice of Adjudication (the "Second Adjudication Notice"). A2 was subsequently appointed as Adjudicator on 29 April 2014, but the Employer disputed his jurisdiction on the grounds that the dispute referred to him was the same or substantially the same as that decided by the first adjudicator. The Employer therefore refused to participate in the adjudication and did not serve a counter-notice (which it was entitled to do under Clause 4.8.4.3, and in the absence of which it was obliged to pay the Contractor the sum stated in the Contractor's notice).

A2 issued his decision (the "Second Adjudication") on 27 May 2014, finding that the dispute which had been referred to him was not the same or substantially the same as that which had been referred to A1. A2 found that A1 had decided that no Final Certificate had been issued in accordance with Clause 4.8.1 and that that decision was binding on both the parties and him. He also decided, however, that the Contractor's 1 April 2014 notice was effective under Clause 4.8.4.1, and that the Employer's refusal to make payment had created a dispute which was not the same or substantially the same as that which had been referred to and decided by A1. Therefore, and having noted that the Employer had not given a counter-notice, A2 decided that the Employer was required to pay the £115,000 plus interest and the Adjudicator's fees.

The Employer refused to pay the sum awarded, and the Contractor subsequently began enforcement proceedings in the TCC, where Judge Raynor QC gave summary judgment in its favour. The Employer appealed.

The CA referred to the recent cases of *Harding v Paice and Springhall* [2015] EWCA Civ 1281 and *Quietfield Ltd v Vascroft Construction Ltd* (Issue 79), and reiterated that the "starting point is the Adjudicator's view of whether one dispute is the same or substantially the same" as the other, this being a question of fact and degree. LJ Jackson in the Harding case had said that:

"It is quite clear from the authorities that one does not look at the dispute or dispute referred to the first adjudicator in isolation. One must look at what the first adjudicator actually decided. Ultimately it is what the first adjudicator decided which determines how much or how little remains for consideration by the second adjudicator."

The Court found that A2 was entitled and correct to conclude that he was not considering the same or substantially the same dispute as A1: he had recognised that both parties were bound by A1's original finding that the Final Certificate was ineffective and that the Contractor's letter of 20 December 2013 did not constitute a valid payment notice, and that he was being asked to decide whether a different notice, served some four months later, had different consequences. Whilst both adjudications were dependent on the ineffectiveness of the Final Certificate and were for the same sum, the Contractor was not seeking redetermination of any matter which had already been decided by A1.

This was not a case where the Contractor had "tried in some way to cure a defect in the earlier notice so as to rely on it"; the Contractor had approached its claim "via a new and different route … which relied on the letter of 1 April and thereby raised a different dispute", and it was "the new notice and only the new notice which founded the Respondent's entitlement to be paid". The CA dismissed the appeal, agreeing with HHJ Raynor QC that

"what was decided in the First Adjudication was the ineffectiveness of the notice given in December 2013. That was not raised at all as an issue in the Second Adjudication."

Can a duty of care arise between friends?

Burgess & Anr v Lejonvarn Construction Services Ltd

[2016] EWHC 40 (TCC)

This was a trial of preliminary issues relating to the question of whether a professional consultant owed a duty of care in tort when performing gratuitous services for friends.

In 2012, Mr Peter and Mrs Lynn Burgess (the "Burgesses") obtained a quotation of approximately £200,000 for works to the back garden at their home in Highgate, London. The Burgesses had been friends for a number of years with Mrs Basia Lejonvarn ("Lejonvarn"), a Netherlands-registered architect living in London, who informed them that she believed the Works could be completed within a smaller budget. Lejonvarn, who had in the past provided gratuitous design services for the Burgesses, began providing design and project management services for the project. She did not ask for payment from the Burgesses, but it was her intention to charge a fee for detailed design work at a later stage in the project.

As the project progressed however, the Burgesses became concerned about the quality and cost of the Works. The relationship between Lejonvarn and the Burgesses deteriorated, and ultimately the Burgesses engaged the specialist landscape designer who had provided the original quote to complete the project. The Burgesses then claimed against Lejonvarn, in both contract and tort, for the increased cost of completing the works (including remedial works). The maximum value of the claim was £265,000.

The TCC had to determine the following five preliminary issues:

(i) Was a contract concluded between the Burgesses and Lejonvarn?
(ii) If so, what were its terms?
(iii) Did the professional consultant (Lejonvarn) owe a duty of care in tort?
(iv) If so, what was the nature and extent of her duty?
(v) Was a budget of £130,000 for the project discussed by the parties before 5 July 2013, and if so, when?

Mr Alexander Nissen QC held that there was no contract between the parties, as there had been no offer and acceptance capable of giving rise to a contract, as well as no consideration. The Burgesses' claim in contract therefore failed.

The court further observed that the losses claimed by the Burgesses were pure economic losses, and noted that whilst there were conflicting authorities as to whether a professional designer in the construction sphere owes a duty of care in respect of pure economic loss, "the preponderance of authority is that a duty is capable of being owed" despite the decision in *Payne v John Setchell* [2002] BLR 498.

Lejonvarn did not deny that a duty of care could arise, but instead challenged the scope of the duty, arguing that a duty of care in respect of pure economic loss could arise from advice given, but not from a duty to perform a service. Referring to *Hedley Byrne v Heller* [1964] AC 465 and *Murphy v Brentwood District Council* [1991] 1 AC 398, Lejonvarn contended that the law distinguished between advice on the one hand and the provision of services (such as supervision) on the other, and noted that the courts had clearly rejected the notion that a duty of care should be imposed on a contractor carrying out construction work (see *Murphy*). It was submitted therefore that it would be illogical if a party who was generally overseeing work (in this case, Lejonvarn) owed a duty which was wider than that of those actually executing the work itself.

Referring to a number of other cases, including *Henderson v Merrett Syndicates* [1995] 2 AC 145 and *Robinson v Jones (Contractors) Ltd* (Issue 128), the court rejected Lejonvarn's argument, finding that "a duty of care extends to the protection against economic loss in respect of both advice and any service in which a special skill is exercised by a professional". Further, the court referred to the case of *Lidl Properties v Clarke Bond Partnership* [1997] Env. LR 662, where a duty of care had been found to exist with regard to the giving of gratuitous advice in the construction sphere.

The court therefore found that Lejonvarn owed a duty of care in tort to the Burgesses, and that the duty covered *inter alia* the selection and procurement of contractors and professionals, project management and supervision of the works, and detailed design work. The court qualified the duties which it had identified by holding that Lejonvarn should be judged by the standards of a reasonably competent architect and project manager, and not by the standards of a structural or geotechnical engineer.

In this regard, the court held that the Burgesses and Lejonvarn had discussed a budget of £130,000 on two occasions prior to 5 July 2013, and that Lejonvarn knew the Burgesses were relying on that figure. Lejonvarn therefore assumed responsibility to the Burgesses for the accuracy of the budget figure.

Whilst this judgment clearly highlights the inherent risk to professionals in offering informal advice, it is important to note that the court emphasised that:

"this was a significant project … approached in a professional way. This was not a piece of brief ad hoc advice of the type occasionally proffered by professional people in a less formal context. Instead, the services were provided over a relatively lengthy period of time and involved considerable input and commitment on both sides."

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