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

Dispatch

Adjudication costs

Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd

16 August 2017 - Westlaw

This was an adjudication enforcement case which came before Mrs Justice O'Farrell. The adjudicator awarded the claimant £81,000 plus interest, as well as its reasonable costs of recovering the debt plus VAT of £14,900, and adjudication fees. The principal claim was enforced. However, the claim for costs was dismissed and that part of the adjudicator's decision was severed.

Details of the case are brief, because there is not, as yet, a formal judgment and there may not be one, but it is clearly an important point of principle.

From the case note, it would appear that the Judge was influenced by the fact that the claim for costs was based on an implied term. Following the amendments made in 2013 to the Late Payment of Commercial Debts (Interest) Act 1998, it had been suggested that a party may be able to recover the costs incurred during an adjudication where payment was sought. Specifically, section 5A of the Late Payment Act provided for an implied term in a contract that a successful party was entitled to its costs of recovering a debt. In contrast, section 108A of the HGCRA as amended provides that where a construction contract has been referred to adjudication, the costs of an adjudication can only be awarded where such a provision has been made in writing.

The Judge agreed that in accordance with the principles of the Late Payment Act, Enviroflow was entitled to seek its reasonable costs by reason of the implied term. However, following section 108A of the HGCRA, that term would be ineffective unless an agreement had been made in writing. In other words, the specific requirements of the HGCRA that any agreement providing for the payment of costs had to be in writing took precedence.

Here, it was apparently common ground that no agreement had been made in writing. Therefore the adjudicator did not have jurisdiction to make a costs award and that part of his decision was not enforced.

This Decision is therefore in line with the spirit of Mr Justice Coulson's decision from the end of last year in the case of *WES Futures Ltd v Allen Wilson Construction Ltd* (Issue 196) where he noted that in "an ordinary case", a party seeking to recover a sum awarded by an adjudicator is not entitled to (and cannot seek) the legal costs it incurred in the adjudication itself. That was because, pursuant to the Housing Grants Act, as amended, costs incurred in adjudications are not recoverable:

"... if a successful party cannot recover its costs in the adjudication itself, it cannot recover them in enforcement proceedings either".

Expert evidence

Bank of Ireland & Anr v Watts Group Plc

[2017] EWHC 1667 (TCC)

One of the key issues in this case which came before Mr Justice Coulson, one of the last cases before his elevation to the Court of Appeal, was the reliability or otherwise of the expert valuation evidence.

The Judge concluded that the Bank's expert was not a properly independent witness. This was because the Bank was the expert's principal client, providing the vast majority of his work (and fees). Further, the expert in question had spent most of the past few years acting for the Bank as an expert witness in actions against monitoring quantity surveyors arising out of the 2008-2009 financial crash. This was the first time any of the cases had reached the courts, the others having been resolved by ADR. The Judge was concerned that the expert was unaware of the difference between acting as the Bank's advocate in a mediation, and the duties owed to the court when giving expert evidence.

Further, the Judge noted that Watts were paid £1,500 for producing the Report which was in dispute before the court. This was a modest fee which, it turned out, reflected the fact that they were not expected to do their own detailed calculations of cost, time or cash-flow, but instead had to check the calculations and proposals which had been undertaken by the Borrower. The small size of the fee was good evidence of the limited nature of the service that Watts were expected to provide.

In contrast, the expert, in addressing the Report, in his first report (and he produced more than one), incurred fees of £24,000, and the Bank's solicitors incurred a similar sum in respect of their commissioning, checking and liaison work in connection with that same report. This lead the Judge to conclude that this was a "clear indication" that the criticisms which had been generated were based on an entirely unrealistic expectation of what it was that Watts were required to do. What the expert should have done was to establish what a reasonably competent monitoring surveyor would have done in the circumstances, and to test Watt's performance against that benchmark.

The Judge considered that the expert's approach was "thoroughly unreasonable". The agreed note demonstrated that he made no concessions at the experts' without prejudice meetings. Apparently the expert used the meeting "quite deliberately" to raise new matters with his opposite number. In fact the Judge observed at the beginning of the trial that he had never seen a Joint Statement between experts that contained no agreement at all. The main reason for this was due to the complete failure to make any concessions at all.

Unsurprisingly, the Judge did not accept the evidence of the expert concerned.

Adjudicator's fees

Christopher Linnett Ltd v Harding (t/a M J Harding Contractors)

[2017] EWHC 1781 (TCC)

Here, the Claimant adjudicator sought payment of statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 which had accrued during the period of delay in settling the payment of his fees, statutory compensation and debt recovery costs. The adjudicator was successful on all fronts.

Harding had argued that it was not a party to the adjudication agreement. He had not concluded an adjudicator's agreement and the only relationship he had with Mr Linnett arose out of the obligation on the part of the adjudicator to comply with the Scheme. The Judge, Mr Nissen QC, disagreed. The Defendant, as evidenced by the various communications and exchanges, agreed to and did in fact participate in the adjudication process (albeit without prejudice to his jurisdictional objections) and he had, therefore, by his conduct, requested the adjudicator to adjudicate on the dispute. It was the adjudicator's terms which applied. Once the terms had been sent out, it was for the Defendant to say that he did not accept them. Otherwise the conduct which formed the basis of his acceptance of the offer would be conduct on those terms.

The purpose of the Late Payment Act was to provide businesses with a right to statutory interest which they would not otherwise have had. The Late Payment Act did apply to the adjudicator's agreement not only because the Defendant was acting in a business capacity but also because he concluded it in the course of a business. It was a commercial transaction. Accordingly, the fees claimed by the adjudicator were a qualifying debt of the Late Payment Act. Further, the adjudicator's terms included the right to recover the reasonable costs of recovering the debt in accordance with the 2013 Late Payment Regulations and so the adjudicator was entitled to recover the time spent in pursuing recovery of the overdue sums.

Relief from sanctions

ADVA Optical Networking Ltd & Anr v Optron Holding Ltd

[2017] EWHC 1813 (TCC)

During 2016 ADVA settled a claim brought by BT concerning allegedly defective in-line socket electrical cables. In order to pass the claim down the supply chain, ADVA commenced proceedings against Optron who in turn joined in their own supplier Rotronic Instruments (UK) Ltd. The proceedings between ADVA, Optron and Rotronic were initially stayed pursuant to a standstill agreement but a trial date was fixed for April 2018. Mr Justice Coulson noted that there had been a reasonable amount of cooperation between these parties.

However, Rotronic was unable to obtain the consent of its own supplier, A One Distribution (UK) Ltd, to enter into the standstill agreement or to become a party to ADVA's proceedings. Rotronic therefore commenced separate proceedings against A One and served its particulars of claim on 10 March 2017. A One did not file an acknowledgement of service or serve a defence. Rotronic's solicitors wrote to A One more than once advising A One to obtain legal advice "as a matter of urgency". There was no response

A Case Management Conference ("CMC") in both Rotronic's proceedings against A One and in ADVA's proceedings against Optron/Rotronic was fixed to take place on 16 June 2017.

On that day, Rotronic's solicitors were contacted by solicitors appointed by A One who indicated that they had only just been instructed and were unable to consider directions. At the CMC the Judge ordered A One to issue an application for relief from sanctions pursuant to CPR Rule 3.9 on or before 23 June 2017. A One did this and also issued a draft defence together with an application for an extension of time for service and/or relief from sanctions.

The Court of Appeal in *Denton & Others v TTH White Ltd* [2014] EWCA Civ 906 had outlined a new three-stage test for considering breaches. In respect of stage one, Mr Justice Coulson considered that in circumstances where A One had refused to sign the standstill agreement, (which had the result of forcing Rotronic to issue separate proceedings), and where A One had then gone on to ignore those proceedings, including failing to serve a Defence, this was a serious default.

Similarly, the Judge did not consider that there was any good reason for A One's serious breach of the court rules. The submission that A One had not understood the meaning and effect of the documents served by Rotronic was a "thoroughly bad point". There was nothing complicated about these documents. The decision by A One to ignore the proceedings was "entirely consistent" with their conduct to date.

That said, although A One's conduct had been "very poor" in failing to comply with the relevant rules which in turn "prevented the efficient and proportionate conduct of the claim against them", A One were saved by consideration of the third stage. First, if A One was granted relief it would not cause any delay to the litigation overall, given that ADVA's proceedings against Optron and Rotronic were at an early stage. Disclosure had not yet commenced and the trial was not listed until April 2018.

Second, Mr Justice Coulson agreed that if judgment in default were granted against A One, this would be contingent and therefore unsatisfactory, given that Rotronic's primary position as against Optron was to deny liability. Thus any contingent judgment against A One would only become relevant if Rotronic's defence against Optron was rejected. There was also a risk that with a contingent judgment to rely upon, Rotronic might decide not to engage further in the detail of the claim in the main action, knowing that, even if their primary case failed, because of the default judgment, it would be A One who would be picking up the bill.

Therefore the Judge decided to grant A One's application for relief, accepting that:

"this is one of those (relatively rare) cases of serious default in which it is appropriate to grant relief from sanctions".

Parties should note, with care, the comment "relatively rare".

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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