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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

Case update: contracts & liability caps

Arcadis Consulting (UK) Ltd v AMEC (BCS) Ltd

[2018] EWCA Civ 2222

We reviewed this case in Issue 197. At first instance, Mr Justice Coulson had said that this was a classic "contract/no contract" case. Buchan, who acted as the specialist concrete subcontractor, engaged Hyder to carry out design works on a car park in anticipation of a wider agreement between the parties that did not materialise. It was alleged that the car park was defective and may need to be rebuilt at significant cost. Hyder denied liability but also said that if they were liable, there was a simple contract in respect of their design works, pursuant to which their liability was capped in the sum of £610k. If Hyder were wrong, their potential liability could have amounted to some £40million. At first instance, the Judge held that the parties had agreed a simple contract arising out of a letter dated 6 March 2002 and that no set of terms and conditions was incorporated into the Contract. Hyder appealed.

Mr Justice Coulson had considered that in the absence of any over-arching Protocol Agreement and its terms and conditions, described as the "November terms", the parties could not be taken to have agreed that Hyder's liability was to be capped. There was too much uncertainty and too much that was not agreed for the court to conclude, on any objective analysis of the correspondence, that the parties intended to be bound by a liability cap.

LJ Gloster in the CA disagreed. The 6 March 2002 letter was a request to start work on all of the terms as set out in that letter of intent. It was an offer of an "if" contract. This was because, in the letter, Buchan requested Hyder to carry out a certain performance and promised Hyder that, if it did so, it would receive a certain performance in return. The letter established a fixed fee of £56,000, which was capable of being revisited. It was a standing offer which, if acted on before it lapsed or was lawfully withdrawn, would result in a binding contract.

Hyder accepted that offer. The "best evidence" that Hyder had accepted was its conduct in undertaking the work. Given that the letter of 6 March 2002 included that the work was to be carried out: "*in accordance to...the Terms and Conditions associated that [the parties] are currently working under...*", the court had to determine what, if any, terms and conditions had been incorporated. Here LJ Gloster highlighted the need to distinguish between the interim contract under which the parties were currently working (the Contract) and the Final Contract, the terms of which would supersede the Contract once agreed. The parties had chosen "to stop the music" in relation to the terms that applied in the interim in relation to the Contract but not in relation to the Final Contract. Once the final terms had been agreed, they were to supersede the interim terms for the purpose of all of the projects.

The appellate Judge was clear that the reference to the "Terms and Conditions" was a reference to terms that the parties had previously exchanged and agreed to work under. On the evidence these were terms which had been agreed on a parallel project and Buchan had sent Hyder an email saying that "**[w]e intend to use the documents** for the Wellcome Building works subject to your agreement and we will be providing more details shortly". The emphasis is that of LJ Gloster. This was an offer, which was accepted either by Hyder's conduct in starting work on 13 November or by a later letter.

A feature of Mr Justice Coulson's original judgment had been his recognition that his analysis rendered a particularly harsh result for Hyder. LJ Gloster thought that the harshness of the original result was another reason why the original decision was not correct. It goes without saying that parties should not take any comfort from these words; LJ Gloster's decision, like that of Mr Justice Coulson, was based on an analysis of the documents said to make up the contractual relationship between the parties – an analysis that was only necessary because of the original failure to sign up to a full contract agreement in the first place.

Contracts: liability for asbestos removal

West Reg. Street (Property) Ltd v Central Demolition Ltd

[2018] CSOH 98

The parties entered into a contract to demolish three adjacent buildings. The Contract was the SBCC Standard Building Contract Without Quantities 2011, albeit that documents referred to as bills of quantities defining the required work were provided at tender stage. During the demolition, asbestos was found. A dispute arose as to who should bear the cost of removing the asbestos.

West Reg. said that the contract was a lump sum contract. The Works included the "complete demolition" of the Victorian and 1960s buildings to existing basement levels. The lump sum price was an inclusive price for all work which was necessary to achieve that result. Central was aware of the risk that the buildings might contain unknown asbestos over and above the two particular known quantities it had been asked to price separately. On a fair reading of the contract as a whole a reasonable person in the position of the parties at the time of contracting would have understood that all known asbestos identified would have been removed prior to the demolition work, but that Central bore the risk of other unknown asbestos being discovered during demolition.

Further, clause 2.1D of the Contract provided that:

"Any adverse ground conditions, artificial obstructions or contamination encountered during the execution of the Works shall be the sole responsibility of the Contractor (whether or not the same could reasonably have been foreseen at the date of this Agreement by a contractor exercising the standard of skill care and diligence referred to in Clause 2.1A) and no adjustment shall be made to the Contract Sum or to the Date for Completion in respect of such matters."

The word "contamination" had its ordinary meaning. Asbestos encountered during demolition of the buildings was "contamination encountered during the execution of the Works". Further, when a pay less notice had been served Central had not at first argued otherwise.

Central said that the contract was a lump sum contract to perform defined work. Whereas in a with quantities contract the bills of quantities define the scope of the works, in a without quantities contract the contract documents taken together describe the quantity and quality of the work included in the contract sum. Here, the Works were defined by the Specification and the drawings. There was provision in the contract for variation of the Works. In terms of SMM7 the removal of toxic or other special waste was to be described and measured as a separate item. In the event of it not being possible to do that, General Rule 10 directed that it be included as a provisional sum. As there was no specific item or provisional sum in the Specification for the removal of toxic or other special waste, there had been no item against which to price asbestos removal work or make allowance for the risk that unknown asbestos would be discovered during the Works. The asbestos removal was not part of the Works. West Reg.'s position flouted business common sense. It involved Central "gambling" on the absence of further asbestos, running the risks of having to undertake potentially costly and time-consuming work for which no allowance had been made in the bill items or the tender, and exposing itself to the risk of liquidated damages.

As for clause 2.1D, Central had been assured that asbestos was not contamination and about further asbestos work being a variation. Clause 2.1D was not relevant to the issue between the parties. Asbestos within the buildings was not "contamination". Contamination involved defilement, i.e. the deposit of waste on land.

Lord Doherty did not accept that West Reg. provided the assurances alleged. The Judge thought it "odd" that the suggested assurances were not raised when the pay less notice was first served. The Judge also commented that:

"while ideally a considered view ought to have been taken at the time, it is not uncommon that work which has been treated as a variation in an interim valuation is later recovered as an overpayment when its true character is determined..."

As to who bore the risk for the "additional unknown asbestos"? The answer depended upon how a reasonable person in the position of the parties at the time of contracting would have interpreted the contract's terms. Here, clause 2.1D also pointed "strongly" towards the suggested construction of the contract. A reasonable person in the position of the parties would have understood "contamination" to include asbestos in the buildings. In Lord Doherty's opinion:

"at the time of contracting a reasonable person in the position of the parties would have known that, notwithstanding the soft strip and asbestos removal, there remained a risk of further, unknown, asbestos being present within the buildings which were to be demolished...that was clear from a fair reading of the Contract Documents as a whole. It was also clear from the terms of the surveys which the pursuer had provided to the defender. The reasonable person would also have understood that the scope of the work which the defender undertook to perform for a lump sum price included the removal of any presently unknown asbestos which might be encountered during demolition."

Arbitration: scope of the dispute

Bond v Mackay & Ors

[2018] EWHC 2475 (TCC)

Here Bond brought an application under section 67 of the 1996 Arbitration Act for a decision that an order by an arbitrator be varied so that the scope of the arbitration included whether or not the Third Defendant was in breach of a deed pursuant to clause 2(i). The issue essentially turned on the nature of the dispute between the parties. There was no specific reference to the clause in question in the arbitration referral, but that did not matter according to Bond because the dispute was about an entitlement to compensation and that included rights under clause 2(i).

The question of what makes up part of the dispute is equally relevant to adjudication. Back in Issue 22, we reported on the adjudication case of *Edmund Nuttall Ltd v R G Carter Ltd*, where HHJ Richard Seymour QC had said:

"what constitutes a dispute between the parties is not only a claim which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side."

Mr Jonathan Acton Davis QC took the view that in the circumstances of this case, the Court was required to:

"take a broad view of the factual matrix as shown...in the correspondence leading up to the appointment of the Arbitrator and his acceptance of the appointment. This is not a case where there were Terms of Reference as required in a number of the Rules which govern international arbitrations."

The Third Defendant argued that given there was no reference to a dispute under clause 2 of the Deed in any of the correspondence, it must therefore follow that any dispute under clause 2(i) could not have been referred to arbitration. Further, no reference had been made in the Statement of Case to clause 2(i). Therefore, there could not have been any dispute under clause 2(i) when matters had been referred to arbitration. Bond said the court must look at the "big picture". The dispute concerned the liability to pay compensation: that is a claim for compensation under all the relevant clauses of the contract, including clause 2(i).

The Judge agreed; taking a broad view of the factual matrix, the dispute under clause 2(i) did fall within the substantive jurisdiction of the Arbitrator. Whilst the Statement of Case only specifically referred to two other clauses, it was plain from the document that this must include a claim for compensation:

"If the claim is part of the matrix, as it was, the scope of the Reference to Arbitration cannot be reduced by the pleadings."

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