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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

Notices: conditions precedent

Sitol Ltd v Finegold & Anr
[2018] EWHC 3969 (TCC)

This was an application by Sitol, a specialist tiling and ceramic company, to enforce an adjudication decision in the sum of £45k plus the adjudicator's fees of £42k. One of the arguments raised by the Finegolds was that the dispute was referred to the adjudicator too late by reference to specific notification provisions in the relevant contract. At clause 93.3 of the contract, it said:

"A party may refer a dispute to the adjudicator if the party notified the other party of the dispute within four weeks of becoming aware of it."

In this case, the relevant notification was not earlier than 25 April, and it may have been 30 April, being the dates of the notice of adjudication and the referral. However, the Finegolds said that a dispute had arisen by 19 February and Sitol was aware of the dispute by 19 February, so the clock started ticking then. If that was correct then the latest date for notification was 19 March and Sitol missed that and were out of time. Sitol said that the clock did not start running until 4 April because it was only by then that there was a dispute of which it was aware.

When it came to defining dispute, Mr Justice Waksman referred to the first four of Mr Justice Jackson's seven propositions in the case of *Amec Civil Engineering Ltd v Secretary of State for Transport:*

"1) The word 'dispute' is to be given its normal meaning.

2) Despite the simple meaning of 'dispute', there is no hard-edged legal rule as to what was or was not a dispute, but the accumulating judicial decisions have produced helpful guidance.

3) The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4) The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted ... The respondent may simply remain silent for a period of time, thus giving rise to the same inference."

Here, on 17 January, Sitol sent an invoice for unpaid fees to the Finegolds. It was delivered on 23 January. Sitol sent a chaser on 6 February and an email on 20 February. However, on 19 February solicitors for the Finegolds, DLA, wrote challenging whether Sitol had entered into a contract with the Finegolds or in fact the main contractor. On 9 March, Sitol wrote back, saying that they had still not been paid.

On 16 March there was a reply, maintaining that there was no obligation to pay Sitol. In response to comments that no contract had been provided, Sitol duly sent copies of what they said was the contract. That made no difference and a further letter came from the solicitors concluding that the claim was without merit. Mr Justice Waksman said that this was not a case of silence:

"It is not a case where it is suggested the dispute has arisen simply because an invoice has been rendered that has not been paid. This is not even a case of an implied rejection. This is, on any analysis, a case of an express rejection of the claim. So, the difficulties that one finds in some 'notification of dispute' cases simply does not arise here. In my judgment, the dispute had crystallised once DLA had written its letter of 19 February. It made plain its contention that whatever Sitol might have said or got, there was no contract between the Finegolds and Sitol. That is made plain in the whole of the body of the letter of 19 February. There is nothing more to be said about that dispute."

Further, the fact that in the course of a dispute which has arisen one party says, "Show us what you have", or, "Can you not do any better?" or "We will be interested to see what evidence you have", does not indicate that the dispute has not arisen. It just means that it is possible that the dispute might be resolved, for example, without litigation, depending on what is produced. So, on any view, for the purposes of this notification clause, a dispute had most clearly arisen by 19 February. Here, the dispute had been objectively brought to Sitol's attention the moment they got the letters because they happened to be the other party to the letters. Accordingly the Judge noted that he had:

"come to the conclusion (with no great enthusiasm, I should add), that this adjudication was started too late. It may be regarded as a technical point, but I have to apply the law, I am afraid. The analysis and the correspondence here I am afraid only points one way."

Adjudication, enforcement and CVAs

Indigo Projects London Ltd v Razin & Anor
[2019] EWHC 1205 (TCC)

This application for summary judgment to enforce an adjudicator's decision was resisted because, since the date of both the decision and the application to enforce it, Indigo had entered into a Company Voluntary Arrangement ("the CVA") and Razin said that enforcement would undermine the proper operation of the CVA.

Previously, in 2013, in the case of *Westshield Ltd v Whitehouse & Anr* [2013] EWHC 3576 (TCC), a slightly different situation had arisen. Having previously decided to seek and enter into a CVA, in March 2011, Westshield commenced an adjudication against the Whitehouses. Westshield were awarded £130k. The Whitehouses did not pay and instead filed a claim against Westshield with the Supervisor. On enforcement, the Judge decided that the adjudicator's decision was binding but declined to order summary judgment.

Instead he decided that proceedings should be stayed pending the outcome of the Supervisor's account. In doing this, the Judge left open whether, following the accounting exercise, Westshield might issue a further summary judgment application.

The adjudication in question here, was about payment of a sum stated in a Payment Notice where Razin had failed to serve a Pay Less Notice. It was not a decision representing any valuation of Indigo's claim after taking into account any cross-claims made by Razin.

Indigo's application for summary enforcement was issued on 24 January 2019. By a letter dated 8 February 2019 notice was given to the recipients of a "virtual" meeting which was to be held on 28 February 2019 in order to approve the CVA proposal. Clause 7 of the CVA Terms dealt with mutual set-off.

Indigo said that since the adjudication award pre-dated the CVA, the award should be enforced first, with the accounting exercise under the netting-off provisions to follow. Alternatively, the award could be enforced in part, as an initial step under the accounting exercise, to the extent that Razin had not been able to reduce the sum due by reference to quantified alleged counterclaims.

Razin's position was that it was an express term of the CVA that the supervisors were to take account of the sums claimed and counterclaimed between Indigo and each of its creditors, and this was the exercise that was required to be carried out as between Indigo and Razin. Given that Razin's cross-claims had not been determined, they would have to be considered for the first time by the supervisors in the CVA. To enter judgment for the sum awarded by the adjudicator would result in the CVA supervisors having to distribute that sum amongst the other creditors. This would interfere with the CVA supervisors' exercise of taking an account as between Indigo and Razin. Further, if the decision was enforced, Razin would only receive a few pence in the pound from the CVA.

This case and situation was different from others because the CVA in this case was entered into after the adjudicator's decision and the application to enforce it. Sir Anthony Edwards-Stuart also thought that it was relevant that the decision of the adjudicator was not a decision on the merits of one party's case, or part of its case, but a decision based solely on the failure to serve a Pay Less Notice. This meant that if that decision had been complied with, the effect in a subsequent resolution of the entire dispute would have been that the payment would have been treated as an interim payment on account.

The key issue for the Judge was that the effect of the adjudicator's decision, which created a debt that arose before the CVA was entered into and which, if paid prior to the CVA, would have to be taken into account as part of the netting-off exercise, was, under the rules of the CVA, quite different from the effect of a payment of that sum to Indigo after the CVA had been entered into. The latter would go into the general fund for the benefit of the creditors as a whole, rather than being taken into account as part of the exercise of drawing up the balance of the dealings between Indigo and Razin.

Sir Anthony Edwards-Stuart said that:

"To order the Defendants to pay, after the CVA has been entered into, the sum determined by the adjudicator would, in my judgment, distort the process of accounting that is required under the CVA because the money would not be applied for the sole benefit of the Defendants but instead for the benefit of the creditors generally."

Adjudication and Natural Justice

J J Rhatigan & Co (UK) Ltd v Rosemary Lodge Developments Ltd

[2019] EWHC 1152 (TCC)

RLD sought to resist enforcement of an adjudicator's decision in the sum of £1.7 million on the basis that the decision had been reached in breach of natural justice. Mrs Justice Jefford reminded the parties that when alleging that a breach of natural justice has occurred, it is necessary to establish that the breach is more than peripheral: it must be material. To resist enforcement, RLD had to establish:

(i) that there was some plain breach of the rules of natural justice;

(ii) that that breach was material to the outcome of the adjudication; and

(iii) that that material breach was such that it would be unfair to enforce the decision.

The decision included the comment that the adjudicator had *"carefully considered all the evidence and submissions although not specifically referred to in this Decision"*. There was no dispute that this appeared to be a "pro forma" paragraph in the adjudicator's decision. However, the Judge noted that the fact that a paragraph is a standard paragraph does not mean that it is not true and accurate.

In making a decision about whether or not an agreement had been reached, the adjudicator referred to statements from four people who had attended a key meeting but made no reference to another statement on the same issue. As a result of overlooking that statement, it was said that the adjudicator had failed to deal in its entirety with a key defence, namely that there was no intention to create legal relations at the meeting in question.

The Judge said that she was prepared to accept that RLD would have a real prospect of success on the argument that the adjudicator overlooked the statement on this issue. However, that was not the relevant issue. Rather, the question was whether there was a real prospect of defending the claim to enforce the adjudicator's decision and that turned on whether the adjudicator had failed, inadvertently in this case, to address a key defence to the extent that that amounts to a breach of natural justice. The apparent omission of any consideration of the statement was only relevant in so far as it went to whether there was a real prospect of success on the argument that the adjudicator had failed to address a key defence.

The Judge did not consider that this was the case here. For example, the evidence in question added nothing to other evidence which was referred to. The "overlooked" evidence was "not in any sense crucial".

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.

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