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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.

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Dispatch

Payment provisions, HGCRA, milestones

Bennett (Construction) Ltd v CMC MBS Ltd
[2019 EWCA Civ 1515

This case was all about the interplay between the agreed contract terms and the requirements of the HGCRA as to an adequate payment mechanism. In particular:

(i) Did a regime requiring payment of a percentage of the contract sum on "sign-off" of a particular stage of the works comply with the HGCRA?
(ii) If it did not, can the HGCRA and Scheme be incorporated into the contract in order to "save" the bargain which the parties made?

The project in question was a new hotel in East London. The contract, which the Judge noted had been put together in "a somewhat ramshackle way", was based on the JCT Form, but the arrangement dealing with interim payments had been replaced by five milestone payments, including Milestone 2, 30% on "sign-off" of prototype room by Park Inn/Key Homes/Bennett in China; Milestone 3, "30% on sign-off of all snagging items by Park Inn/Key Homes/Bennett in China"; and Milestone 4, "10% on sign-off of units in Southampton;" There was no definition of "sign-off" in the contract.

Disputes arose with the result that there was no actual sign-off of either the prototype or the units themselves, nor any agreement that the prototype or the units had ever reached a stage of completion in which they could have been signed off. There was an adjudication about the validity of the Milestone payments which led to a decision in Bennett's favour. CMC said that the Milestones did not comply with the requirements of the HGCRA. In July 2018, Mr Justice Waxman agreed in respect of Milestones 2 and 3. After giving the parties time to agree a replacement payment schedule, which they were unable to do, in a second judgment he concluded that it was impossible to alter just Milestones 2 and 3 and that: *"for reasons of workability and coherence the only approach on the facts of this case was to incorporate Paragraphs 2, 4 and 5 of Part II of the Scheme for Construction Contracts to supplant Milestones 2-5 as a whole".*

This resulted in a liability on the part of Bennett to make interim payments calculated by reference to the value of the work which CMC had carried out. LJ Coulson noted that:

"The commercial effect of the judge's decisions is stark. Prior to these proceedings, the principal dispute between the parties concerned whether or not the prototype and the units had been completed...But, in consequence of the judge's two judgments, Verbus [CMC] became entitled to interim payments by reference to the value of the work which they had carried out. In this way, Verbus would become entitled to payment, regardless of whether or not the prototype or the units themselves had reached a stage of completion at which they could have been signed off."

This was: "*a significant reapportioning of the commercial risk which the parties had agreed*".

The CA considered that sign-off was to be assessed objectively. Taking the contract as a whole, the parties intended that, on completion of the relevant stage, the Milestone would be paid. There was nothing in the contract which sought to tie in sign-off to the production of a certificate or record of any sort. There was no difficulty with the use of the word "sign-off" in Milestones 2 and 3. It denoted the objective state which the prototype and then the units had to reach before the payment was due. It did not require an actual signing-off. But even if it did, that could not affect any entitlement to be paid because, if the prototype or the units were in the state in which they were capable of being signed off, CMC were entitled to be paid. A failure to sign-off the relevant documentation would not be a defence to a claim based on that entitlement.

Further, the potential involvement of third parties (Key Homes and Park Inn) in any sign-off process did not detract from the only applicable criterion, namely completion of the prototype or the units in accordance with the contract. If compliance with the contract specification was (objectively) achieved, the works were capable of being signed off and Milestone 2 (for the prototype) and Milestone 3 (for the units themselves) became payable, whether they were actually signed off or not. The relevant completion date (of prototype and units) was therefore the date on which the payment of Milestones 2 and 3 became payable. The fact that there was no express date for payment did not matter, because the sum was payable when that completion was achieved.

Accordingly, the CA considered that the judge at first instance was wrong to find that this contract did not contain an adequate mechanism for determining what payments became due under the contract, and when. This dealt with the appeal. However, "because of its wider importance" LJ Coulson carried on. He did so on the basis that, contrary to his actual finding, the contractual mechanism did not contain an adequate payment mechanism. Here, the Judge was satisfied that it was settled law that, where payment provisions do not comply with the HGCRA, the Scheme applies, but only to the extent that such implication is necessary to achieve what is required by the HGCRA itself. In a case where the parties did not agree a payment arrangement by reference to interim valuations of the work done, Part II of the Scheme did not impose such a regime. The question therefore was, which part of the Scheme should be incorporated to deal with milestone payments? The answer was paragraph 7 which provides that:

"Any other payment under a construction contract shall become due (a) on the expiry of 7 days following the completion of the work to which the payment relates, or (b) the making of a claim by the payee, whichever is the later."

The payment in respect of Milestone 2 would be 7 days following the completion of the prototype in accordance with the contract. For Milestone 3, it would be 7 days following the completion of the units in accordance with the contract. In this way: "*the right replacement option (paragraph 7 of Part II of the Scheme)*" did "*the least violence to the agreement between the parties*".

Adjudication: natural justice & crystallisation of disputes

Dickie & Moore Ltd v McLeish & Others
[2019] CSOH 71

D&M sought summary enforcement of an adjudication decision. One of the issues related to the involvement of a Mr Murray, a quantity surveyor and claims consultant, who had acted as the adjudicator's pupil. Neither party had objected to this. However, they were not informed until the adjudicator issued his fee-note that Mr Murray had also provided other assistance during the adjudication, for which he was to be paid.

The adjudicator was cross-examined and said that he considered that he had a duty to assist those who wished to gain experience of adjudication. Indeed, he had acted in this way before. Insofar as Mr Murray had acted as a pupil, he was given access to the documents, attended hearings, and was kept advised of developments in the adjudication. Mr Murray's role in the adjudication had involved providing assistance by (i) populating the Scott Schedule; (ii) taking meeting notes and producing the action points; and (iii) proof reading the decision. These were not pupillage tasks. The Scott Schedule had had to be updated to reflect changes in the parties' positions. The adjudicator had decided every issue that had arisen in the adjudication himself, without any oral or written advice from Mr Murray suggesting an answer to any issue. Nor had he used Mr Murray as a sounding board to test his own views.

McLeish did not suggest that the adjudicator had not acted in good faith. However, they did suggest that there had been a material breach of natural justice - an opportunity had been afforded for injustice to be done. The adjudicator had obtained quantity surveying assistance and advice from Mr Murray on significant matters. The parties had not been told about this and they had had no opportunity to comment on it. D&M's position was that the services provided had been of an administrative, secretarial and arithmetical nature. The adjudicator had reached each and every determination himself. Lord Doherty agreed noting that the services which Mr Murray provided were essentially of an administrative nature. They were not quantity surveying advice. All of the material decisions in the adjudication were taken by the adjudicator himself solely on the basis of the information which the parties put before him. Accordingly, while the Judge thought that the adjudicator ought to have told the parties what Mr Murray was doing, in the whole circumstances his failure to do so was not a material breach of the requirements of natural justice.

McLeish also suggested that a dispute had not crystallised. The Judge,referring to *Coulson on Construction Adjudication*, said that when a party resists enforcement of an adjudicator's award on the grounds that the relevant dispute had not crystallised the court should adopt a: "*robust, practical approach, analysing the circumstances prior to the notice of adjudication with a commercial eye.*" An over-legalistic analysis should be avoided. The court should avoid any: "*nit picking comparison between the dispute described in the notice and the controversy which pre-dated the notice.*"

Here, in valuation 17, D&M had sought an EOT (plus associated prolongation costs) of four weeks (for weather) and a prolongation claim of 13 weeks. The EOT sought in the adjudication included 16.2 weeks for groundworks and 30.3 weeks for issues to do with the superstructure shell. Looking at the matter "broadly", the claims in the Notice were of a different nature and order of magnitude from the previous disagreements. Therefore: "*a very material part of the dispute described in the Notice had not crystallised before the Notice was served*". This meant that the question of severance arose. Could the time-related disputes be severed from the rest of the dispute? However as that had not been explored in the hearing, further submissions were required.

Claims under collateral warranties

British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd
[2019] CSIH 47

In 2008, SM entered into a contract with Northburn to design and build retail units and other works. BOBN purchased the development in June 2013 and, as required under the building contract, SM entered into a collateral warranty in favour of BOBN. In May 2013, following a flood at one of the development car parks, a report was produced which eventually led BOBN to commence proceedings against SM in June 2018, claiming that the flood was a result of SM's defective design. Clause 3.1 of the warranty said that SM were entitled in any action brought by the Beneficiary (BOBN) to rely on any limitation rights in the building contract and to raise the equivalent rights in defence of liability as it would have against the original employer. The prescriptive period (or limitation period in England) under the building contract expired in June 2014, five years after practical completion. The claim was started just within five years from the granting of the collateral warranty. At first instance the court held that BOBN's rights under the warranty were subject to a fresh five-year prescriptive period from the date of the warranty. Therefore the claim was brought in time.

SM appealed, arguing that the fact that the collateral warranty was only granted in June was immaterial, because it is the prescriptive period incorporated into the design and build contract that is applicable, not the period that would have been imposed under the statutory law of prescription. Its obligations under the collateral warranty are subject to a contractual time limitation rather than the general law. Lord Drummond Young noted that an important purpose of collateral warranties was:

"*to provide persons such as a purchaser or tenant or security holder with rights against the contractor, or a subcontractor or member of the design team, that are equivalent to the rights that were enjoyed by the original employer under the building contract and the ancillary contracts with architects, engineers, subcontractors and others. The notion of equivalence is central. The purpose of the warranty is not to provide purchasers, tenants and security holders with rights greater than those held by the original employer; to do so would make no commercial sense.*"

Whilst it was possible for parties to a warranty to agree a different time bar period, because of the importance of time-bar provisions to contractors and designers, a collateral warranty should normally be subject to the same time bar as applied to the original building contract. Here the warranty was intended to confer on SM the same defences against BOBN as would be available against the original employer. That meant that any claim by BOBN must be subject to the same prescriptive period. SM's liability to the original employer was extinguished by prescription/limitation at the latest five years after the report was obtained about the drainage problems in the car park.

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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Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

www.fenwickelliott.com