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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

Insurance: all-risk policies

The Rugby Football Union v Clark Smith Partnership Ltd & Anr

[2022] EWHC 956 (TCC)

During works to upgrade Twickenham rugby stadium for the 2015 World Cup, the RFU engaged Clark Smith to design the ductwork and Conway to install it. The RFU and Conway entered into a JCT Standard Building Contract without Quantities 2011. The RFU also obtained an all-risks insurance policy.

The RFU said that there were defects in the ductwork which caused damage to the cables when they were pulled through it. The RFU was indemnified under the terms of the all-risks policy in respect of the replacement and related costs but said that Clark Smith and Conway were liable for those losses because of defects in the design of the ductwork and workmanship deficiencies.

Conway said that it was co-insured with the RFU under the all-risks policy and so had the benefit of the cover to the same extent as the RFU. The result was that the RFU could not bring claims in respect of those alleged losses as they were covered by the policy, and it could not make a subrogated claim (on behalf of insurers) in respect of the sums already paid out under the policy.

The RFU said that Conway was not an identified party or co-insured. Whilst the RFU had entered the all-risks policy as an agent for Conway as its undisclosed principal, the RFU's authority was derived from the terms of the contract. The insurance obtained for Conway had been such as to satisfy the requirements imposed on the RFU under Option C of the JCT contract but no further. Option C required the RFU to arrange insurance that provided cover to Conway in respect of physical loss or damage to the work executed or to site materials, no more. Accordingly, Conway's cover under the policy was limited to that extent and, in particular, did not extend to the insured losses for which the RFU had been indemnified by insurers.

The all-risks policy included the statement that an exclusion of "*all loss or damage to the property insured due to defective design, plan, specification, materials or workmanship*" would not accord with the definition or the insurance options. It noted that, a wider, all risks cover might be available but that it was "*not standard.*"

The core question was whether or not the insurance of Conway under the all-risks policy was limited to the extent of the cover that was required under Option C of the amended JCT contract in which case Conway was not co-insured with the RFU in respect of the relevant loss and the waiver of subrogation would not preclude a claim by insurers.

The starting point for Eyre J was the core principle that the law does not allow an action between two or more persons who are insured under the same policy against the same risk. However, this principle could be over-ridden by the express terms of the contract. Here, the terms of the contract determined the existence and extent of Conway's insurance cover under the all-risks policy.

The Judge felt that the terms of the letter of intent, all-risks policy and contract were clear. The effect of those documents and the terms of Option C was that the RFU was obliged to take out insurance which gave Conway cover in respect of physical loss or damage to the work executed or to site materials.

However, it was also clear from those documents that insurance in respect of the cost of rectifying damage caused by Conway's own defective works was excluded.

Conway disagreed saying that, if the documents were read in light of the parties' dealings at the time, there was an agreement or, perhaps, an understanding that the RFU would obtain comprehensive insurance for Conway. The Judge agreed that the manager of a firm providing project management services to the RFU believed that, in a previous project at Twickenham, there had been difficulties because of disputes between different contractors and between their different insurers as to their responsibilities and obligations.

As a result, the manger considered that a comprehensive project insurance policy covering all the contractors would be the solution to this problem. This would require the insurance to be more extensive than that envisaged in the standard terms of the JCT contract.

The Judge accepted that the manager (and Conway) believed that the intention had been for comprehensive insurance cover creating a fund, recourse to which would be the sole avenue for making good the relevant loss or damage. However, whether or not this understanding was accurately reflected in the actual terms of the agreement was something different.

The parties were substantial entities dealing at arm's length. The project was a major exercise which involved the RFU engaging several sub-contractors and, in relation to which, it was acting through a number of professionals including solicitors and insurance brokers. Conway was a substantial civil engineering business with an in-house legal department and an internal insurance manager. The terms were agreed between teams of a number of professionals on each side – not just two individuals.

The letter of intent stated expressly that it was envisaged that the contract which would be entered between the RFU and Conway would be in the terms of the JCT contract and that, if such a contract was entered, it would apply retrospectively

and supersede the letter of intent. The contract, when entered, was in the form of the JCT contract. However, it was subject to a number of bespoke amendments. The JCT contract sets out a detailed structure for allocating risks and responsibilities. Different options were available in respect of the insurance arrangements. The parties chose Option C but did so without any express modification or expansion of its effect.

The claim here was for loss allegedly suffered by the RFU as a consequence of damage to the cabling caused by deficiencies on the part of Conway in respect of the ductwork. The Judge asked whether the RFU intending to take out insurance covering Conway in respect of the liability for such loss with the consequence that the RFU's recourse should be limited to a claim under the policy? It was not.

The Judge was satisfied that the all-risks policy came into effect on the basis that it was providing the cover contemplated by Option C in the JCT contract. It was doing so in respect of the project as a whole, but it was not going beyond that. It did not provide a common fund recourse, which was to be the RFU's sole redress for loss flowing from breaches by Conway or any other contractor.

The all-risks policy insured both the RFU and Conway, but they were not insured to the same extent in respect of the same risk. In particular, they were not co-insured in respect of the losses which the RFU was said to have suffered by reason of damage to the cables resulting from defects in the ductwork and for which the RFU had been indemnified by insurers.

The RFU were able to proceed with their claim.

Adjudication: loading the contractual dice

Bexheat Ltd v Essex Services Group Ltd
[2022] EWHC 936 (TCC)

BHL applied for summary enforcement of a "smash and grab" adjudication decision for just over £700k in relation to Interim Payment Application 23. ESG sought to rely on an earlier "true valuation" adjudication in relation to Application 22.

Mrs Justice O'Farrell said that, if ESG wanted to do this, it could and should have raised this in a Pay Less Notice. Having failed to do so, the sum claimed in Interim Application 23 became the "notified sum" due for the purposes of section 111 of the HGCRA, and BHL was entitled to enforce the decision through summary judgment. ESG's submission that the court should order a stay of execution pending determination of the "true value" of Interim Application 23, by adjudication or litigation, was contrary to the general rule that adjudicators' decisions are intended to be enforced summarily and the successful party should not, as a rule, be kept out of its money.

ESG resisted enforcement on two other grounds:

(i) ESG had a contractual entitlement to set off or make deductions against the adjudicator's award; and
ii) BHL had deprived ESG of its contractual right to elect to have the true value of the application payment in dispute determined at the same time by the same adjudicator as the notified sum dispute.

Under the Contract, clause 30 provided that:

"30.2 The Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator's award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor under the Sub-Subcontract or otherwise.

30.3 If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another."

The problem for ESG was that these sub-clauses were contrary to the provisions of the HGCRA and the Scheme. They were seen as attempts to get round the key principles underlying the adjudication process.

The Scheme includes the following provisions:

"21 In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.
...

23(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

In *Ferson Contractors Ltd v Levolux AT Ltd* [2003] EWCA Civ 11, the CA considered whether, pending final resolution by arbitration or litigation, an adjudicator's decision should be enforced in derogation of contractual rights with which it may conflict. Mantell LJ said that:

"The intended purpose of s.108 is plain ... The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down."

The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.

ESG also said that the adjudicator was wrong to refuse to allow joinder of the "true value" of Interim Application 23 with the "notified sum" issue in the second adjudication, in accordance with clause 30.3 of the Contract. Again, the Judge disagreed. Here, the clause, which gave ESG an unilateral right to refer more than one dispute to the adjudicator, was inconsistent with paragraphs 8 and 20 of the Scheme, which require the consent of all parties to a multiple dispute adjudication.

Both clauses were contrary to the principles underlying statutory adjudication. The decision was accordingly enforced.

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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