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The construction & energy law specialists

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

Expert evidence: "our case"

Coldunell Ltd v Hotel Management International Ltd

[2022] EWHC 1290 (TCC)

This was a claim for dilapidations at a hotel in Surrey.

Both parties instructed experts. One was very familiar with the property having first been instructed by Coldunell in 2014, if not before, to deal with an insurance claim arising out of flooding.

The expert conducted numerous inspections over several years, including at the end of the Lease when they spent three to four days at the property taking photographs and then assisting with videos. The expert was also the contract administrator for the external works and boiler repairs, so had personal knowledge of what work was required and why.

HMI argued that the expert could not be independent because of the dual role both dealing with the dilapidations claim and acting as contracts administrator for the repair and remedial works. The Judge did not consider that this duality of roles prevented the expert from giving their genuinely held independent expert opinion to the Court. Given the sums at stake in these proceedings, around £1million, it was reasonable and proportionate for Coldunell to rely on the expert given the expert's detailed knowledge of the condition of the property and works required.

The Judge formed the view "having carefully listened and observed" that the expert gave evidence in a forthright and measured manner, clearly accepting the limits of their knowledge in relation to certain matters and making concessions where appropriate. Overall, the expert was seeking to assist the Court and well understood the need to perform an independent role.

HMI's expert regularly acted for parties in adjudications and from time to time as an expert witness; however, this was the first occasion that they had actually given expert evidence in Court. "Unfortunately", the Judge considered it "plain" that the expert was arguing HMI's case, even referring to it as "our case". The expert did not answer counsel's questions, challenged the veracity of the underlying factual evidence presented by Coldunell, relied on argument rather than expert opinion, and totally disregarded the merits of the argument being advanced by Coldunell

The situation was made worse by the obvious lack of credibility in relation to several of the opinions expressed; for instance, insisting that the boilers were "in good and substantial repair and condition" despite the substantial body of evidence to the contrary.

Further, the expert had not carried out any inspection of the property. Instead, their opinion was based on a view of the certain, (and not all of the) photographs. The Judge commented that the impression given to the Court was that the expert had taken a very "slap dash" approach, even to the limited evidence of condition that they considered relevant. In short, the expert was an "advocate" for their client and not that of an independent expert. The result was that the Judge felt unable to place any reliance on that evidence.

Adjudication: was the decision wrong and if so, was it still binding?

Hart Builders Ltd v Swiss Cottage Properties Ltd

[2022] EWHC 1465 (TCC)

Hart made an application under Part 8, seeking, amongst other issues, a declaration that a decision of an adjudicator was wrong and no longer binding upon the Parties.

The Adjudicator had decided that the matter at issue between the Parties had been settled by an Acceptance Agreement. The Judge decided that the Adjudicator was mistaken. Was Hart, therefore, entitled to launch a fresh adjudication? SCP said they could not, because of the effect of Paragraph 9(2) of the statutory scheme, which prevents two adjudications about the same dispute.

The Judge was of the view that, on the issue upon which the Adjudicator based their Decision, although wrong in law, was not a nullity. However, as a result of the conclusion reached, the Adjudicator declined to determine the amount(s) due as between the Parties. Did this prevent the financial dispute now being determined in a fresh adjudication? The Judge referred to the 4th Edition of *Coulson on Construction Adjudication*:

"If the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that earlier adjudication, then paragraph 9(2) is unequivocal: in such circumstances, the adjudicator must resign. Doubtless as a result of this finality, there have been a large number of reported cases in which the responding party has sought a declaration or a finding that the adjudicator should have resigned and that, in consequence, he had no jurisdiction to give the decision that he did ...

"Perhaps unsurprisingly, the majority of the reported cases dealing with what might be called attempted readjudication demonstrate a general desire to find that the disputes in question were not the same or substantially the same ..."

In *Hitachi Zosen Inova AG v John Sisk & Son Ltd* [2019] EWHC 495 (TCC), Stuart-Smith J considered a similar case:

"The referred dispute in the eighth adjudication was the valuation of Event 1176. That was precisely what the adjudicator declined to decide in the second adjudication, for want of substantiating evidence at that time. The dispute referred to in the eighth adjudication was, therefore, not the same as the dispute in the second adjudication.

"In my judgment, the dispute referred to in the eighth adjudication was also not 'substantially the same' as the dispute decided in the second. It is important to bear in mind that the comparison to be made is between what was referred in the eighth adjudication and what was decided in the second. Once it is recognised that there was no valuation decision at all in the second adjudication, it become clear that, in the matter of the value to be attributed to and recovered for Event 1176, there is no overlap at all ..."

In the case here, there were two issues before the Adjudicator: (1) did the Acceptance Agreement mean that they could not enter upon the merits of the Clause 8.7.4 assessment? (2) If not, what decision should be reached in respect of that assessment? Because of the decision reached on issue (1), the Adjudicator did not make any decision on issue (2).

Therefore, now that the decision on issue (1) had been held to be wrong, a second adjudicator was free to decide issue (2) on its merits.

Costs: refusing to mediate

Richards & Anr v Speechly Bircham LLP & Anr [2022] EWHC 1512

This was a costs judgment where Richards sought indemnity costs because SB did not accept four offers to mediate. SB said that their approach to mediation was not unreasonable and that an unreasonable refusal to mediate was only one part of a party's conduct to be taken into account when determining costs.

SB relied upon what they described as their "measured" Part 36 offer and highlighted that their initial response to the proposal of a mediation was that it should follow disclosure, and also pointed to the provision for mediation in their costs budget as an indication that they were open to mediation.

The Judge did not agree. There was a refusal to mediate. Any concern about the need for some disclosure to shed light on certain aspects of the case could have been explored in preparation for mediation or inquired into at a mediation. Further, certain assumptions about Richards which meant that "mediation was therefore most unlikely to succeed" were just the kind of matters which a mediator would have explored. Most mediators are skilled in seeking to moderate the expectations of any party which may be based on matters collateral to the merits of its case.

The Judge also noted that SB's Part 36 offer was only made just over three months before the trial, the timing of which signified a general passivity in the ADR process over the period of almost three years since a mediation was first proposed.

However, the Judge did agree with SB's second point referring to the CA case of *Gore v Naheed* [2017] EWCA Civ 369, where Patten LJ said:

"... a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion ..."

Although the Judge concluded that SB had failed to engage with the proposals for a mediation, that was only one aspect of the conduct to be considered. Here, the Judge noted that SB successfully resisted a significant part of a claim against them and did significantly better than either of Richardson's Part 36 offers.

Where neither side had made a cost-effective Part 36 offer, SB's unreasonable conduct in relation to mediation was sufficiently marked by an order that they pay Richardson's on the standard basis. That was an appropriate "sanction" for them not engaging in a process of ADR which might have curtailed those costs to a significantly lower sum at an earlier stage of the proceedings.

Case update: adjudication & collateral warranties

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP [2022] EWCA Civ 823

We reported on this case in Issue 254.

At first instance, the Judge said that "applying commercial common sense," it was difficult to see how a collateral warranty executed four years after practical completion, and months after the disputed remedial works had been remedied by another contractor, could be construed as an agreement for carrying out of construction operations. By a split majority, the CA disagreed, holding collateral warranties can be "construction contracts" for the purposes of the HGCRA.

That is, of course, depending on the words used and right conferred. In short, where a collateral warranty is simply a fixed promise or guarantee about a past state of affairs, then this is unlikely to be a construction contract. However, where the warranty makes reference to a contractor "carrying out" or "continuing to carry out construction operations," then this could be a contract "for the carrying out of construction operations" under the HGCRA.

Further, what was important was the actions that were a part of the warranty, not the timing. If part of the warranty talks about future performance, then this may be enough for the warranty not to be a construction contract. That was not the case here, however and Abbey was able to enforce the adjudication decision.

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