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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.

Issue 271 - January 2023

Dispatch

Adjudication: same dispute

Sudlows Ltd v Global Switch Estates 1

[2022] EWHC 3319 (TCC)

Sudlows sought summary enforcement of an adjudicator's decision that Global should pay a total of £1 million plus VAT. This was the sixth adjudication between these parties. Global said that the adjudicator had acted in breach of natural justice by taking "too narrow a view of" their jurisdiction by holding that they were bound by certain findings made by a different adjudicator in Adjudication 5. Global also sought enforcement of alternative findings made in Adjudication 6, the effect of which would mean Sudlows had to make payment of some £200k plus VAT, interest and fees.

In Adjudication 5, the adjudicator extended the completion date for the Section 2 works to 4 January 2021 and said that Global Switch was not entitled to withhold or deduct LADs. The Relevant Events leading to this EOT were defective ducting, Global being responsible for any delays by taking the new cable out of Sudlows' scope of work and Sudlows being entitled to refuse to terminate, and energise the new cables. Following Adjudication 5, Global Switch omitted the energisation from Sudlows' scope of work and certified practical completion as being achieved on 7 June 2021. Sudlows then sought a final EOT (and related costs) from 19 January 2021 to 7 June 2021.

The Adjudicator asked the parties to confirm if they should consider alternative positions in connection with the extent to which they were bound by Decision 5. Sudlows accepted the suggestion saying: "For the avoidance of any doubt, we confirm that Sudlows does not submit to your jurisdiction to open up and re-decide what, in Sudlows' submissions, has already been decided" in Adjudication 5.

The main issue for the Judge was whether the adjudicator was bound by the decision in Adjudication 5 in the sense that they were bound to grant the further 133 days EOT (and with it, the prolongation and other costs) which would flow if the Relevant Events found in Adjudication 5 continued to apply. If the adjudicator was so bound, they obviously could not take account of the new evidence or, indeed, assess the matter differently. Whether a dispute is substantially the same is a question of fact and degree. In *Quietfield Ltd v Vascroft Construction Ltd* ([2006] EWCA Civ 1737), Dyson LJ said:

"If the contractor identifies the same Relevant Event in successive applications for extensions of time, but gives different particulars of its expected effects, the differences may or may not be sufficient to lead to the conclusion that the two disputes are not substantially the same. All the more so if the particulars of expected effects are the same, but the evidence by which the contractor seeks to prove them is different. Where the only difference between disputes arising from the rejection of two successive applications for an extension of time is that the later application makes good shortcomings of the earlier application, an adjudicator will usually have little difficulty in deciding that the two disputes are substantially the same."

In Quietfield, the basis for the EOT claim in the first adjudication was contained in two letters, while in the later adjudication, the claim for the same EOT, this time submitted as a defence to the liquidated damages claim, was much larger. That was sufficient to differentiate the two adjudications. Here, the difference in materials concerned not those which supported the underlying claim but rather those ranged against it. But that made no difference in terms of forming part of the dispute. Those materials consisted of the fact and result of the successful testing of the new cables in the existing ductwork and two reports. The Judge noted that their effect was quite dramatic because it caused the adjudicator to conclude that (a) the original ductwork and cables were fit for purpose, and (b) the refusal on the part of Sudlows to facilitate the termination, connection and subsequent energisation was unreasonable. The fact that Sudlows contended that the new materials took the matter no further was irrelevant. They clearly did in the eyes of the adjudicator and that view could not be challenged.

The Judge held that, in those circumstances, it could not be said that Global was simply repeating its previous argument without more. It was relying on the testing and reports, being an event and evidence that simply did not previously exist. That, in turn, was a function of the fact that Adjudication 5 did not, and could not, deal with the entirety of the relevant contractual period since it had not yet expired. Moreover, this was not a case where a contractor claimant might be said to seek a further adjudication artificially, in order to re-run an argument it had previously lost. It is about a respondent employer putting forward a defence to a new adjudication claim relating to a different time period, so there was no artificiality on its part. The fact that, in both adjudications, the existence or otherwise of those Relevant Events was an issue, was plainly insufficient to mean that, in both adjudications, the dispute was the same or substantially so. The Judge said this was because:

"(a) they relate to underlying EOT's for different periods of time, (b) the dispute in relation to the new EOT sought involved new relevant materials and the event of testing which were not, and could not, have been part of the dispute leading to the prior adjudication, and (c) this particular issue formed only one part of a much wider dispute between the parties as to the true value of the contract works as a whole, engendered by Sudlows Interim Application for Payment Number 46; the latter was in fact its final payment claim, on the basis that practical completion had now taken place. Indeed, in my judgment, elements (a) and (b) alone would suffice."

The jurisdictional question involved an analysis of what both disputes were about, and whether they were the same or substantially so. Here, the decision in Adjudication 5 was for an EOT for a prior period. Further, the new material was significant. It was more than argument - it was new evidence. Therefore, Adjudication 6 could not be enforced. This left the alternative finding, which was just that - a finding to be substituted for the primary one if the latter was not enforceable. The alternative findings were ones which were just as detailed - in every respect - as the primary findings - and they were covered by the parties in their extensive submissions. For the purposes of enforcement, the adjudicator plainly had jurisdiction to formulate the award on an alternative basis.

Contract Interpretation

Lagan Construction Group v Scot Roads Partnership Project Ltd & Anr

[2022] ScotCS CSOH_92

Lagan and the Second Defender formed a joint venture to carry out motorway upgrade works for Scot Roads. Clause 5.5.6 of a letter of credit procured by Lagan provided:

"Project Co [Scot Roads] shall return to the Contractor by transfer into a bank account specified by such Contractor, an amount equal to such Contractor Company Contractor Security Account Balance as soon as reasonably practicable following: [two events]..."

One of the events having passed, the issue for Lord Baird was who was meant by "the Contractor" in the first line; the joint venture or Lagan? The balance of the monies, after deduction of sums due to Scot Roads, was just over £1milllion. If "the Contractor" meant Lagan, the parties were agreed that it was entitled to payment of the sums. If not, then a full hearing would be needed to determine what should happen. Reference was made to various UK authorities. Lord Baird held that:

"The court must strive to ascertain the parties' intention by determining what a reasonable person, having the background knowledge of the parties, would have understood by the language selected; the meaning of the words must be assessed having regard to the other relevant parts of the contract; if there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense; the language used must be balanced with the factual background and the consequences of any alternative meaning;...in other words, construing a contract is a unitary exercise, not a two-stage process."

The Judge noted that the contract was not "happily drafted" and suggested that a style had "perhaps been borrowed" from a case where it was the contractor itself which provided the letter of credit, rather than, as here, a letter of credit was being procured by each of two members of an unincorporated joint venture. Clause 5.5.6, read as a whole, was ambiguous. It was impossible to determine what was intended on a purely textual analysis. Therefore, to decide which of the two competing constructions should be preferred, it was appropriate to have regard to commercial common sense, and the factual matrix.

The starting point was to consider the purpose of the funds in the Contractor Security Account. The defenders submitted that, although the primary purpose of the funds was to provide security for the first defender, there was a secondary purpose, namely, that any balance should be available for the remaining Contractor Company in the event that the other had entered insolvency, as had happened here.

Lagan said, and the Judge agreed, that the sole purpose of the Contractor Security Account was to provide security for the first defender as the project company, not to provide a source of funds for Contractor Companies in the event of financial stress. The whole tenor of those provisions which provided for the Contractor Security Account was to ensure that the project was completed and that the first defender was able to recover the cost of making good defects. Once it was understood that the sole purpose of the funds was to provide security to the first defender, and that it was not part of that purpose to provide financial succour to the other Contractor Company, it was not commercially reasonable that the balance of the funds simply be paid to the joint venture, which itself had no obligation to reimburse the bank.

Misrepresentation

Griffiths % Anr v Gilbert

[2022] EWHC 3122 (TCC)

The Claimants claimed damages for fraudulent misrepresentation, alleging that Mr Gilbert represented to them that CEG would take out full NHBC cover of £2 million. Mr Gilbert said that he had only ever said that CEG would obtain a standard NHBC policy, which has a limit on defects' claims of £1 million. The law was not in dispute. Rix LJ in *The Kriti Palm* [2006] EWCA Civ 1601 said that:

"The elements of the tort of deceit are well known. In essence they require (1) a representation which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on"

HHJ Watson had to consider what representations were made. The Claimants said that a note of a meeting held on 2 December 2007, was not genuine. The Judge commented that:

"I am aware that it is common practice for construction professionals to keep day books, diaries or notebooks as records of events and reminders to themselves. I do not find it surprising that Mr...decided to transcribe his notes from one notebook to another so that they were all in his main notebook. Of course, it is possible that the entry in relation to NHBC could have been added later for the purposes of the litigation. However, it is not in dispute that both notebooks were disclosed simultaneously in the arbitration proceedings. No attempt was made to withhold the existence of the earlier notebook or the fact that it did not contain the record contained in the A4 notebook. That is not the action of an individual fraudulently creating records for the purposes of litigation. I find that the record is a record of [...]'s recollection of the discussion at the meeting, albeit that it was written at least eight months after the meeting took place."

Further, the Claimants did not raise their claims immediately. In the view of the Judge, it was unusual for someone who felt they had been cheated to withhold their complaint for several years before making it to the person who cheated them.

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.

Dispatch is a newsletter and does not provide legal advice.

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