

DISPATCH

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“ Constructive Law for the Construction Industry ”

Mediation

We have recently reported on a series of cases, for example *Hurst v Leeming* (see *Issue 24*), in which the Courts have given strong hints that parties should try and resolve their disputes through mediation or other forms of ADR.

The question arose again in *Societe Internationale de Telecommunications Aeronautiques SC v Wyatt Co (UK) Ltd & others*. Here, Wyatt's case against Maxwell Batley (the Part 20 Defendant) failed, and Wyatt, relying on the earlier cases, said that MB should be deprived of some of their costs on the grounds that, on three separate occasions, they had declined invitations to mediate. This case makes it clear that it is not enough merely to offer to mediate a dispute. To obtain cost protection, that offer must be a genuine attempt to resolve the matters in dispute.

On the first two occasions MB were invited to be a party to a mediation between the Claimant and Wyatt in the main action. The final occasion was three weeks before trial, after the Claimant and Wyatt had settled their own dispute. Wyatt did not press the argument in relation to the third occasion since the invitation was simply too close to the commencement of the trial.

MB were only given two months' notice of the first mediation. In the circumstances, this was deemed to provide insufficient time to prepare. There were vast quantities of documents to be studied. Significantly, Park J found that the true reason Wyatt wanted MB to take part was to pressurize them to contribute to the sums sought by the Claimant. The main purpose was not to resolve the dispute between Wyatt and MB without litigation but to settle the dispute in the main action. The way in which Wyatt sought to encourage MB to join in the mediation was both “disagreeable and off-putting”. Wyatt had tried to bully MB into the mediation.

Finally, it was entirely reasonable for a party to decline to join in a mediation when it had been told that the mediator was “motoring” against them.

Adjudication

In *Bovis Lend Lease Ltd v Triangle Development Ltd*, HHJ Thornton QC had to consider whether a party could withhold against a sum directed to be paid by an adjudicator following three adjudications between the parties. The Judge concluded by setting out a number of factors that must be in place before such a withholding can be made:

- The decision of an adjudicator that money must be paid gives rise to a separate contractual obligation. The paying party must comply with that decision within the stipulated period. Usually the paying party cannot withhold, make a deduction, set-off or cross-claim against that sum.
- To withhold against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given and been ruled upon and made part of the subject matter of that decision.
- However, if there are other contractual terms which clearly have the effect of superseding, or providing for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail.
- Equally, where a paying party is given an entitlement to deduct from or cross-claim against the sum directed to be paid as a result of the same, or another, adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed.

Here, Triangle, who had determined Bovis' contract for failing to proceed regularly and diligently, was found to be entitled to rely on both the contract and the adjudicator's third decision (that the determination was valid) to withhold payment of the sum directed to be paid under the adjudicator's first decision. Bovis' contention (namely that the determination of its employment was invalid) was not sufficient, in the absence of either an adjudicator's decision to that effect or, alternatively, any sufficient evidence to sustain that contention, to enable them to counter this.

Health & Safety – Corporate Manslaughter

The much talked about legislation that could make a company director personally liable for the death of an employee was again absent from the recent Queen's Speech. Thus it is unlikely that this legislation could come into force before the end of 2004 at the earliest.

Health & Safety – Update

In Issue 24, we reported on the conviction and imprisonment of a contractor, Brian Dean, for manslaughter following the death of two men on a demolition project. That conviction has now been overturned by the CA who held that the Judge's original summing up was inadequate. This made the original conviction unsafe.

Health & Safety – Asbestos

The Control of Asbestos at Work Regulations finally came into force on 21 November 2002. The Regulations implement an EU Chemical Agents Directive to protect workers from the risks from chemical agents. The biggest change, the introduction of a requirement to manage asbestos, is yet to come into effect. Anyone defined as a duty holder (i.e. someone who has an obligation to maintain or repair non-domestic premises) must assess whether the workplace contains asbestos and the extent of any risk. This may include carrying out surveys for asbestos-carrying material, preparing procedures to ensure that asbestos is not disturbed or setting up warning systems to deal with potential emergencies. This new duty has a lead-in period of 18 months coming into force on 21 May 2004. However, given its all-embracing nature, thought should be given now as to how to comply.

Health & Safety – Cases

In *Horton v Taplin Contracts Ltd*, the CA considered a claim following the fall by Horton from a scaffolding tower. The accident was caused by a colleague who deliberately toppled the tower over following a dispute. The CA held that there was no breach of any statutory duty. The scaffolding tower was a safe place of work save when it was deliberately pushed around by a third party. It was not reasonably foreseeable that the third party would behave as he did. Thus it was not something that Taplin could guard against. This was even though the scaffolding was lacking in outriggers and handrails. The cause of the accident was the "*extraneous deliberate and unpredictable behaviour*" of the third party. The statutory obligations to introduce stability and/or suitability for the purpose are to be measured by reference to those hazards to health and safety which might reasonably be foreseeable.

Arbitration

In *Re The MV Pamphilos*, an application was made under s.68 of the 1996 Arbitration Act to set aside an arbitrator's decision on the grounds of a serious irregularity. The complaint was that the arbitrator had made findings of fact of which they did not forewarn the parties and for which there was no evidential basis. Thus the parties were deprived an opportunity of addressing the arbitrator on those matters. The arbitrator had failed to provide a fair means for the resolution of the matters in dispute.

Colman J noted that although the duty to act fairly was distinct from the power to make findings of fact, it would not usually be necessary for an arbitrator to refer back each and every inference of fact, for further submission. Particularly where there are complex factual issues, it may be impossible to anticipate what inferences of fact should be drawn from the findings of primary fact which may be in issue. Arbitrators are often appointed because of their professional (be it legal, commercial or technical) experience. Parties therefore may well run the risk of an arbitrator exercising a degree of that experience.

Colman J ended by commenting that if parties do not cooperate on matters such as inspection, taking samples and disclosure of documents, the resolution of disputes will become far more difficult and far more expensive. However, that lack of cooperation is not normally enough to render inadmissible evidence that may have been obtained unilaterally and without cooperation. Arbitrators may have to do their best with what little they have, using their commercial, technical or arbitral experience.

Environmental Legislation

The Environment Agency have just launched a new, free website called NETREGS. The purpose of the website is to give clear guidance and advice on all the environmental legislation which impacts upon the construction sector. The website address is www.environment-agency.gov.uk/netregs

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