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Dispatch

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The Dispatch highlights a selection of the important legal developments during the last month.

Adjudication

Orange EBS Ltd v ABB Ltd

In Issue 35, we reported on the decision of *Beck v Norwest Holst* where Forbes J had to consider whether or not there was a dispute. Forbes J said that the CA decision in *Halki v Sopex* was fully binding but further added that the law in this regard had been satisfactorily stated by HHJ LLoyd QC in the decision in *Sindall v Solland* (see Issue 35). Here HHJ Kirkham applied both principles in deciding that a dispute had arisen. However, it was clearly a close call.

Part of the dispute related to the final account. Orange submitted a final account on 2 December 2002, but served a notice of adjudication on 6 January 2003. Orange's contract had been terminated in July, but it had taken no further steps between July and December. ABB instructed an investigator to consider the final account and suggested they would be able to respond by 20 January and if no agreement had been reached within 7 days thereafter ABB indicated that they were willing to submit to adjudication.

ABB also said that there could be no dispute because the contractual machinery under DOM/1 had not run its course before the notice of adjudication was served. Orange said that the effect of repudiation was to bring the sub-contract to an end and thus the contractual mechanism no longer existed. HHJ Kirkham agreed. Once the sub-contract was terminated, the contractual mechanism for payment of sums due also fell away.

Applying the *Halki* test, the fact that the ABB had not admitted the claim or paid, meant that a dispute had arisen. Applying the *Sindall v Solland* test was more difficult. HHJ Kirkham had to decide whether, when the adjudication notice was served, the process of discussion and/or negotiation had ended and whether there was something which needed to be decided. Given the industry Christmas shut-down and the fact that ABB had made what they thought was a reasonable alternative suggestion in relation to the timetable, it was submitted that it would be "*bizarre, unreasonable, absurd and unworkable to conclude that a dispute had arisen*".

However, on balance, the Judge concluded that by 6 January 2003, sufficient time had elapsed for ABB to have both evaluated the claim and to have concluded any discussions and/or negotiations with Orange. This was notwithstanding the holiday period. The process of negotiation and discussion had come to an end, so a dispute had then arisen.

Deko Scotland Ltd v ERJV & Others

ERJV was set up to design and construct a new royal infirmary and medical school. The plasterboard and partitioning sub-contractor went into liquidation and the sub-contract was novated to Deko who assumed all of the responsibilities and liabilities under the sub-contract. A dispute arose and an Adjudicator issued a decision. The adjudication was governed by an amended version of the ORSA Adjudication Rules 1998 version 1.2.

When the matter came to court, the only point in issue was the Adjudicator's power to make an award in respect of the costs and expenses of the adjudication. One of the amendments introduced a new clause, 21A, which provided that "*the Adjudicator may require any Party to pay or make contribution to, the legal costs of another Party arising in the Adjudication …*". The Adjudicator ordered ERJV to pay half of Deko's costs including Deko's legal costs. Deko had claimed costs in the following five categories; claims consultant, surveyor, solicitors, internal costs and one half of the Adjudicator's fee.

Lord Drummond Young held that the Adjudicator did have the power by virtue of amended clause 21A to decide that ERJV should pay half of Deko's costs. However, that power was limited to Deko's legal costs only. Further, these legal costs were liable to taxation and the same principles as those that applied to the legal expenses of litigation (and arbitration) applied. Thus that part of the Adjudicator's decision dealing with costs would not be enforced until those legal costs had been assessed by the Court or agreed between the parties.

This case was decided in accordance with an amended version of the old TeCSA rules. The current rules adopt a different approach, providing that an adjudicator only has jurisdiction to award costs if the parties agree. The new version of the rules goes further, stating that regardless of the terms of the contract, the adjudicator shall have no power to require the party that referred the dispute to adjudication to pay the costs of the other party merely by reason of having referred the dispute to adjudication.

Shimizu Europe Ltd v LBJ Fabrications Ltd

Shimizu and LBJ entered into a contract based on a letter of intent which incorporated an amended form of DOM/1. The Adjudicator decided that Shimizu should pay LBJ £47,718.39 "without set-off" not later than 28 days after delivery of a VAT invoice. Under the amended clause 21.2.4, LBJ had to deliver a VAT invoice before any interim payment became due. Shimizu served a withholding notice after the VAT invoice was delivered. Following the decision in *Levolux v Ferson*, (see Issue 31) you might have expected the Court to say that this would be of no effect.

However, here the Judge held that the decision did not create an immediate obligation to pay. The HGCRA permits the parties to decide when payment becomes due and this was what the parties had agreed.Whilst Shimizu had no right to set off those sums which had been claimed in the adjudication, the Adjudicator did not decide that Shimizu had no future right of set off. Thus, the Adjudicator's decision did not override Shimizu's statutory entitlement to serve a withholding notice in relation to a payment which would become due pursuant to the decision.

The Judge recognised that this was a harsh position but the parties were bound by the contract and the provisions of the HGCRA. The only way round the position was for LBJ to have issued a VAT invoice with their original application for payment. Then the Adjudicator could have decided that a sum was due and should be paid immediately. However, this of course, would itself lead to practical difficulties, for example, the early submission of a VAT invoice would have advanced the date on which that VAT would have to be accounted for.

RSL (Southwest) Ltd v Stansell Ltd

RSL entered into a sub-contract with Stansell incorporating the standard DOM/2 1981 Conditions. Disputes arose in relation to the final account. The Adjudicator sought agreement to employ a colleague to assist with programming matters. Both parties consented, although Stansell asked for copies of any instructions and any report and a reasonable time to comment on such report. The Adjudicator duly asked for comment on an initial report.

RSL's advisors responded. Stansell's did not, as they did not think it necessary since the report concluded that RSL had failed to prove its case in respect of the causes of delay of which it had complained. The Adjudicator noted that his colleague would review the claims. Programming was also discussed at a meeting between the parties.

When the Adjudicator made his decision, following consideration of a final programming report, he awarded an EOT of 55 days. Stansell objected because they had not seen the final report nor been invited to comment upon it.The Adjudicator said that, having heard the evidence of the meeting and considered submissions and the advice from the colleague, he did not consider it necessary to refer the matter back to the parties for comment.

HHJ Seymour QC disagreed saying:

"*...the procedure adopted in the interests of speed is inevitably somewhat rough and ready and carries with it the risk of significant injustice. That risk can be minimised by Adjudicators maintaining a firm grasp upon the principles of natural justice and applying them without fear or favour… The duty to act impartially is, in its essence, a duty to observe the rules of natural justice. It is not simply a duty not to show bias.*"

Natural justice required the parties to know the case against them and to have an opportunity to meet it. An adjudicator should give the parties the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision.

Thus, the Adjudicator here should not have had any regard to the final report without giving both RSL and Stansell the chance to consider the contents of that report.

Dispatch is produced monthly by Fenwick Elliott, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.
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