Fenwick Elliott
Solicitors

Dispatch

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

Adjudication

n TUF Panel Construction Ltd v Capon

This case is the first New Zealand court decision under the Construction Contracts Act, their equivalent to the HGCRA. Under the CCA, there is a procedure whereby a party can establish why it has not been paid. Here, TUF who supplied pre-cast concrete panels had only received part payment for the invoices that had been rendered. It therefore served a formal payment claim on Capon. No payment schedule was supplied in response.

As a result, TUF was able to go to court to enforce payment through a summary judgment procedure. The court held that as a valid payment claim had been served but no payment schedule had been sent out in response, the debt had crystallised and was due for payment. There was no need for a Judge to look into the validity of the payment claim itself. This was notwithstanding an attempt by Capon to argue that he was not personally liable to pay the invoices in that they were debts owed by his company not him personally. The view of the court was that these matters had not been raised in a payment schedule and in accordance with the strict time frames imposed by the CCA.

n Amec Projects Ltd v Whitefriars City Estates Ltd

Amec entered into a contract incorporating the JCT Standard Form of Contractors Design which provided for the reference of disputes to an adjudicator either appointed by agreement or when there was no agreement, by the individual named as the adjudicator in Appendix 1 to the contract or in the event of his unavailability a person nominated by that person. A dispute arose and Amec successfully referred the matter to an adjudicator. However, the adjudicator the matter was referred to was not the adjudicator named in the contract. Accordingly, the court refused to enforce the award because as the adjudicator was not the named adjudicator, he did not have jurisdiction.

Amec tried to refer the same dispute to adjudication again but before the matter could be referred, the named adjudicator died. Amec said that as the contractual mechanism for appointing an adjudicator had broken down, the Scheme would apply. Amec thus sought the appointment of the original adjudicator. He again made an award in Amec's favour. Whitefriars again refused to pay. The Judge at first instance said that the correct contractual machinery had been applied but also held that there had been breaches of natural justice. Both parties appealed. The CA agreed that the second adjudicator did have jurisdiction. The adjudicator named under the contract could not be the adjudicator because he was unavailable and he had not nominated an adjudicator. Therefore the default machinery of the Scheme had to apply.

Whitefriars did not submit that the adjudicator was in fact biased in reaching his second decision. Whitefriars claimed that the decision should be declared invalid on the grounds of apparent bias - that is whether a fair minded and informed observer, having considered all the circumstances, would conclude that the decision was biased, or that there was a real possibility that it was biased. The difficulty here was that the adjudicator had been nominated to decide the same issue as he had purportedly decided in the first adjudication. Could the adjudicator be relied upon to approach the issue on the second case with an open mind, or was there a real (as opposed to fanciful) possibility that he would approach his task with a closed mind, predisposed to reach the same conclusions as before regardless of the evidence and arguments that might be adduced?

Dyson LJ said that the mere fact that the adjudicator had previously decided the issue was not of itself sufficient to justify a conclusion of apparent bias. The adjudicator should be assumed to be trustworthy and to understand that he should approach every case with an open mind. Whilst it would be unrealistic to expect him to ignore his earlier decision, he must be careful not to approach any re-hearing with a closed mind. There must be something of substance. Dyson LJ observed that the intentions of Parliament vis-a-vis adjudication would be undermined if allegations of breaches of natural justice were not examined critically when they are raised by parties who are seeking to avoid complying with an adjudicator's decision.

One reason advanced here was that Amec's solicitors had spoken to the adjudicator once he had been reappointed. They indicated that the reason why the dispute was referred back was that as he was familiar with the facts, this would save time and costs. Dyson LJ did not accept that this remark amounted to an invitation to the adjudicator to reach the same decision as on the previous occasion.

n A&S Enterprises Ltd v Kema Holdings Ltd

The parties entered into a JCT Standard Form with Contractor's Design 1998 contract. Following the non-payment of a certificate issued by the architect which took the sum claimed to a figure in excess of the original contract sum, Kema referred the matter to adjudication and was awarded the sum of around £90,000.

At an early stage of the adjudication, an issue had arisen as to the role of the architect. The adjudicator then wrote to the parties indicating that he felt a meeting with the architect would be useful, if the architect was prepared to attend, in order to learn his account of the events leading up to the dispute. Alternatively, the adjudicator said he would accept a written statement from the architect, provided it was supplied in good time for a considered response by the parties. A meeting was duly arranged. However, because the meeting was arranged at such short notice, a key representative of Kema, a Mr Overend, was unable to attend. Kema suggested that a conference call be arranged.

The meeting took place. Those present included the adjudicator and a representative of A&S and the architect. Representatives of Kema, including a solicitor, participated by telephone. In the enforcement proceedings, there was a dispute about what was said at the meeting. The adjudicator provided a witness statement. He noted that he had not prescribed who should attend on behalf of either party at the meeting but limited attendance to one legal representative and two others. He had assumed that Mr Overend would attend since he had been involved in the dealings with the architect. As he was not able to attend, some trouble was taken to ensure a telephone conference link could be arranged. The adjudicator wanted Mr Overend to attend and had expected him to take part. Further, he was surprised to be told at the start of the meeting that he was not able to. However, HHJ Seymour QC noted that the relevant correspondence did not make any suggestion that the purpose of the telephone conference link was to ensure that Mr Overend could participate. The adjudicator in his decision noted that the failure of Mr Overend to attend was "very unhelpful" and he took a view on Kema's submissions in that light.

Kema attacked the adjudicator's decision on the grounds of this amounting to a breach of natural justice. The Judge applied the usual test. Was an adequate opportunity given to each party to put its case? HHJ Seymour QC considered that the fair-minded and informed observer would consider it a real possibility that the adjudicator was biased. The adjudicator was critical in his decision on the fact that Mr Overend did not attend the meeting. However, the adjudicator had not prior to that meeting indicated that he was expecting to hear from Mr Overend. Through examination of the correspondence, he felt the adjudicator was holding the meeting principally to hear from the architect. The adjudicator, had he felt it important to hear orally from Mr Overend should have made that clear before he issued his decision in order to give Kema an opportunity to make him available for all questioning. The decision was not enforced.

n Emcor Drake & Skull Ltd v Costain Construction Ltd & anr

Costain was the main contractor for the refurbishment of a hotel. EDS was one of the principal subcontractors. The subcontract was made on the standard form DOM/2 1981 edition. An adjudicator decided EDS was entitled under clause 11.7 of the subcontract to an extension of time and to payment of just over £200,000. Costain said that the decision was made without jurisdiction and/or was in excess of jurisdiction and/or that the reference was an abuse of the adjudication process.

Over a year previously, EDS had referred an earlier claim to adjudication. That adjudicator had decided that EDS was not entitled to a declaration of an extension of time. It was common ground that an adjudicator must respect any decision made in any previous adjudication between the parties. Costain argued that the second adjudicator had considered facts and matters that had been adjudicated upon and reached conclusions in relation to those facts and matters which were contrary to those reached in the first adjudication. In doing so his jurisdiction was exceeded. HHJ Seymour QC disagreed. Whilst the adjudicator may well have considered facts and matters considered by the first adjudicator in reaching his conclusion, that was not in itself objectionable. The second adjudicator was not invited to trespass on the first decision and he did not do so.

Finally, a submission was made that the fact that EDS had included within its second referral facts, matters and documents relating to and considered in the first adjudication, was unfair and it was an abuse of the adjudication process to require Costain to respond to those facts and matters in the second adjudication. The Judge gave this short shrift. The fact that the same documentation appeared in two successive adjudications was a wholly insufficient ground for describing what happened as an abuse of process.

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