Fenwick Elliott
Solicitors

Dispatch

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

Adjudication - Case Update

■ Ritchie Brothers (PWC) Ltd v David Phillip (Commercials) Ltd

We discussed this case in Issue 46. DPL resisted enforcement saying that the decision was reached after the expiry of the relevant time period. At first instance, Lord Eassie held that underlying paragraph 19(3) of the Scheme, was the intention that once started, the adjudication process should be seen through even if the decision is delivered late. The expiry of the 28-day period is not enough to say that the adjudicator's jurisdiction has come to an end. In other words, the provisions of the Scheme relating to the time within which the adjudicator must reach his decision are directory not mandatory.

The matter has now come before the Inner House of the Court of Session. By a 2:1 majority, the Scottish judges reversed the decision. LJ Clerk felt that the key question was whether, despite the expiry of the 28-day time limit, the adjudicator retained his jurisdiction. The true interpretation of paragraph 19 was that jurisdiction ceased on the expiry of the 28-day time limit, unless it had already been extended in accordance with the Scheme. The court had to choose between two alternatives, that jurisdiction expired at the end of the 28th day or that it continued after that date and remained in existence until one of the parties should serve an adjudication notice under paragraph 19(2) of the Scheme. LJ Clerk felt that this interpretation reflected the natural meaning of paragraph 19(1)(a). It was a simple and straightforward approach. Paragraph 19(1) says that an adjudicator shall reach his decision not later than 28 days after the date of the Referral Notice (unless extended).

The Judge noted that the situation in this case need never have arisen. Adjudicators are specialists who should be able to assess the prospects of reaching a decision within the necessary timsescale as soon as they receive the papers. If there is any doubt, the adjudicator should at once seek the referring parties' consent to an extension of time or, if need be, seek the consent of both parties. Accordingly, the decision of the adjudicator was set aside.

In reaching this conclusion, the Scottish courts are in effect disagreeing with the TCC decisions in *Barnes & Elliott Ltd v Taylor Woodrow* and *Simons Construction Ltd v Aardvark Developments Ltd* - reported on in Issue 42.

Adjudication - Set-Off

■ Balfour Beatty v. Serco Limited

Serco engaged BB to design, supply and install variable message signs at locations on motorways. By an adjudication decision, BB were awarded an extension of time providing a revised completion date of 7 June 2004 and also the sum of £620,000 plus VAT. Serco refused to pay saying that as at 6 December 2004 the works were not practically complete. Thus it was entitled to levy liquidated and ascertained damages ("LAD's) for the period after 7 June 2004. This sum exceeded the sum payable to BB.

Mr Jackson noted that the adjudicator had granted an interim extension of time and awarded loss and expense in respect of the period of the extension. He did not refuse to grant any further extension of time. He had not been asked to do so and the question was left open. Mr Jackson then considered the various authorities about whether you can set-off against an adjudicator's decision including *Levolux* v *Ferson*. He concluded that where it follows logically from a decision that the employer is entitled to recover a specific sum by way of LAD's, then the employer may set-off that sum against monies payable to the contractor or pursuant to a decision, provided proper notice, if required, is given. Where the entitlement to LAD's has not been determined either expressly or impliedly by a decision, then the question of whether an employer is entitled to set-off LAD's would depend upon the contract terms and the circumstances of the case.

Here, the Adjudicator had not reached any definitive conclusion as to the total extension of time due to BB. Thus no specific entitlement to LAD's followed logically from the decision. As the contract required that both parties give effect forthwith to the decision, BB were entitled to payment.

Costs - ADR

■ Birchell v Bullard and Others

This was an appeal by a small builder against a costs order made following heavily contested litigation arising out of work done to a property owned by the Bullards. The builder's solicitors in May 2001, suggested that to avoid litigation the matter be referred to ADR. The response was that as the matters complained of were technically complex mediation was not an appropriate way to settle matters. No Part 36 offers or payments had been made. Following a trial in March 2004, Birchell recovered almost the full £18k claimed. The Bullards recovered £14k, being approximately 15% of the counterclaim. As part of the counterclaim related to the roof, Birchell had also taken Part 20 proceedings against a roofing subcontractor. The Trial Judge ordered that Bullard pay Birchell's costs of the claim, but that Birchell pay Bullard's costs of the counterclaim and the costs of the roofing subcontractor.

LJ Ward described the costs picture as being "horrific". The builder's costs were £65k. The Bullards costs were £70k. The Bullards had also rejected an offer from Birchell to submit the costs question to mediation pursuant to the Court of Appeal scheme. LJ Ward said that in making a costs award following the event, the Trial Judge had fallen into error. He should have considered alternatives - namely making a percentage order. LJ Ward noted in particular that Birchall had not exaggerated his claim. However, the Bullards had exaggerated their claim as it only succeeded to the extent of only 15%.

LJ Ward then considered the *Halsey* case. He thought that a small building dispute is exactly the kind of dispute which lends itself to ADR. However, the offer of mediation was made before *Halsey*, and indeed before the earlier case of *Dunnett* v *Railtrack*. Therefore, the act of refusing mediation in 2001, was not necessarily an unreasonable step at that time. Here, LJ Ward specifically drew attention to Paragraph 5.4 of the Pre-Action Protocol Construction Engineering Disputes which expressly requires parties to consider that a pre-action meeting or some form of ADR procedure be more suitable than litigation. LJ Ward said:

"...Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate ... made before the claim was issued. With court fees escalating it may be folly to do so."

LJ Ward thought an appropriate costs award was to award Birchall 60% of the costs of the proceedings, claim and counterclaim lumping them together to include 60% of the subcontractor's costs. This was because the Bullards had asserted that the roof had to be replaced and the roof had been built by the subcontractor. It would have been unwise for the builder not to have brought the subcontractor into proceedings.

Expert Evidence

■ Great Eastern Hotel Co Ltd v John Laing Construction Ltd & Anr

We reported on this decision last month. During his judgment, HHJ Wilcox made a number of comments about expert evidence which demonstrated again just how important it is that an expert understands and complies with the primary duty he owes to the court. Here the Judge found that one of the experts had failed to understand that duty. An expert must thoroughly research all the evidence available to him. He should not uncritically accept the evidence put forward on behalf of those instructing him. This is particularly so when the experts on the other side put forward evidence that challenges and contradicts that picture. If this happens, an expert must, in accordance with his clear duty to the court,revisit his earlier expressed views. HHJ Wilcox made it clear that the court is looking for an expert who bases his conclusions upon sound and thorough research, who has extensive practical experience in the discipline he is claiming expertise (and it helps if he has relevant experience of operating under similar contractual provisions as exist in the particular case) and who is prepared to make concessions when his independent view of the evidence warranted it.

***Dispatch* is produced monthly by Fenwick Elliott LLP, 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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Fenwick Elliott

Solicitors

Aldwych House
71-91 Aldwych
London WC2B 4HN

T +44 (0)20 7421 1986
F +44 (0)20 7421 1987
Editor Jeremy Glover
jglover@fenwickelliott.co.uk
www.fenwickelliott.co.uk