Fenwick Elliott
Solicitors

Dispatch

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

Arbitration

■ Surefire Systems Ltd v Guardian ECL Ltd

This was an application for leave to appeal, pursuant to section 69 of the 1996 Arbitration Act. Surefire said that the arbitrator had failed to take into account evidence it had put forward during the arbitration. Surefire further suggested that the arbitrator failed to have regard to the burden of proof and that he disregarded certain clauses of the subcontract. As a result, the arbitrator awarded sums to which Guardian were not entitled.

In accordance with section 69 the 1996 Act, it is necessary to identify the questions of law which the arbitrator was asked to determine and which, it is said, the arbitrator fell into error over. Mr Justice Jackson, having reviewed previous authorities, agreed that the legislative intent of this section was to prevent parties seeking to dress up questions of fact as questions of law. Any party seeking leave to appeal under section 69 must take as his starting point, the arbitrator's findings of fact. He must then identify the questions of law arising from those facts upon which the arbitrator fell into error. Typical evidence on any application for leave to appeal will comprise the award and evidence relevant to those issues. The Judge stressed that it was not the function of the Court to review the arbitrator's assessment of the factual evidence.

Mr Justice Jackson concluded by emphasising three points which he stressed needed to be understood by those concerned with arbitrations in the construction industry:

1. Where parties enter into an arbitration agreement, any right to challenge any award is strictly limited by the 1996 Arbitration Act;
2. An application for leave to appeal will not be granted unless the applicant can surmount the substantial hurdles set out by section 69 Act.
3. Where an application for leave to appeal is made, the Court should not be burdened with vast amounts of intricate argument and inadmissible evidence and about the factual issues which the arbitrator has decided.

Mr Justice Jackson specifically said that the "*preparation of such material is a waste of time, effort and costs*." Mr Justice Jackson also noted there are good commercial reasons for parties in the construction industry to choose arbitration. There is, however he said, a price to be paid.

"The parties cannot have their cake and eat it. The parties cannot refer their factual or technical disputes first to an arbitrator and then to a judge of the Technology and Construction Court."

In saying this, Mr Justice Jackson reinforced the reluctance of the English Courts, expressed by the House of Lords in the case of *Lesotho Highlands Development Authority v Impregilo Spa & Ors*, to intervene with the finality of arbitration awards.

Arbitration - Interest

■ Pirtek (UK) Ltd v Deanswood Ltd & Anr

At the conclusion of an arbitration, Pirket was ordered to pay Deanswood the sum of £127k within 60 days. No award was made for interest. Indeed, interest had not been claimed by Deanswood prior to the award being made. 17 months later, Deanswood requested that the arbitrator award interest. At the time, having sought to challenge the award in the courts, Pirtek had not paid the judgment.

Aitkens J said that under section 49(4) of the 1996 Arbitration Act, if a party seeks post-award interest, it must be specifically applied for unless there is provision in the rules under which the dispute was being heard. Here, there was no evidence to indicate the arbitrator was asked to consider making an award of interest at any stage prior to the subsequent request. By section 57 of the 1996 Act, an arbitrator can make an additional award in respect of interest. This additional award can be made on his own initiative or on the application of a party. However, the additional interest award can only be made in respect of a claim presented to the Tribunal but not dealt with in the award. Thus, if a party, like Deanswood here, did not seek interest in its original claim, then it cannot use section 49 or 57 of the Act by making a fresh claim at a later stage.

Liquidated & Ascertained Damages

■ Decoma UK Ltd v Haden Drysys International Ltd

As part of a dispute over a paint-spraying system, HHJ Coulson QC had to determine certain preliminary issues. In order to do this there were a number of assumed facts. One of these was that substantial completion was never achieved because the commissioning was never completed. Therefore final acceptance of the spraying system had not taken place. By Article 12 of the contract, if Haden failed to achieve the final completion date, LAD's could be levied up to a maximum amount of 5% of the contract price. It was stated that both parties agreed that these rates were a genuine pre-estimate of loss.

As a consequence of the problems Decoma claimed sums significantly in excess of the LAD rate. Haden sought to rely on these cap clauses to limit its liability.
One of the arguments put forward by Decoma was the legal presumption that a party cannot take advantage of his own wrong.The Judge considered the case of *Alghussein v Eton College* where the principle was applied, noting that there the literal meaning of the clause in question rendered it wholly inconsistent with all other parts of the relevant lease. Second, the Judge noted that the clauses, which provided that Decoma could recover for a particular type of loss only up to a certain specified limit, are a common feature of commercial contracts. They reflected the agreement that, in the event of a breach, the wrongdoer's liability would be fixed at a pre-set maximum limit.

Here, the claims made by Decoma were clearly limited by the cap clauses. This was even though the delays caused by the failure by Haden to complete the paint spraying system meant that the damages far exceeded the cap. However, this was something which would have been in the contemplation of the parties at the time the contract was negotiated. It was of no help to Decoma that the contract provided for Haden to provide a warranty. The warranties only took effect on the date of final completion, something Haden were unable to achieve.

The Rule in Rylands v Fletcher

■ LMS International Ltd & Others v Styrene Packaging and Insulation Ltd & Others

LMS claimed that Styrene was responsible for a warehouse fire. Styrene made polystyrene blocks for insulation purposes and polystyrene mouldings for packaging. The first way in which the claim was put was under the old rule in *Rylands v Fletcher*. In the case of fire, the rule works like this. If a party has brought on to his land things likely to catch fire, and kept them there in such conditions that, if they did catch fire, fire would be likely to spread to adjoining land and if he did so in the course of some non-natural use of the land, then he would be strictly liable for any damage caused by the fire. There would be no need to prove negligence. The items brought on to the land must represent a recognisable risk to the owners of the adjoining land.

LMS also claimed in negligence alleging that the duty of care owed was more onerous than normal because of the potentially dangerous nature of Styrene's production process. It was also alleged that Styrene negligently failed to stop the spread of the fire once it had started. The Judge accepted that the standard of care owed was that which was reasonable in all the circumstances. These included the nature of the business and the risk of accident and danger to others. The Judge agreed that an occupier has a continuing duty to abate a fire but it is a question of fact as to what steps must be taken to discharge that duty.

The Judge found that here Styrene did bring on to site a large quantity of inflammable EPS which was a known fire risk. It was kept in such a way that, if ignited, the fire would spread beyond where it was housed. There was therefore a recognisable risk to LMS who were next door. The use of the land also amounted to a non-natural one. The damage was not caused by an every day element of modern life like a domestic water pipe. The land was used for a specific manufacturing purpose and there was a real risk to adjoining land owners. Accordingly, LMS made out its claim under the rule in *Rylands v Fletcher*. Further, Styrene was liable in negligence. The nature of Styrene's business was such that Styrene ought to have been aware of the need to train their employees to deal with such fires and safely operate the machines. As a result of the lack of training, Styrene was unable to deal with or abate the fire immediately.

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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