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Dispatch

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

Letters of Intent

■ Skanska Rasleigh Weatherfoil v Somerfield Stores Ltd

Here Somerfield sought tenders to carry out maintenance works at their stores. Skanska were one of the successful tenderers and on 17 August 2000, Somerfield wrote to Skanska confirming their appointment. The letter was stated to be subject to contract and enclosed a draft facilities management agreement. It further stated:

"Whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28 August 2000 ... until 27 October 2000".

This period was extended several times. The final letter extended it until 21 January 2001 and said that Somerfield were not prepared to give any further extension. That deadline passed and Skanska continued to perform their services.

By the end of 2002, a dispute had arisen over whether Skanska were entitled to be paid for a number of jobs which were stated to be "timed out" because an invoice had not been submitted within the period required by the draft facilities management agreement.

Before Mr Justice Ramsey, Somerfield argued that all of the terms of the facilities management agreement were incorporated including the "timed out" provisions. Skanska said that the terms of the agreement were incorporated only to the extent that they defined the services which Skanska was required to provide. Skanska also argued that the agreement expired on 21 January 2001.

The Judge said that that letter of 17 August 2000 was intended to give rise only to an interim arrangement pending the negotiation of an acceptable facilities management agreement. The use of the phrase subject to contract, for example, demonstrated that the parties were not to be bound by the full terms of such an agreement until all necessary matters had been finally negotiated. However, Somerfield's immediate requirement for maintenance works could not await the outcome of the negotiations.

The Judge further held that the obligation to provide the services "under the terms of the contract" could not be read as including all the terms of the facilities management agreement. However, equally it could not be read as including none of those terms. The intention of the parties could not have been to incorporate the terms of the draft agreement attached to the letter, because these were the terms which the parties were negotiating and which were therefore not necessarily acceptable.

Therefore, the Judge said that the parties intended to incorporate the terms of the facilities management agreement only to the extent that they were necessary to define the services which Skanska was to provide.

In answer to the question as to whether or not any binding agreement continued beyond 21 January 2001, the Judge looked at what happened in the period from 17 August 2000. Somerfield said that the parties operationally carried on as before after 21 January 2001. Skanska said that they carried out work after that time only in response to Somerfield faxed requests. The Judge considered that whilst the wording of correspondence in this period made it clear that Somerfield were reluctant to extend the interim period, it did not contemplate that the terms of the contract (as expressed in the 17 August 2000 letter) would not continue beyond 21 January 2001.

The question for the Court was whether the parties continued to operate on the basis of the original contract after 21 January 2001. Perhaps the most important fact as far as the Judge was concerned was that the parties continued to conduct themselves as they had before with the pre-existing agreement. Nothing really happened contractually after 21 January 2001.

Skanska continued to provide services in the same way as they envisaged under the August 2000 letter. It may not have been what the parties intended. However that was the consequence of the parties' failure to regularise their contractual relationship.

This meant that no binding agreement had been reached about the alleged timing out at any period. No

supplementary agreements were made. The purpose of the meetings that took place in relation to them was to negotiate the finalisation of the facilities management agreement. These meetings were at all times carried out on a subject to contract basis.

Adjudication

■ Hillview Industrial Developments (UK) Ltd v Botes Building Ltd

A dispute arose between the parties in relation to Hillview's entitlement to liquidated and ascertained damages as a consequence of delays in completion. Hillview obtained an adjudicator's award in its favour in the sum of just under £300k.

Botes brought separate proceedings to recover a sum it claimed was due under the final account. It also applied for summary judgment. The Botes' application was due to be heard later. Botes accepted it had no defence to the claim made by Hillview. However, Botes relied upon its own application for summary judgment in relation the final account which was pending. Botes were seeking just under £200k.

It therefore submitted that there was a compelling reason that the Hillview application should be adjourned so that both applications could be heard together. Botes said it was entitled to set off the balance due to it against the larger sum awarded under the adjudication proceedings. Alternatively, if summary judgment was entered for Hillview, execution of that Judgment should be stayed until Botes' own application for summary judgment had been determined.

HHJ Toulmin CMG QC decided that Hillview was entitled to summary judgment. Botes had conceded that it had no defence. There was no justification to adjourn a summary judgement hearing. Adjudication under the HGCRA was intended to resolve construction disputes, albeit on a provisional basis, by way of prompt payment.

Obligation to Insure

■ TFW Printers Ltd v Interserve Project Services Ltd

TFW was the leasehold owner of a building. Interserve agreed to carry out various building works under the standard JCT Agreement for Minor Building Works. Clause 6.3A of that agreement provided that Interserve should insure, in the joint names of TFW and itself, against loss and damage caused by storm, tempest and flood. Clause 6.3B provided that TFW in the joint names of both parties should insure against loss or damage to the existing structures, the works and all unfixed materials and goods delivered to the works caused by storm, tempest and flood.

During the defects liability period (after the works were completed) heavy rainfall caused flooding to part of the building. TFW said that this flooding had been caused by Interserve's breach of contract and/or negligence.

The Court considered whether TFW's obligation under Clause 6.3B ceased upon practical completion of the works or whether it continued until discharge of the defects liability obligation. The Judge found that the obligation continued for the duration of the defects liability period.

The CA disagreed and said the insurance obligation in Clause 6.3B ceased upon practical completion. The CA noted that the Minor Works Contract, as a matter of construction, made it clear that the obligation to insure ceased upon practical completion. By the time practical completion was achieved, all materials and goods intended for the works would have been fixed. It was unlikely that it was intended that the works would be used to relate to any materials or goods brought to the site in order to make good defects.

The phrase the "works" referred to work and materials required by the contract to bring the project to completion. Equally, if the obligation to insure against loss or damage to unfixed materials and the works ceased on practical completion, then it could not have been intended that the obligation to insure against loss or damage to the existing structure should be for a different period. The obligation to insure under Clause 6.3A ceased upon practical completion.

The Court held that once the contractor has achieved practical completion, possession of the site is passed to the employer. As building owner, he bears the risk of damage to the building and contents.

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