



# Dispatch

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

## Adjudication - Insolvency and Section 111 of the HGCRA

### ■ Melville Dundas Ltd & Ors v George Wimpey (UK) Ltd & Ors

This is the first time that the HGCRA has reached the House of Lords. The dispute here, which related to the payment part of that legislation, highlighted the tension between an employer's payment obligations and the impact on those obligations of the contractor going into administration. Here, on 2 May 2003, Melville applied for an interim payment. No withholding notice was served. The final date for payment was 16 May 2003. Wimpey did not pay, but on 22 May 2003 administrative receivers were appointed.

Clause 27.6.5.1 of the contract, the Scottish Building Contract, with Contractor's Design, as is typical, stated that in these circumstances the parties must wait until the works are finished. Then an account will be taken and any balance paid to the receiver. The Scottish CA and the minority of the House of Lords were of the view that at the time the receivership was announced, the payment was due as no notice of withholding had been served. If the final date for payment has passed, then the notice requirements of section 111 cannot be applicable as they have to be implemented before the final date for payment. Therefore the monies ought to be handed over to the receivers.

And this of course represents the tension described above. When a contractor's employment has been determined and a receiver appointed, two consequences follow. The contractor no longer has any duties to perform and the liability to make interim payment is no longer provisional. While the employer retains the money, he can set it off against his cross claim for non-completion against the contractor. More often than not, that cross claim will exceed any claim the contractor may have for unpaid work. Once the employer has paid the money, it will be gone, swept up by, for example, floating charges. If Wimpey paid the money over, it would never see it again.

In the House of Lords there was limited discussion about the payment provisions of the HGCRA. Lord Hoffman noted that the object of these clauses was to introduce clarity and certainty as to the terms for payment and to dictate to the construction industry what those terms should be. He did not feel that section 110 necessarily achieved this, in particular with regard to the notice provisions.

He agreed with other commentators that serving a notice under section 110(2) seemed to have no consequences. There was no penalty for doing so. He described its purpose as being "*something of a puzzle*" and noted that it seemed "*to have dropped from heaven into the legislative process on its last day in the House of Commons...*".

However, the crux of the issue was section 111. Was Wimpey entitled to withhold the interim payment when it did not serve a notice before the final date for payment on 16 May 2003? It would not have been possible for Wimpey to serve such a notice by 11 May 2003. The earliest that they could have known they were entitled to withhold the interim payment was when the receivers were appointed on 22 May 2003.

Lord Hoffman said the purpose of the section 111 Notice is to enable the contractor to know immediately and with clarity why a payment is being withheld. The notice is part of the machinery of adjudication in that it provides information which the contractor can challenge through adjudication if he so wishes. Clause 27.6.5.1 did not extend the final date for making an interim payment. He thought that the problem here had arisen because Parliament had not taken into account that parties would enter into contracts under which the ground for withholding a payment might arise after the final date for payment.

Lord Hoffman decided that here section 111(1) "*should be construed as not applying to a lawful ground for withholding payment of which it was ...not possible for notice to have been given in the statutory time frame.*" Therefore he allowed the appeal.

Lord Hope of Craighead also allowed the appeal but for slightly different reasons. He chose to give a purposive construction to section 111(1). (Some might consider this to be an interesting choice of word given the reluctance of the CA to adopt such an approach to construing section 107 in the *RJT* case.) The mischief that section 111 addresses is to reduce the incidence of set-off abuse by formalising the process by which the payer claims to be entitled to pay less than that expected by the payee. Therefore, Lord Hope took the view that section 111 should not apply to situations where the employer wishes to exercise right of set-off given by clause 27.6.5.1 when he has determined the contractor's employment under the contract. Thus the view of the majority was that Wimpey could hold on to the money.

## Time At Large

### ■ Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd

Multiplex engaged Honeywell under an amended JCT DOM/2 contract to carry out the design and installation of the electronic systems at the new Wembley National Stadium. The subcontract contained a detailed programme for Honeywell to follow. Honeywell's works fell into delay. The reasons for this were disputed. Honeywell sent notices of delay to Multiplex and requested an extension of time. Multiplex rejected the notices as not complying with the requirements of clause 11 of the subcontract (extensions of time). In the absence of valid notices and information required by clause 11 Multiplex advised Honeywell that it was unable to assess Honeywell's entitlement to an extension of time. Honeywell claimed that it was impossible to provide the information required. Clause 11 provided that:

*" In the event the Sub-Contractor fails to notify the Contractor ... and/or fails to provide any necessary supporting information then he shall waive his right, both under the contract and at common law, in equity and/or pursuant to statute to any entitlement to an extension of time under this clause 11."*

During the course of the works Multiplex issued revised programmes to Honeywell under clause 4.2 which said that the contractor may issue any reasonable direction in writing to the Sub-Contractor in regard to the Sub-Contract Works.

The key issue in this case was whether time was set "at large"? In other words, had Honeywell's contractual obligation to complete within 60 weeks, (subject to any extensions of time) fallen away and been replaced with an obligation to complete within a reasonable time and/or reasonably in accordance with the progress of the main contract works? Honeywell alleged that time had become at large.

Following an adjudication, Multiplex commenced proceedings for a declaration that on the true construction of the sub-contract, clause 11 provided a mechanism for extending the period for completion of the sub-contract works in respect of any delay caused by an instruction under the contract, thus an instruction given under the contract would not render time at large.

Mr Justice Jackson had to consider whether directions issued under the contract, via clause 4.2, could give rise to a relevant event under clause 11. He said that they could. Directions causing delay were acts of prevention and were covered by the "sweep up" relevant event in clause 11.10.7. An act of prevention may be a legitimate act. Time was not at large on this ground.

However the Judge did not consider that Multiplex had failed to operate the extension of time machinery, nor that the machinery broken down. Clause 11 only required Honeywell to do its best in supplying notices and information. Honeywell's evidence stated that Honeywell had done its best. The machinery therefore was capable of being operated and was in fact being operated.

Further, the condition precedent did not render time at large. A condition precedent which bars a right to an extension of time if not complied with is valid. The condition precedent here did not seek to take advantage of any potential breach by Multiplex that may have prevented Honeywell from giving notice. This was because clause 11 did not require Honeywell to give notice if it was impossible to do so. Had it not been qualified in this way, it may have been unenforceable.

Finally, the Judge did not agree that the agreement between Multiplex and Wembley placed time at large. The Judge did not see how a separate agreement between Multiplex and a third party could unilaterally affect Honeywell's right to an extension of time under the subcontract.

Mr. Justice Jackson agreed with the view taken by the Scottish Court of Appeal in *City Inn Ltd v Shepherd Construction Ltd* (See Dispatch Issue 35), that there are good reasons both for the employer requiring a contractor to give prompt notice of delay, and also for creating a sanction by way of condition precedent for any failure to give such notice. He said that:

*"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."*

Time bars are becoming increasingly common. This judgment confirms that time bars are legally enforceable and that they do not set time at large. Consequently, all parties should always carefully check their contracts when entering into them in order to see whether there are any time bars in the extension of time or loss and expense clauses.

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