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Dispatch

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

Adjudication - late decisions

■ **A C Yule & Son Ltd v Speedwell Roofing & Cladding Ltd**

Yule sought to enforce an adjudicator's decision that they were entitled to payment of £191k. Speedwell claimed that as the decision was provided after the agreed extended period, it was a nullity. HHJ Coulson QC noted that following the *Amec* and *Carillion* cases, jurisdiction and natural justice challenges have become more difficult and the number of disputed applications to enforce adjudication decisions had fallen. Thus, what the Judge termed the "*resourceful losing party*" has had to look elsewhere and a new common ground was to allege that the adjudicator had not complied with the strict timetable required by the HGCRA.

Here, it appeared that the decision was completed out of time. Having been granted a 14 day extension, the time for completion of the decision was 3 April. Yet it was provided on 4 April. The Judge, having reviewed the authorities, concluded that paragraph 19 of the Scheme required that the adjudicator reach his decision within 28 days (and/or the agreed extended period). In order to be valid, an adjudicator's decision must be completed within this period.

The Judge then took a closer look at the facts. On 27 March, Yule provided a number of responses to queries raised by the adjudicator. Later that day, Speedwell sought time to respond. On the same day, the adjudicator agreed that Speedwell could have two days to respond but he required agreement that he be given two more days to issue his decision. Yule expressly consented to the request which took the time of completion of the decision to 5 April. Although Speedwell made no response to the request for further time, it did comment on the substantive issues. The adjudicator read these and raised various queries. Both parties made it clear that they could not respond over the weekend and would have to wait until Monday 2 April. On the morning of 2 April, the adjudicator asked Speedwell for copies of invoices. Speedwell promised those that afternoon. They were not in fact provided until lunchtime on 3 April. They ran to 65 pages. On the morning of 4 April, the adjudicator indicated that he would provide his decision that day. There was no response from either party. There was no suggestion from Speedwell that this might mean the decision was out of time. Indeed, it was not until 14 May, that Speedwell first suggested that they were going to take the point that the decision was a nullity because it was late.

The Judge noted that this was "*hardly an argument awash with merits*" although it did fall within the guidance provided by the legal authorities. However unlike the CA in the *Bothma* case, set out below, the Judge did not accept Speedwell's case for three reasons. The first was that the Court had to be mindful of the difficulties imposed upon adjudicators by the timetable. There may be times when late in the day, new information made it necessary for an adjudicator to ask for more time. This is exactly what happened here. When an adjudicator makes such a request, the Judge thought there was a clear obligation on both parties to respond plainly and promptly. If a party did not respond, there must be a strong case for saying that they had accepted, by their silence, the need for the extension.

An adjudicator can do no more than work out that he needs a short extension and seek agreement for that. The Judge duly inferred here that by their silence, Speedwell had accepted that the time was extended to 5 April. Second, Speedwell did more than acquiesce to an extension by silence. They, "*participated in a process which made it impossible"* for the decision to be provided by 3 April. For example, they failed to respond to a request for information causing the delay, then they promised further documentation but supplied it a day late and when they did supply it, did not indicate that in their view, the 3 April was the last day for the adjudicator to complete his decision.

In other words, their conduct was consistent with having agreed to an extension. Finally, the Judge felt that Speedwell were estopped from denying that the decision of 4 April was a valid decision. They had failed to say in terms that they did not agree to the extension and they had participated in the exchange of information all the way through to the latter part of 3 April.

Finally, the Judge commented on an argument made by Yule that even if the decision was completed outside the extended period, it should still be enforced. This was an argument made in reliance upon an Australian decision called *Brodyn v Davenport*. Although his comments do not form part of the ratio of his decision, and so are not binding, HHJ Coulson QC said that what was important was that the benefits of speed and certainty underpinned the statutory requirements that the decision of an adjudicator "shall" be provided within 28 days (or the agreed extended period) and not thereafter. In other words, if the Judge had concluded that the adjudicator's decision was a day late, it would have been a nullity.

Adjudication - Breach of natural justice

■ **Humes Building Contractors Ltd v Charlotte Homes (Surrey) Ltd**

Humes sought to enforce an adjudicator's decision for some £160k. The building contract was based upon a JCT Intermediate Form with Contractors Design 2005 Edition. Relations between the parties deteriorated and Charlotte purported to terminate the contract under clause 8.4. Humes brought a claim for measured work and wrongful determination. Charlotte counterclaimed for defects and LAD's. The adjudicator valued the contractor's claim but in his decision refused to consider the counterclaim on the basis that no withholding notice had been served.

Charlotte refused to pay on the basis that the adjudicator had exceeded his jurisdiction in deciding that the termination had been wrongful. Further, he had decided a different question to the one asked and had made an error by failing to consider the counterclaim merely because there was no withholding notice. This meant that the adjudicator had failed to consider the merits of their case in respect of the deduction of LAD's and defects. HHJ Gilliland QC considered that the adjudicator had answered the questions put to him, although he may have decided some of the points incorrectly. Nonetheless an error of fact or law would not be enough to refuse enforcement. Refusing to consider the defects and LAD's claim was in the Judge's view wrong, regardless of the fact that a withholding notice had not been issued. Yet these were errors within the adjudicator's jurisdiction.

However, Charlotte had also argued that it was unfair to enforce the decision because they had not been given the opportunity to address the adjudicator in respect of the adjudicator's incorrect legal reasoning. Therefore, the Judge had to consider whether the actions of the adjudicator were so unfair that the court should refuse to enforce. He agreed holding that:

"In my judgment what the adjudicator has done was manifestly and seriously unfair to the defendant. The defendant's claims that the claimant's work was defective was an important part of its defence. The defendant claimed the defects amounted to £135,916.48 and if that was correct the amount of any award in favour of the claimant would have been very significantly reduced. The adjudicator however rejected this claim (and any balance of the claim for liquidated damages) without considering it upon its merits as in my judgment he should have done. The defendant has been deprived of any opportunity of persuading the adjudicator that his view of the law was incorrect and the consequence is that the adjudicator has excluded a very substantial part of the defence without consideration of its merits for reasons which are wrong in law. There is nothing to suggest that the defendant should have realised that the adjudicator might be of the view that a withholding notice was necessary before he could consider these claims. In my judgment the failure of the adjudicator to raise the point with the parties and to invite their comments before issuing his decision was so unfair to the defendant that the court should not enforce the decision summarily."

Adjudication - Same dispute

■ **David and Theresa Bothma t/a DAB Builders v Mayhaven Healthcare Ltd**

Here, the CA was asked to consider an application for leave to appeal against the refusal of HHJ Havelock-Allan QC to enforce an adjudicator's decision. The notice of adjudication identified four disputes, namely the completion date, the validity of the architect's instructions, the status of a notice of non completion and the sum due under valuation 9. Bothma sought a number of remedies including that the adjudicator determine the revised date for completion and the sum properly payable to it.

The adjudicator awarded an extension of time, said that the non completion certificate was invalid and ordered Mayhaven to pay just over £21k. However Mayhaven resisted enforcement saying that an adjudicator only had jurisdiction to determine one dispute at the same time. At first instance, the Judge held that the adjudicator had decided two unrelated disputes being the correct figure for valuation 9 and whether the contractor was entitled to an extension of time and thus the validity of the non completion certificate. On the facts, any challenge to the non completion certificate was of no monetary consequence to the sum due under valuation 9. LJ Dyson agreed. If interim valuation 9 had included a claim for extended preliminaries or other time related sums, there would have been a clear link between the figure claimed and the claim for an extension of time. Here, however, no disputes were identified which had any time implications at all.

Although LJ Waller expressed some concern about the application, describing the point taken by the employer as "*somewhat technical*", he accepted it served no useful purpose to allow the appeal to go ahead where the would-be appellant was almost bound to lose. If it did, the CA would be furthering an argument which was described as "*practically hopeless*", and this would simply give rise to further costs being incurred.

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