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Dispatch

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

Damages - costs of repair and reinstatement

■ **London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd & Ors**

This case came before HHJ Toulmin CMG QC following a fire at a training centre. The LFEPA claimed that since the fire it had not been possible to use the centre for its primary purpose and the training had to be undertaken elsewhere at substantial additional cost. The LFEPA claimed for the costs of repair of the damage caused by the fire, the costs of investigation of the cause of the fire, the replacement of defective ductwork and associated equipment and loss of use based on a 45 month shutdown.

The Judge said that to succeed, the LFEPA must establish that Halcrow design was negligent and that this negligence caused the loss as claimed. In considering the second point, it was necessary to consider not only whether Halcrow's alleged negligence caused the loss but whether the LFEPA suffered a loss for which it should reasonably be compensated. In other words, was it reasonable for the LFEPA to recover the cost of reinstating the property? The Judge in particular had in mind the words of Clarke LJ in the 2001 case of the *"Maersk Colombo*", who said that:

"Ruxley also supports the proposition that, although what a claimant does with any damages he receives is irrelevant, his intention to reinstate or not to reinstate, while not conclusive, is relevant to the question whether it would be reasonable to reinstate the property…"

The LFEPA claimed that they intended to carry out the reinstatement works but that it was prudent for it to wait and see what damages were awarded before commencing the works. Halcrow put in issue the intention of LFEPA to carry out any remedial work. They said that the LFEPA had taken no steps since the fire more than two years ago to implement any remedial scheme. The Judge commented that there was no documentary or other evidence about the LFEPA's intentions. The court had offered to postpone the trial on quantum. However, on the basis of the evidence, he could not conclude that the LFEPA would carry out any of the remedial schemes. Accordingly, the Judge was satisfied that it would not be reasonable for the LFEPA to carry out remedial works (for which damages were claimed) and in addition, that they had any intention of doing so.

ADR and the NHBC

■ **Holloway & Anr v Chancery Mead Ltd**

This claim related to a proposed arbitration in respect of the purchase of a private property by the Holloways from CM, the Developer. CM said that whilst they were content to agree to the appointment of an arbitrator, first, the Holloways had to abide by clause 24.1 of the contract and refer their complaints to the NHBC dispute conciliation process. CM said that this was a condition precedent to arbitration. The Holloways sought a court declaration that they were entitled immediately to refer the dispute to arbitration. The relevant part of the contract, clause 24, provided that: *"If any disputes shall arise … either party shall at the written request of the other seek to resolve such dispute … through conciliation by the NHBC."* Clause 24.6 said that the *"making of a determination by an NHBC investigator shall be a condition precedent to any right to refer the matter to arbitration …"*

The issue before Mr Justice Ramsey was whether and to what extent these provisions would prevent an arbitration being commenced until they had been satisfied or complied with. It should not be forgotten that the Holloways had two alternative remedies, one against the builder or the NHBC, the other against the developer. Here, clause 24.1 did not create any enforceable obligation to resolve a dispute between the developer/seller and the purchaser under the contract. The dispute here was for damages for breach of contract in relation to obligations under the contract not for remedies that might be available under the NHBC/Build Mark documentation. The disputes here were outside the scope of the NHBC Dispute Resolution Service.

Although having decided this, the matter was closed, Mr Justice Ramsay did comment upon the question as to whether or not the NHBC Resolution Scheme amounted to any more than an agreement to agree. For the ADR clause to be sufficiently certain, (i) there should not be a need for an agreement at any stage before matters can proceed, (ii) the administrative process for selecting a party to resolve the disputes should be defined and (iii), the process (or at least the model of the process) should be set out so that detail of it was sufficiently certain. Here the Build Mark documentation was sufficiently detailed to provide a method of dispute resolution which was certain and that included the imposition of the condition precedent requiring the parties to go through the NHBC Resolution Scheme before pursuing arbitration.

Adjudication - crystallisation of a dispute

■ **Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd**

Vauxhall employed Ringway to carry out the development of a large car park to accommodate new cars being built by Vauxhall. The contract was the JCT1998 with Contractor's Design as amended. On 16 May 2007, Ringway submitted interim application No 11. This was a detailed document, and sought the sum of £1,303,704.95. Vauxhall, acting principally through its agent Walfords LLP, finally responded on 27 June 2007 stating that it had not had sufficient time to consider in detail the build up of the variation costs. It did not issue a payment notice. Although, both parties discussed the need to resolve the matter between themselves, this came to nothing and an adjudicator was appointed. Vauxhall made several jurisdictional challenges, which were rejected. The adjudicator found that by operation of clause 30.3.5, Vauxhall were obliged to pay Ringway the amount stated in the interim payment application, plus interest and his fees.

The inevitable enforcement proceedings came before Mr Justice Akenhead. The jurisdictional challenges included that the adjudication notice referred to Ringway's ultimate entitlement under its final account as opposed to the amount due under the interim application.Vauxhall also said that no dispute had crystallised prior to the reference to adjudication in relation to the interim application, because no demand had been made for payment. As Ringway had not, prior to the reference, relied upon the provisions of clause 30.3, no dispute existed or could exist in relation to the claim made in respect of interim application which was based on clause 30.3.5.

The Judge was of the view that the key issue was whether the adjudicator had jurisdiction to decide that, in the absence of any timely payment or withholding notices, Ringway was entitled under clause 30.3.5 to the sum claimed in interim application 11. The Judge was satisfied that the dispute which was referred to adjudication, was a dispute relating to the interim application. It was material that the previous applications for payment were numbered 1-10, and that these were valued by Walfords LLP within a seven day period of their receipt. Interim application 11 was not an academic valuation exercise which Ringway were seeking to embark on. Further, the Judge had to decide what, if anything, was in dispute and if there was a dispute, whether the dispute resolved by the adjudicator was the one referred to him. Here, as a matter of fact, the dispute concerned the amount due to Ringway arising from application 11. Part of this dispute was whether or not Vauxhall had complied or not with the payment provisions of the contract.

The Judge held that the issuing of a payment notice under clause 30.3.3 was a mandatory obligation. Vauxhall's failure to do so was effectively a breach of contract. Although there was no express reliance in the adjudication notice to clauses 30.3.3 and 30.3.5, this did not change the fact that there was a clear claim for payment. The lack of a timely notice under clause 30.3.3, inevitably meant that under clause 30.3.5, the sum claimed became due and payable. Thus, no invoice can have been required in circumstances where Vauxhall was itself in breach.

Adjudication - contracts in writing

■ **Harris Calnan Construction Co. Ltd v Ridgewood (Kensington) Ltd**

This was a claim to enforce an adjudicator's decision for some £102k. Ridgewood said that the adjudicator did not have the necessary jurisdiction because there was no contract in writing. Unusually, there was no suggestion in any of the documents before the court that Ridgewood had actually reserved its position on this issue during the adjudication. Accordingly, it seemed to HHJ Coulson QC that the decision that the adjudicator reached as to the existence of a contract in writing could not now be challenged by Ridgeway. However, the Judge did go on to consider whether or not there was a contract in writing. This is of interest because the contract in question took the form of a letter of intent. There have been a number of cases including *Bennett v Inviron* (see Issue 82) where the particular letters of intent in question were ruled not to be contracts where all the terms were in writing.

As HHJ Coulson QC made clear, each case must turn on its own facts. Here, the letter of intent made plain that there was complete agreement as to the parties to the contract. The contract workscope was contained in what was described as "Tender Documents dated 2nd November, 2005". There was an agreed lump sum of £200,787.75 and an agreed set of contract terms (namely the JCT 2005 Standard Form, Private with Quantities). The retention was 5% and LAD's were agreed at £5,000 per week. Finally, the contract period was sixteen working weeks. The adjudicator observed that "*there appears to be nothing left for the parties to agree*" and went on to note that all that was missing was a set of documents which made that agreement more formal. The Judge agreed that that did not mean that there was not a contract between the parties. All the terms were evidenced in writing. Accordingly, the adjudicator did have the necessary jurisdiction.

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