



Dispatch

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

Adjudication

Consultation on the Scheme for Construction Contracts

As everyone knows Parliament finally passed the Local Democracy, Economic Development and Construction Act last year. Of course, what that did not mean was that the intended changes to the HGCR legislation came into force immediately. Indeed they may not do so until at least 2011. One reason for this is the need to amend the Scheme so that it falls into line with the changes. On 25 March 2010, BIS, the Department for Business, Innovation and Skills issued a consultation document setting out the following proposed changes and questions:

- (i) the inclusion of an express provision allowing the adjudicator to determine how payment of his fees should be apportioned;
- (ii) the inclusion of a slip rule giving the adjudicator seven days to correct his decision;
- (iii) the incorporation of new rules to reflect the new payment notice framework;
- (iv) a proposal to clarify the date of referral, for example seven days from the receipt of the adjudication notice by the adjudicator;
- (v) asks whether parties are content with the current position that an adjudicator cannot adjudicate related disputes unless the parties agree;
- (vi) questions whether the position about the confidentiality or otherwise of the adjudication process should be clarified;
- (vii) asks whether the limitations under the Scheme on an adjudicator's power to open up and review any decision or certificate that is said to be final and conclusive, should be lifted or clarified; and
- (viii) asks whether an adjudicator should be given wider powers to award interest.

Full details can be found on the BIS website - www.bis.gov.uk and the consultation closes on 18 June 2010.

Frustration

Gold Group Properties Ltd v BDW Trading Ltd [2010] EWHC 323 TCC

If performance of a contract becomes more difficult or even impossible, then the general rule is that the party who fails to perform is liable in damages. An exception to this is the doctrine of frustration. Lord Radcliffe in the House of Lords in the case of *Davis Contractors v Fareham UDC* said:

"... frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract... It was not this that I promised to do."

As a historical note, the earliest case - *Paradine v Jane* dates from the English Civil War. The case involved a defence by a tenant that he could not pay rent because his lands had been taken over by Prince Rupert and his army. The court dismissed the defence. Whilst that might seem harsh, on a strict contractual view, the tenant's performance of his obligations under the contract, i.e. the payment of rent, had not been affected by the supervening event - what had been affected was his enjoyment and use of the land. And that harsh approach has been followed by the courts today, especially when it comes to the suggestion that a contract has been frustrated because of economic difficulties. For example, here, Gold entered into a Development Agreement with BDW, whereby it was agreed that BDW would develop a substantial site in Surrey owned by Gold. BDW would build a large number of houses and flats and then sell the properties on long leases on behalf of Gold who would retain the freehold. The revenue generated by the sales would be split between Gold and BDW.

The works failed to commence in June 2008 as programmed and by October 2008 BDW reported that property prices in the area had dropped by at least 20%. This had a major impact on the sale value of the properties. BDW wrote to Gold stating that this would result in a significant loss in the event that the development went ahead and proposed that the build be delayed until at least December 2010. Gold did not accept this proposal and the parties were unable to come to any agreement as to the way forward. BDW said that the Agreement was void and unenforceable as the contract was frustrated owing to the fall in property market values which rendered performance impossible.

Gold commenced proceedings. Mr Justice Coulson concluded that the Agreement was not frustrated. It was clear that both parties foresaw the possibility that the property market would drop and the minimum prices would not be achieved. Indeed, not only was the event foreseen, but the Agreement made express provision for what should happen in the event that the minimum prices needed to be reduced. Thus, the event which occurred was something which the Agreement expressly contemplated and allowed for. If BDW considered that the properties would have to fetch a certain minimum price before it would be viable for them to commence the building works, then this should have been expressly set out in the terms of the contract.



Adjudication - the granting of an injunction to halt adjudication

Mentmore Towers Ltd & Ors v Packman Lucas Ltd
[2010] EWHCTCC 457

Packman sought payment of outstanding fees. In June 2009, an adjudicator agreed that the claimants should pay the outstanding sums. The claimants refused to honour the decision and Packman was forced to go to the courts to enforce the decision. Then in October 2009, the claimants issued their own claim, alleging overpayments to Packman. In November 2009 Packman applied for a stay of those proceedings pending, among other things, the claimants complying with the adjudicator's June 2009 decisions. Mr Justice Akenhead duly granted the stay application - see Issue 115. Referring to the claimants' conduct as being "*unreasonable and oppressive*", he held that the failure to honour the adjudicator's decisions was a sufficient ground to stay proceedings that sought to overturn those decisions.

The claimants tried again, this time issuing adjudication notices. Having taken expert advice the claims had been reduced by about 50% from the claims issued before the courts. Packman now applied for an injunction to prevent the claimants from taking any further steps. Mr Justice Edwards-Stuart granted the application and restrained the claimants from taking any substantive steps in the adjudication. He made it clear that the injunction would only be lifted when and if the claimants complied with the previous court orders enforcing the previous adjudicator's decisions.

The Judge said that he could see no reason why a referral to adjudication that is unreasonable or oppressive should not be restrained by the application of the same principles that would apply to an application made on similar grounds for the stay of the same claim brought by way of litigation - albeit that the fact that a particular claim was being pursued by way of adjudication, rather than litigation, may affect the court's view as to whether or not it amounts to unreasonable and oppressive behaviour. That said, he noted that it may be more unreasonable to bring adjudication proceedings and gave the example of the successful respondent being unable to recover his costs of resisting the claim.

Mr Justice Edwards-Stuart stressed that the courts have said, "*again and again*", that the decisions of the adjudicators are to be strictly enforced unless there has been some excess of jurisdiction or breach of natural justice. That is he continued "*the "pay now, argue later" approach that underlies the legislative purpose.*"

Here the claimants had persistently refused to honour the adjudicator's first decisions and put Packman to the time and expense of taking the necessary steps to enforce the awards. The Judge concluded that the referrals were simply another attempt to circumvent the machinery and policy of the HGCR. It was therefore both unreasonable and oppressive for Packman to be subjected to further proceedings by way of adjudication when the claimants had still failed to honour the original awards and the subsequent court judgments.

Case Update - letters of intent

RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG
[2010] UKSC 14

We have reported on this case twice before - see Issues 96 and 105. Very briefly, RTS provided quotations to design, manufacture, assemble, install and commission automated equipment to package yoghurt pots. Once Müller had decided to award the contract to RTS, a letter of intent was sent out. The letter of intent anticipated that the full terms and conditions would be agreed and signed within four weeks of the date of the letter. Those full terms and conditions were never agreed and now the case has ended up before the Supreme Court. Right at the outset, Mr Justice Clarke said that this case is another example of the "*perils of proceeding with work under a letter of intent*". What is a particularly surprising if unexpected peril is that at every stage of the court process, a different decision about what was actually agreed has been reached. Something perhaps to ponder.

Overturning the CA's position that there was no contract, the Supreme Court accepted that the parties had reached a binding agreement. What Lord Clarke found to be striking was that:

- (i) essentially all the terms were agreed between the parties;
- (ii) substantial works were then carried out; and finally
- (iii) that the agreement was subsequently varied in important respects.

For example, it was unrealistic to suppose that the parties did not intend to create legal relations in circumstances where the price of £1,682,000 was agreed. Looking at the conduct of the parties, the essential terms had to all intents and purposes been agreed. Further, to the extent any terms did actually remain to be agreed, neither party intended agreement of those terms to be a precondition to agreeing the contract. So there was a contract, but on slightly different terms to those suggested by the trial Judge.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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