



Dispatch

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

Adjudication

Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720 TCC

In last month's *Dispatch*, we reported on the *RTS* case and the difficulties which can be caused if there is no signed contract. Another problem which can arise out of protracted contract negotiations is that important amendments to a contract can be overlooked. And of course, it is only when disputes arise that the contract is dusted off and the full implications of the amendments are understood.

Here, Yuanda, a curtain walling contractor, had been engaged by Gear on the Westminster Bridge Park, Plaza Hotel project and had signed up to a JCT Trade Contract which contained two significant amendments in relation to adjudication and interest on late payment:

- (i) the clause in relation to adjudication, permitted the joining of members of the professional team (who were not parties to the Contract) in what was described as a "multi-party dispute situation" and required that Yuanda meet Gear's legal and professional costs of any reference Yuanda made to adjudication, regardless of the outcome; and
- (ii) the clause in relation to interest on late payment was amended by Gear from the JCT standard of 5% above the base rate to 0.5% above the base rate.

Yuanda had not appreciated the commercial consequences of the amendments to the Contract until a dispute arose with Gear. Yuanda then realised that it could not refer disputes to adjudication if it was to pay Gear's legal and professional costs (which were not limited by the Contract).

The lack of reciprocity meant that Yuanda's right to adjudicate was fettered in a way that Gear's was not. It was also noted by Yuanda that the rate of interest was very low and would not compensate Yuanda for late payment or act as an incentive for prompt payment by Gear. Therefore, Yuanda had no real option but to commence CPR Part 8 proceedings seeking declarations that two clauses of the Contract were void and invalid, and should be struck out by the Court.

Specifically, Yuanda sought declarations from the TCC that:

- (i) the clause on adjudication should be ousted and replaced wholesale by the Scheme because it was incompatible with the HGCRA 1996;

- (ii) in the alternative, the term of the adjudication clause that permitted a "multi-party dispute situation" was void for uncertainty and the whole clause should be struck out and replaced by the Scheme;
- (iii) or in the further alternative, the requirement to meet Gear's costs was an unreasonable contract term and void as defined by s3 of UCTA 1977; and
- (iv) Yuanda also sought a declaration that the clause relating to interest should be declared void in accordance with s8 and s9 of the Late Payment of Commercial Debts (Interest) Act, as it submitted that 0.5% could not be regarded as a substantial remedy.

Mr Justice Edwards-Stuart decided that although, on the facts, the adjudication clause was not unreasonable within the meaning of UCTA, it did fail to comply with the HGCRA 1996. He cast doubt on the Judgment in the broadly similar case of *Bridgeway Construction Ltd v Tolent Construction Ltd* (reported in the very first Issue of *Dispatch* in July 2000). He observed that this was an early case decided before the full commercial impact of adjudication had been properly understood, and where the facts were materially different because the relevant clause applied to the parties equally.

He said that "if a party knows that it will have to pay the other party's costs of any referral to adjudication, irrespective of the outcome, then it will not be worth making a referral unless the sum it expects to recover will significantly exceed the likely costs of the other party" – and it would not be able to estimate those costs (which the other party would have no incentive to minimise). Therefore, the clause in this case did fall foul of HGCRA as inhibiting the entitlement to adjudicate.

The Judge also agreed that in view of the fact that the 0.5% interest rate had been effectively imposed on Yuanda, and there were no other special circumstances, it failed to constitute a substantial remedy for the purposes of the Late Payment of Commercial Debts legislation. Therefore the statutory rate, of 8% above the base rate, would be substituted. Obiter, he indicated that interest fixed below the statutory rate (even as low as 3% to 4%) might constitute a substantial remedy in appropriate circumstances.

Finally, the Judge indicated that the multi-party adjudication clause was not voidable. That said, the overriding importance of this case is that, in anticipation of the forthcoming revisions to the HGCRA, it undermines attempts by contract drafters to deny a party the right to adjudicate by oblique means and gives guidance as to what interest rates on non-payment may be of sufficient substance to be upheld in the construction industry.



Freezing orders: when are they appropriate?
Shepherd Construction Ltd v Berners (BVI) Ltd & Anr
[2010] EWHC TCC 763

Shepherd were engaged to carry out work at the Berners Hotel. Berners failed to make several interim payments and Shepherd suspended work on three separate occasions. Shepherd commenced an adjudication and was awarded just over £1 million plus VAT and interest. During the adjudication Berners issued a cheque for £1.15 million but this was dishonoured by its bank. Two further cheques were similarly dishonoured.

Berners did not pay, and Shepherd enforced the decision by judgement in default. Later, Shepherd also entered judgement in default against JJW, who had provided a parent company guarantee for Berners. Shepherd then attempted to wind up Berners, but a compromise was reached for payment by instalments for the total sum of £2.2million. Berners paid the first instalment but defaulted on the remainder. Shepherd then entered judgement in default in respect of the outstanding amount, £1.7million.

At an earlier hearing a Judge had granted a worldwide freezing order on the defendants' assets of up to £1.75m. The hearing before Mr Justice Coulson was the defendants' application to discharge those orders. The Judge held that the freezing orders would remain in place due to the risk of dissipation of the defendants' assets.

This risk arose due to the following factors:

- (i) The defendants were companies registered outside England and Wales. Berners is a BVI company and JJW is registered in Guernsey. Financial information on the companies was not readily obtainable, and not forthcoming from the defendants. Berners was an SPV and its only obvious asset was the holding in the hotel being refurbished by Shepherd;
- (ii) There was a history of non-payment by the defendants, not only in respect of interim applications but also court judgments. Despite JJW's assertions that it had multi-million pounds worth of assets worldwide, the simple fact was that it had not paid the comparatively modest sums to Shepherd;
- (iii) Berners had made repeated promises to Shepherd that it would be paid soon, but in an affidavit to the court, Berners' Chief Financial Officer stated that Berners had profound cash flow difficulties which would be expected to continue until a group financing in the near future; and
- (iv) The defendants had not obviously been in business very long, particularly Berners. The nature of the assets held were property and there was no information as to accurate values, loans, charges or similar.

However, Mr Justice Coulson did give JJW liberty to apply to amend the order to only its UK assets, if it could demonstrate, with proper evidence, that any loans or charges against its properties were sufficiently outweighed by the property values.

Public procurement - disclosure of documents
Croft House Care Ltd & Others v Durham County Council
[2010] EWHC 909 (TCC)

These proceedings were brought following a revised tender process - the need for the second process being caused by a challenge to the original one by another tenderer. At the first case management conference, Durham sought directions about disclosure and the inspection of documents. Durham claimed that disclosing these documents would compromise their legitimate commercial and public interests and also their ability to re-run the procurement process. Durham identified two particular categories:

- (i) Material provided by third parties, including other tenderers - which Durham considered may be confidential; and
- (ii) General material, the disclosure of which would prejudice Durham's ability to re-run the procurement process.

The question before Mr Justice Ramsey was which of these categories of documents, if any, should the claimants be allowed to inspect. In the first category, the Judge held that the ultimate test is whether disclosure and inspection is necessary for disposing fairly of the proceedings. Though a document may contain confidential information, that is not, in itself, a reason for not providing such documents on disclosure. It is necessary to balance the rights of third parties to confidentiality, against the necessity for the documents to be provided for the purpose of a fair trial. Here, without disclosure of this material, the claimants would not be able to properly put forward their case at trial.

With the second category, whilst Mr Justice Ramsey did accept that there may be potential problems in re-running the procurement process, he did not believe that these were insurmountable. However, the Judge did agree that certain safeguards were necessary to limit the access by the claimants to the documents. He therefore ordered that the individual directors or personnel of the claimants be permitted to read specific documents (which he then went on to list), on the basis that they were read in the presence of their solicitor and they were not to be provided with copies or make notes other than notes which were provided to their solicitors. Additionally, the parties were to agree a procedure if any redactions were to be made to any documents.

***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.**

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