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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Payment of an adjudicator's fees

PC Harrington Contractors Ltd v Systech International Ltd

[2012] EWCA Civ 1371

We reported this case in Issue 137. Mr Justice Akenhead had decided that an adjudicator appointed pursuant to the Scheme was entitled to be paid when his decision had been ruled to be unenforceable because of a failure to comply with the rules of natural justice. The Judge noted that, as required by the Scheme, the adjudicator had carried out a number of activities, including producing a decision. Further there were policy reasons in favour of the adjudicator. The Judge said:

"One should therefore be somewhat slower to infer that what parties and adjudicators intended in their unexceptionably worded contracts was something which excluded payment in circumstances in which the adjudicator has done his or her honest best in performing his or her role as an adjudicator, even if ultimately the decision is unenforceable. The position might well be different if there was to be any suggestion of dishonesty, fraud or bad faith …"

Harrington appealed, arguing that the adjudicator had failed to perform the service which he had contracted to perform. The CA, led by the Master of the Rolls, Lord Dyson, agreed.

The CA did agree that the Scheme imposes an obligation on the adjudicator to produce a decision within a short period. It also agreed that the adjudicator was obliged to perform some ancillary functions and entitled to perform others. He could not simply produce a decision out of the hat. However the question was not whether the adjudicator was obliged or entitled to take these steps. Rather it was whether he was entitled to be paid for those steps, if they led to an unenforceable decision. Here, the adjudicator's terms of engagement had to be read together with the Scheme. The Scheme carefully defines the circumstances in which the adjudicator is entitled to be paid. For example, the purpose of paragraph 25 of the Scheme is to make it clear that an adjudicator cannot charge an unreasonably high fee. Lord Dyson noted:

"I return to the question: what was the bargained-for performance? In my view, it was an enforceable decision. There is nothing in the contract to indicate that the parties agreed that they would pay for an unenforceable decision or that they would pay for the services performed by the adjudicator which were preparatory to the making of an unenforceable decision. The purpose of the appointment was to produce an enforceable decision which, for the time being, would resolve the dispute."

A decision that was unenforceable was of no value. The parties would have to start again in order to achieve the enforceable decision which the adjudicator had contracted to produce. If the adjudicator's appointment was revoked due to his default or misconduct, he is not entitled to any fees:

"the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a "default" or "misconduct" on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner."

The CA considered the difference between arbitrators and adjudicators. First, an arbitral award is binding, subject to the supervisory jurisdiction of the court under sections 66-68 of the Arbitration Act 1996. Second, when ancillary functions are carried out by an arbitrator, they are binding and therefore the arbitrator gives value in performing them. Thirdly, an arbitrator has inherent jurisdiction to make a binding decision on the scope of his own jurisdiction. Finally, the CA considered the policy question:

"I accept that the statutory provisions for adjudication reflect a Parliamentary intention to provide a scheme for a rough and ready temporary resolution of construction disputes. That is why the courts will enforce decisions, even where they can be shown to be wrong on the facts or in law. An erroneous decision is nevertheless an enforceable decision within the meaning of the 1996 Act and the Scheme. But a decision which is unenforceable because the adjudicator had no jurisdiction to make it or because it was made in breach of the rules of natural justice is quite another matter."

Such a decision does not further the statutory policy of encouraging the parties to a construction contract to refer their disputes for temporary resolution. It has the opposite effect. It causes the parties to incur cost and suffer delay. The CA stressed that what mattered was what the contractual arrangements between the parties actually said. Here, the adjudicator had not produced an (enforceable) decision which determined the matters in dispute. This was what his contract had required of him before his entitlement to fees arose.

Finally, the CA noted that if their decision did give rise to concerns on the part of adjudicators then the solution was:

"in the market-place: to incorporate into their Terms of Engagement (if the parties to the adjudication are prepared to agree) a provision covering payment of their fees and expenses in the event of a decision not being delivered or proving to be unenforceable."

Failure to mediate

ADS Aerospace Ltd v EMS Global Tracking Ltd

[2012] EWHC 2904 (TCC)

Following judgment in favour of EMS, ADS said that there should be a substantial reduction in EMS's entitlement to costs - of at least 50% - because of its unwillingness to enter into mediation. The claim was issued in August 2011 and the trial was heard in early July 2012. In March 2012, EMS's solicitors tried to initiate a settlement dialogue but were told that ADS wanted to wait for the exchange of witness statements (March and June 2012) or possibly expert reports (May 2012). In April 2012, EMS offered £50k to settle the claim. There was no response. EMS made other approaches in April and May. On 31 May ADS's solicitors wrote referring to the £50k offer as a "nuisance" payment. However ADS did, as both parties appeared to be willing to discuss settlement, propose mediation, although ADS said that could not take place until the week commencing 11 June 2012.

On 1 June 2012, EMS's solicitors replied saying that they did not think that mediation was likely to be a worthwhile investment of time and cost as "*each side is now familiar with the other's case, and each ought to be able to assess with a reasonable degree of accuracy the relative strength of its position*". There was nothing to suggest that ADS would accept much less than $16 million and *"absent any such indication we risk doing no more than waste time and (irrecoverable) cost when both parties should instead be focusing on the trial"*. That said, EMS stressed that they would "*in good faith consider any reasonable offer*" and they would welcome a without prejudice discussion sooner rather than later. On 6 June 2012, ADS again proposed mediation suggesting that a skilled mediator could help settle disputes that appeared to be incapable of resolution and that mediation was the better option than without prejudice discussions. EDS's position was that a formal mediation was not necessary given that it was less than three weeks before the trial. EDS repeated their offer of without prejudice discussions. ADS repeated the mediation offer and made a settlement proposal of £4.2million. On 11 June 2012, EMS made a further offer of £100k.

Mr Justice Akenhead did not consider that EMS had acted unreasonably. ADS had not been willing to engage even in a without prejudice discussion until 31 May 2012, whereas EMS had been attempting to start talks since early March 2012. As EMS was at all times prepared to engage in without prejudice discussions, there appeared to be little reason why that approach should not have been tried at some point before June at least on a "nothing ventured, nothing gained" basis. Such an approach might have "bottomed out" where the parties stood. That would have helped. Then there was the timing of the mediation proposal. It was less than 20 days before the hearing. Without prejudice discussions would have been quicker, cheaper and less intrusive into the trial preparations. A mediation even if it lasted only a day, would have diverted everyone for far longer because of the need to prepare. It would also have been more costly than without prejudice discussions. Finally, the Judge considered the merits of the parties' positions. ADS held a strong view that it was entitled to substantial compensation. In particular, based on his views of the witness evidence, the Judge had doubts as to whether ADS would have accepted a nuisance offer. He also thought that EMS was right in its view that it had a very strong case both on liability, causation and quantum. Accordingly, EMS was entitled to its costs in full.

Entitlement to interest where there is delay

Persimmon Homes (South Coast Ltd) v Hall Aggregates South Coast Ltd & Anr

[2012] EWHC 2429 (TCC)

In the case of *Claymore v Nautilus* (see Issue 84), the court had said that where a claimant has unreasonably delayed commencing proceedings, it may exercise its discretion either to disallow interest for a period or to reduce the rate of interest. However it stressed that in exercising that discretion the court must take a realistic view of delay. Here, the Claimant (known as RMC) argued that Persimmon was guilty of delay in making or pursuing its claim. Specifically, RMC said that there was a delay of 3½ to 4 years between the time when Persimmon paid for remedial works to be carried out and the first intimation of any complaint or claim against RMC. There had been no explanation for that delay and it should not be required to pay interest for this period. There was a further delay of two years between the date when directions for the assessment of damages were resisted by Persimmon and when those directions were given by the TCC. During this period, it was incumbent on Persimmon to pursue its claim but RMC, rather than Persimmon, had sought the assessment of damages.

Persimmon said that the basic principle is that interest will be awarded from the date of loss. The TCC had also pointed out that RMC was aware that it should have carried out the remedial work but did not point this out when Persimmon were doing the work themselves. In relation to the second period of delay, Persimmon said that there was an appeal to the CA. It was entirely reasonable not to hold a separate quantum hearing pending an appeal.

Mr Justice Ramsey did not consider that there should be any disallowance of interest on the basis of unreasonable delay. This was a case where RMC was obliged to carry out the remedial work and pay for it but, instead, Persimmon had carried it out. RMC had benefited from having the use of money which it should, at the time, have spent on carrying out the work. There was an unexplained period, but it was evident that Persimmon had other priorities and they could not be criticised for delay in bringing the claim. Further, a party that awaits the decision of the CA cannot be criticised. Finally, the Judge noted that following CA judgment, there had been settlement discussions between the parties. There could be no criticism for waiting to see if these were successful.

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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