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

Dispatch

Practical completion, collateral warranties and limitation

Swansea Stadium Management Company Ltd v City & County of Swansea & Anr

[2018] EWHC 2192 (TCC)

Back on 1 April 2005, Gardiner & Theobald, the Employer's Agent, sent the following letter to Interserve (the Second Defendant), who had been acting (pursuant to a contract signed as a deed on 17 June 2004) as contractor at the Liberty Stadium, Swansea:

"...we are writing in accordance with Clause 16.1 of the Conditions of Contract, to inform you that the Works have reached Practical Completion as at 31 March 2005.
As you are aware there are still some works to complete and defects to be made good and we will be issuing a schedule next week."

Following this, in about April 2005 the Claimant (who own and operate the stadium for Swansea City FC), the First Defendant (the freehold owner of the stadium) and Interserve entered into an undated collateral warranty. The Completion of Making Good Defects was achieved on 14 April 2011. On 14 June 2012 a settlement was agreed in respect of the sums due under the final account.

On 4 April 2017 a claim was issued seeking £1.3million in respect of alleged defects in the concourse flooring and steelwork. Interserve said that the claims were time barred because the claim was commenced more than 12 years after 31 March 2005, the date of practical completion. Clause 16.1 (as amended) of the JCT Standard Form of Building Contract with Contractor's Design 1998 states:

"When in the reasonable opinion of the Employer the Works have reached Practical Completion and the Contractor has complied with clause 6A.5.1 or has complied sufficiently with clause 6A.5.2, whichever clause is applicable, the Employer shall give the Contractor a written statement to that effect, which statement shall not be unreasonably delayed or withheld, and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such statement."

Here, the Collateral Warranty did not contain an express commencement or expiry date; nor did it contain an express term as to the date on which any cause of action for breach would be deemed to have occurred. There was no express limitation period in respect of claims. However Mrs Justice O'Farrell concluded that the words used in the Collateral Warranty and the factual matrix indicated that:

" the clear intention of the parties was that the Collateral Warranty should have retrospective effect. The Second Defendant's liability to the Claimant was deemed to be coterminous with its liability to the First Defendant under the Building Contract. Any breach of contract created by the Collateral Warranty would be regarded as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty."

As to practical completion, the Judge said:

"It is well-established law that a cause of action for breach of a construction contract accrues when the contractor is in breach of its express or implied obligations under the contract. Where, as in this case, there is an obligation to carry out and complete the works, the cause of action for a failure to complete the works in accordance with the contract accrues at the date of practical completion."

Interserve said that the effect of the 1 April 2005 letter was that practical completion occurred on 31 March 2005. The Claimant said that Interserve was still on site working and there were patent defects in the works. Further, the letter of 1 April 2005 contained express reference to outstanding works and defects. An extensive snagging list issued in March 2005 identified the nature and extent of the patent defects in the works.

Of course, the G&T letter was strong evidence that practical completion occurred on 31 March 2005. The letter was sent by the Employer's Agent and contained a clear statement that the works had reached practical completion in accordance with clause 16.1. There was no evidence that the statement was challenged or that the parties did not operate the relevant contract provisions on the basis that practical completion had been achieved.

Interserve submitted that under clause 16 the effect of the written statement by the employer was that practical completion was deemed to have occurred on 31 March 2005. Clause 16 provided that completion would be achieved: *"When in the reasonable opinion of the Employer the Works have reached Practical Completion and the Contractor has complied with ... clause 6A.5.2..."* The date of practical completion was not based on an objective ascertainment of the state of the works, or the provision of the health and safety information, but on the reasonable opinion of the employer as to those matters. The building contract did not require a third party to certify completion of the works and did not stipulate any formalities in respect of the written statement.

Clause 16 continued that where such statement had been given: "*Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such statement.*" The effect of this deeming provision was that the parties agreed that the works would be practically complete, even if there were outstanding or defective works. The existence of any defects or outstanding works, including information required under clause 6A.5.1, would not prevent the operation of clause 16. Where, as here, the employer issued a notice that practical completion had been achieved, practical completion was deemed to have been achieved. Regardless of the physical state of the works at 31 March 2005, or any ongoing works carried out by Interserve, they were deemed to be complete on that date. Clause 16.1 expressly provided that practical completion was deemed to have occurred: *"for all the purposes of this Contract"*.

It therefore followed that any breach of the Collateral Warranty must have occurred by 31 March 2005. The proceedings were issued on 4 April 2017. Therefore, those claims were statute-barred.

Adjudication & liquidation

Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (In Liquidation)

[2018] EWHC 2043 (TCC)

Lonsdale and Bresco entered into a sub-contract for electrical installation works. Bresco left the site in December 2014. Both Bresco and Lonsdale alleged wrongful termination against the other. In late October 2017, Lonsdale intimated a claim against Bresco claiming the direct costs of completing the works said to have been caused by this termination. Bresco, on the other hand, maintained that it was Lonsdale who owed Bresco money. However, on 12 March 2015, Bresco went into liquidation. On 18 June 2018, Bresco initiated an adjudication against Lonsdale in relation to a dispute under a contract for electrical installation works. Lonsdale invited the adjudicator to resign on the basis that he had no jurisdiction as a result of Bresco having become insolvent and placed into liquidation. The consequence of this, Lonsdale said, was that the relationship between the parties was now governed by the Insolvency Rules. The adjudicator declined to resign.

Lonsdale therefore issued Part 8 proceedings which led to Mr Justice Fraser having to consider the following question:

> Can a company in liquidation refer a dispute to adjudication when that dispute includes (in whole or in part) determination of a claim for further sums said to be due to the referring party from the responding party?

In considering this question, the Judge considered the Insolvency (England and Wales) Rules 2016. Rule 14.25 of the 2016 Rules states that:

"An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other."

The 2016 Rules define "mutual dealings" as:

"mutual credits, mutual debts or other mutual dealings between the company and a creditor proving or claiming to prove for a debt in the winding up"

The Judge considered that the sums claimed to be due from Lonsdale to Bresco, and the sums claimed from Bresco to be due to Lonsdale, fell within the definition of "mutual dealings" and were therefore caught by the requirement under the Rule. They were plainly mutual credits and/or mutual debts between the company in liquidation (Bresco) and the creditor (Lonsdale). Upon liquidation, the Insolvency Rules (which have statutory force) required that an account must be taken of those dealings in each direction to arrive at a single balance due either to, or from, the company in liquidation. Such categorisation of these sums included the sums that were the subject matter of the dispute referred to adjudication in this case. The Judge concluded that:

"as at the date of the liquidation, and as a direct result of what occurs upon the appointment of the liquidator and the operation of the Insolvency Rules, the disputes between Lonsdale and Bresco that consist of claims and cross-claims between them become replaced with a single debt. That is thereafter the dispute, namely the result of the account that the 2016 Rules require to be taken to determine the balance payable in which direction."

The only dispute that remained in law was that of taking the account under the 2016 Rules (or the 1986 Rules before that). All Bresco can have is a claim to the balance following the taking of the account required by the Rules. An adjudicator cannot conduct such an account under the Insolvency Rules.

This dispute was not a dispute arising "under the contract". Upon the appointment of the liquidator, any number of disputes between the parties to a construction contract becomes a single one, namely a dispute relating to the account under the Insolvency Rules. It becomes a claim for the net balance under Rule 14.25(2) of the 2016 Rules. A dispute in relation to the taking of an Insolvency Rules' account is not "a dispute arising under the contract": it is a dispute arising in the liquidation. This meant that the adjudicator here did not have jurisdiction to determine the dispute referred to him. The dispute referred to him included both money claims and cross-claims, and an analysis of how much was owed to Bresco. A company in liquidation cannot refer a dispute to adjudication when that dispute includes (whether in whole or in part) determination of any claim for further sums said to be due to the referring party from the responding party.

Bresco noted that liquidators across the country regularly refer disputes to adjudication either separately to taking the account under the Insolvency Rules, as part of taking that account, or as what were termed practical steps to determine disputes between the company in liquidation and its counter-party to construction contracts. However, Mr Justice Fraser was clear that this could not affect the correct legal characterisation of disputes and mutual dealings which are set down in the Insolvency Rules, which have statutory force.

Companies in liquidation will no longer be able to use or threaten to use adjudication proceedings to pursue money claims, if, as inevitably on any construction project, there are claims and counterclaims between the parties.

Agreeing contracts: a reminder

Bain & Bain v Martin

[2018] ScotCs CSOH 83

The issue here was whether the Bains entered into a contract with Martin as a sole trader or a limited company for the construction of an extension to their home. Disputes arose, the parties fell out and the contract was terminated before the work was completed. The Bains brought a claim. The difficulty was that there were no written contractual documents, payments were made in cash and it was said that certain written documents were not "true and reliable". Having reviewed what evidence there was, Lady Clark "inferred" that on the balance of probabilities, the Bains knew that the business vehicle used by Martin was the limited company and that he was acting on behalf of the limited company, not as a mere sole trader. The Judge also noted that at the beginning of the project: *"all parties were on amicable terms and mutually advantageous business contacts were expected to outlive the building of the extension"*. As a result of there being no formal contract documents, the parties ended up in a (no doubt costly) three-day hearing to decide who was in contract with whom.

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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