



Dispatch

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

Adjudication - same dispute

■ Birmingham City Council v Paddison Construction Ltd [2008] EWHC 2254 (TCC)

BCC engaged Paddison to undertake construction work for a new community and training centre. The contract provided for a completion date of 24 February 2006 which was revised to 17 April 2006. Practical completion was certified as at 23 June 2006. Paddison alleged that BCC was responsible for the delay in completion and sought, amongst other matters, a full extension of time and loss and/or expense. Paddison referred the dispute regarding responsibility for delay and the financial consequences of such delay to adjudication. After agreeing to several requests for an extension of time, the adjudicator decided that Paddison was entitled to an extension of time for the full period and that BCC should pay should repay LADs which had been withheld in the sum of £27k and £25k in respect of variations.

In relation to the claims for loss and/or expense, the adjudicator said that these were "*extravagant and exaggerated*". That said, he accepted that some of the claim may be valid and he went on to say that he:

" would grant the Contractor leave to pursue this claim via a further adjudication if they so wish."

Given the tight timescales associated with adjudication, even if an extension of time was granted, the adjudicator was of the view that it was necessary to hold a "dedicated" adjudication to consider the loss and/or expense claim within the prescribed time frame. The adjudicator added that in his view, for the claim to be analysed in detail, he considered that a third party quantity surveyor would need to be appointed to assist.

Paddison said that this meant that no decision had been made in relation to their claim for loss and/or expense. They then required BCC to assess their entitlement to loss and/or expense based upon the extension of time which had been awarded. BCC considered that the adjudicator had decided that Paddison was entitled to nothing further by way of loss and/or expense. Paddison then served a second notice of adjudication, seeking reimbursement of loss and expense, alternatively damages. BCC said that the adjudicator should resign on the ground that the dispute referred to him was the same as that which the first adjudicator had decided. However the adjudicator refused to resign.

Accordingly, BCC commenced Part 8 proceedings seeking declarations to the effect that the dispute referred was the same, or substantially the same, as that which had been previously referred. BCC also argued that the first adjudicator had made a decision on the dispute, such decision having binding effect on a temporary basis; and that, as a consequence, the second adjudicator had no jurisdiction to act as adjudicator and must resign.

HHJ Kirkham decided that the first adjudicator did make a decision. He considered Paddison's claim and found it to be "*extravagant and exaggerated*". He was not prepared to grant further monies relating to the loss and/or expense as claimed. As the Judge said, "*plainly*" the first adjudicator had no jurisdiction or power to "*grant*" Paddison the right to pursue its claim in another adjudication. Further, this was not a case where the adjudicator concluded that he could not make a decision. The first adjudicator gave express consideration to Paddison's claim and decided to refuse to award them any money.

The second question for the Judge was whether or not the dispute referred to the second adjudicator was substantially the same as in the first adjudication. In the second Referral, Paddison relied on an expert report. However having considered the report carefully the Judge was not persuaded that the second adjudication was in relation to a separate dispute.

The period in which the loss and/or expense was claimed was the same or substantially the same. Although different sums were claimed, the differences in the figures lay in the claims made for head office and overhead recovery. In the first adjudication Paddison calculated this head of claim by reference to the Hudson or Emden formula, whereas in the second adjudication the claim was based on records such as invoices. As far as the Judge was concerned this was not a real difference, as a claim made pursuant to a formula must nevertheless still be rooted in evidence. That evidence was the same. Finally, in the second adjudication a claim was made for damages for breach of contract. No such claim was made in the first adjudication. However to all intents and purposes the damages claim was coextensive with the claim for loss and/or expense.

In the clear view of the Judge, Paddison were seeking to make good in the second adjudication, their own shortcomings in the claim in the first adjudication.

Arbitration - are arbitration provisions unfair?

■ Mylcryst Builders Ltd v Mrs G.Buck

[2008] EWHC 2172 (TCC)

Mrs Buck, engaged Mylcryst to construct a single story extension to the front of her bungalow. A contract was formed on 8 December 2004 when Mrs Buck signed a letter, sent from Mylcryst, which confirmed that they were to proceed with the works in accordance with their previously issued estimate and on their Standard Terms & Conditions as identified on the back of the letter. A dispute arose regarding whether or not certain sums had been included in the agreed price of £23,580 which had been set out in that letter. As their Standard Terms & Conditions provided for an arbitration clause, Mylcryst commenced arbitration proceedings. Following the advice of two solicitors and the Kent County Council Trading Standards Department that the contract contained unfair terms and conditions in accordance with Unfair Terms in Consumer Contracts Regulations 1999, Mrs Buck refused to take part in the arbitration proceedings. Mylcryst unilaterally appointed an arbitrator, and, an award was issued finding Mrs Buck liable to Mylcryst for £5,230.21, plus costs, interest, and the arbitrator's fees. Mylcryst subsequently applied to the court under s.66 of the Arbitration Act 1996 seeking permission to enforce the arbitration award.

The principle issues which came before Mr Justice Ramsey were whether the arbitrator been properly appointed and whether or not the arbitration clause was an unfair term and therefore unenforceable against Mrs Buck. The Judge held that, as Mrs Buck had made it clear that she was unwilling to participate in the arbitration and Mylcryst had subsequently appointed the arbitrator unilaterally, s16(3) of the 1996 Act had not been complied with in that the parties had not "jointly appointed" the sole arbitrator. Mylcryst had argued that the arbitrator was properly appointed pursuant to s17 of the 1996 Act which referred to the power in case of default to appoint sole arbitrator. However, Mr Justice Ramsey, referring to the 1996 Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law, stated that s17 is to be used in those situations where there is to be two or three arbitrators under the arbitration agreement and one party has appointed his arbitrator, but the other party has not. That was not the case here. Accordingly, the tribunal lacked substantive jurisdiction to make the award and under s.66(3) permission to enforce the award was not given.

Mr Justice Ramsey also considered whether the arbitration provision itself was enforceable in light of the Unfair Terms in Consumer Contracts Regulations 1999. These state that a consumer arbitration agreement is unfair where the claim is for a pecuniary remedy which does not exceed £5000. For those exceeding £5000, the fairness of the arbitration agreement is determined by the general provisions of the Regulations. Regulation 5 states that a contractual term which causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer, must be individually negotiated.

The Judge considered that here the arbitration provision did cause a significant imbalance in the parties' rights and obligations to the detriment of Mrs. Buck. The reasons for this included that:

- (i) The wording of the Regulations suggested that such a term was "potentially vulnerable" to being unfair. The existence of an arbitration clause excluded or hindered a consumer's right to take legal action;
- (ii) The arbitration clause prevented Mrs Buck from having access to the courts and potentially (but not automatically) caused an imbalance between Mylcryst, as a professional builder and Mrs Buck as a layperson, to her detriment;
- (iii) Whilst the box signed by Mrs Buck properly drew her attention to the existence of the terms, the impact of the arbitration clause would not be apparent to a layperson. The requirement of fair and open dealing meant that for consumer transactions the arbitration clause and its effect needed to be more fully, clearly and prominently set out than it was here;
- (iv) As the evidence showed, it is likely that if the clause and its effect had been drawn to Mrs Buck's attention, she would both have been surprised by it and objected to its inclusion; and
- (v) This was not a case where there was any evidence that Mrs Buck's professional advisers were involved in the drafting of the contract.

Accordingly, the arbitration clause was not binding on Mrs Buck.

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