



Dispatch

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

Adjudication

■ Trustees of the Harbours of Peterhead v Lilley Construction Ltd

The parties entered into a contract which was subject to the ICE Conditions of Contract, 6th Edition. Lilley submitted an interim application for payment. In accordance with the provisions of clause 60, the Engineer concluded that no further monies were due. Lilley then served a notice of adjudication. The Adjudicator found in favour of Lilley. The Trustees paid up but then sought repayment of some of those monies.

To succeed, the Trustees needed to show that Lilley was unable to stay the matter to arbitration. The Trustees argued that when Lilley triggered the adjudication, as they had been perfectly entitled to do, they had stepped outside the provisions of clause 66 and the contractual route to arbitration provided by clause 66 was closed down. Further, there was no dispute which could be referred to arbitration as The Trustees were perfectly content with the Engineer's decision.

Lord Mackay held that the Trustees' claim was an attempt to achieve a final determination in respect of the contractual entitlement to payment. However, the dispute that remained between the parties, as to the extent of Lilley's contractual entitlement to payment, remained a dispute that could be resolved according to clause 66. Equally, Lord Mackay found that by referring the dispute to adjudication, Lilley did not "step outside" the provisions of clause 66 nor did they waive their right to arbitrate. Lilley had exercised a contractual right to adjudicate that was open to them without prejudice to any contractual right they had to refer that same dispute to arbitration.

■ R Durtnell & Sons Ltd v Kaduna Ltd

The parties entered into a contract in the Standard Form of Building Contract, 1980 Edition Private with Quantities as amended to carry out construction works at Laverstoke House in Hampshire. On 14 November 2002, Durtnell referred some disputes to adjudication. Amongst the

questions referred were whether the works had achieved practical completion or in the alternative whether Durtnell was entitled to a further extension of time. There were also claims in relation to loss and expense and additional works.

HHJ Seymour QC held that there was no dispute as to the entitlement to an extension of time or to the valuation of loss and expense consequent upon any grant of an extension of time at the time the matter was referred to adjudication. On 9 September 2002, Durtnell submitted an application for a further extension of time. Under clause 25.3.1 of the Contract, the Architect was bound to determine that application within 12 weeks of receipt of the notice by which the application was made. The application should have been determined by 2 December 2002. Thus, the time allowed in the Contract for the Architect to make a determination had not expired at the time the matter was referred to adjudication. Until the Architect had made his assessment, or failed to do so within the time allowed for by the Contract, there was nothing to argue about and so no dispute.

■ St Andrews Bay Development Ltd v HBG Management Ltd and Another

St Andrews and HBG entered into a contract in respect of the building of a leisure complex at St Andrews. In January 2003, HBG referred a dispute to adjudication in accordance with the Scheme. The Adjudicator, who was named as second respondent, was required to make a decision by 5 March 2003. On 5 March, a secretary employed by the Adjudicator's firm informed HBG's solicitors that the Adjudicator had reached a decision but did not intend to release it until her fee had been paid. By a fax sent the following day, HBG indicated its intention to pay the whole of the fee in order to secure the release of the decision. The decision was then released on 7 March 2003 and the reasons for that decision communicated to the parties on 10 March 2003. At no time did HBG seek an extension of time required to produce a decision beyond 5 March 2003.

St Andrews claimed that the Adjudicator had no power to reach her decision after 5 March 2003. Therefore, the decision was not valid. Lord Wheatley said that the Adjudicator had reached her decision within the time limit set in accordance with the statutory provisions of the standard contract. Paragraph 39A of the standard form of contract (which is similar to paragraph 41A of the same contract in England) required the Adjudicator to reach a decision and forthwith send that decision in writing to the parties. The Judge said this obligation must include a contemporaneous duty to communicate that decision to the parties.

A decision cannot be said to be made until it has been intimated to the parties. Further, in the circumstances of this case, the Adjudicator was not entitled to delay communication or intimation of the decision until the fees were paid. There was nothing in the Scheme or contract to allow this. However, the Judge also held that the failure of the Adjudicator to produce the decision within the time limits whilst serious was not of sufficient significance to render the decision a nullity. It was a technical matter, not such a fundamental error or impropriety so as to render the entire decision invalid.

Other Cases of Interest

■ Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands)

Forbes and the government entered into a FIDIC fourth edition contract in 1997. A dispute arose that was referred to arbitration. Clause 53.4 of the FIDIC conditions required claims to be verified by contemporary records. Forbes wanted to introduce witness statements to cover those parts of the claim where no contemporary records existed. The arbitrator refused an application by the Attorney General inviting him to rule on the meaning of "contemporary records", and also the extent to which statements could cover the absence of such records.

The issue for determination was whether, on the true meaning of clause 53, witness statements could be introduced into evidence to supplement contemporary records. Acting Judge Sanders held that "contemporary records" meant original or primary documents or copies produced or prepared on or about the time giving rise to the claim. These documents could be produced by the parties. However, contemporary records did not mean witness statements that were produced long after the event. Thus, where there were no such contemporary records in support of a claim, that claim must fail. Witness statements could only be used to identify or clarify contemporary records but not substitute them.

Clause 53 deals with procedures for claims, and requires a contractor to give notice of claim to the engineer within 28 days of the event arising. It is not unusual for notices

to be sent late, or even not at all. However, clause 53 requires the contractor to keep contemporary records in order to support the claim. A failure to keep those contemporary records may mean that the contractor is unable to support his claim and that the claim will fail.

■ Action Strength Ltd v International Glass Engineering SpA

This was a House of Lords decision. Action Strength, a labour only subcontractor, was owed some £190k by Inglen, the contractor, and threatened that unless it was paid it would withdraw its labour. Action Strength said that to avoid this happening, the ultimate employer Saint-Gobain said that it would pay Action Strength out of money withheld from what was due to Inglen under the main contract.

Relying on this promise, Action Strength provided further labour until the indebtedness reached £1.3m. Saint-Gobain refused to pay and applied for summary judgment on the ground that the action had no real prospect of success. As this was a summary claim, the case pleaded by Action Strength would have been assumed to have been true.

Saint-Gobain did so on the basis of Section 4 of the Statute of Frauds 1677 which stated that no action shall be brought against a party upon any special promise to answer on a debt of another unless the agreement under which the action is brought is in writing and signed by the parties. This had not happened here and the House of Lords agreed with Saint-Gobain. It is unlikely to have been any comfort to Action Strength that two of the members of the House of Lords dismissed their claim reluctantly and with regret.

Dispatch is produced monthly by Fenwick Elliott, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.

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