Fenwick Elliott
Solicitors

Dispatch

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

Construction Management

Great Eastern Hotel Co Ltd v John Laing Construction Ltd & Anr

This is the first reported case where a construction manager has been found liable to an employer. The construction management agreement ("CMA") provided that the CM should exercise all the reasonable skill, care and diligence to be expected of a properly qualified and competent CM, experienced in carrying out services for a project of similar size, scope and complexity. The CM was also required to procure that each trade contractor complied with all of its obligations under the respective trade contracts.

HHJ Wilcox decided that this was not an absolute obligation but that the contract imposed obligations on the CM of a professional man performing professional services. Laing was not the guarantor of the job or an easy target to blame because the job went wrong. However, Laing did owe clear enforceable obligations to the client as an important member of the professional team.

Laing's responsibility under the CMA extended to selecting, managing, administering, planning and co-ordinating the work with the trade contractors, scoping their works and doing so in a proactive professional manner. Laing's responsibility extended to procuring satisfactory trade contracts and imposing a regime of strict supervision and monitoring to ensure reasonable levels of performance by the trade contractors. To hide behind being ultimately unable to force trade contractor performance is not an answer: the CM must proactively seek the resolution of difficulties. This might include insisting upon additional resources being allocated or holding regular monitoring meetings with trade contractor directors.

Judge Wilcox described the CM as being "at the centre of the information hub of the Project". The CM is uniquely placed on site. He has access to all of the information. It is the CM who is best placed to report to the client on the true position of the works at any given time. If the client does not have accurate information on costs and the programming information is inaccurate, then the client may incur additional costs which might have been otherwise avoidable. Laing had a professional obligation under the CMA to protect their client by giving objective advice based on all available information. If that obligation were breached, the situation might arise whereby the client was encouraged to throw good money after bad trying to deal with a situation without knowing the true picture. Had Laing accepted and reported the true nature and extent of delays, they would have had the opportunity to reorganise contracts before a number of the trade contractors commenced. Work-packages would have been properly co-ordinated in accordance with the actual progress on site - another of the key skills a CM should bring to any project.

The result of this was that as a direct consequence of Laing's breaches, the Great Eastern Hotel was exposed to claims from the trade contractors for prolongation, delay and disruption. On the evidence, the dominant cause of this trade contractor delay was found to be the delay to the project as a whole caused by Laing. In addition, Laing was held liable for acceleration. The acceleration measures were adopted in order to mitigate the growing losses and as such the cost of such measures was recoverable from Laing.

Another key responsibility of the CM is the scoping of the individual trade packages. The ultimate obligation to make sure each package is workable and complete here remained with Laing. The CM was again there to safeguard the client. Laing failed to take reasonable steps to include all of the subject works in the relevant packages. Thus instructions had to be issued to enable those omitted works to be carried out. The expert evidence showed that carrying out work as a variation was not as economical as carrying it out as part of a competitive tender. Judge Wilcox held that what was recoverable was the element representing the enhanced cost caused by the failure to have the works carried out at the economical package rate, namely 15% of the cost of the instructed variation - a concept that was first judicially recognised in the 1997 case of *Turner Page* v *Torres Design*.

Case Update - Meaning of Dispute

■ Amec Civil Engineering Ltd v Secretary of State for Transport

We reported this case in Issue 54. The CA upheld the decision of Mr Justice Jackson on whether a dispute or difference had arisen such that it could be referred to arbitration per clause 66 of the standard ICE conditions of contract. May LJ accepted the 7 propositions put forward by Mr Justice Jackson about the meaning of the word "dispute". However, he added that clause 66 referred not only to a "dispute" but also to a "difference". "Dispute or difference" was less hard-edged than "dispute" alone. Commercial good sense meant that clause 66 should not be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings. Thus, May LJ favoured an inclusive interpretation. It is necessary to consider what would be a reasonable time to respond to a claim bearing in mind the particular facts and the relevant contractual structure. Here, liability for the defects was bound to be highly contentious but the reason given for putting a deadline in correspondence was a good one, namely limitation.

Rich LJ also considered this question. He was more cautious about the concept of a "reasonable time to respond". Amec in many ways did not have a reasonable time to respond. Limitation was expiring, but that was not their fault. Although this is not something which forms part of the decision, he also noted a concern under adjudication that parties may be plunged into an expensive contest, with tight timescales, before they are ready for it and that a responding party should have a reasonable time in which to respond to any claim.

May LJ also considered how an engineer should act in reaching a decision. Compliance with the rules of natural justice, as required of judges and arbitrators, is not required of an engineer giving the decision under clause 66 of the ICE conditions. An engineer's decision does not have to be reached by judicial process. The engineer must act independently and honestly. He must act fairly, as long as what is regarded as fair is flexible and tempered to the particular facts and occasions. Fairness entitles a party to ask for a speedy decision, if limitation is becoming a problem and fairness obliges the engineer to give a speedy decision in such circumstances provided that it is given honestly and independently and is properly considered.

Rich LJ noted that no case was cited to the CA in relation to an engineer's role in the settlement of disputes under clause 66. An engineer must retain his independence and act in a fair and unbiased manner. In any event, if the decision was invalid and unenforceable (for example for being a breach of natural justice or if the decision is not reached within three months), then either party were still entitled to refer that decision to arbitration.

Liquidated & Ascertained Damages

■ Alfred McAlpine Capital Projects Ltd v Tilebox Ltd

Mr Justice Jackson had to consider whether or not a clause providing for LADs was enforceable. Having reviewed case law including the 1915 case of *Dunlop Pneumatic Tyre Company Ltd* v *New Garage and Motor Company Ltd* and the more recent 1993 Privy Council decision in *Phillips* v *The AG of Hong Kong*, the Judge concluded that a pre-estimate of damages does not have to be right in order to be reasonable. The rule about penalties is an anomaly within the rule of contract - the anomaly being that the court will strike down a clause which is not a genuine pre-estimate of loss if it is a penalty. The test of whether the LADs are based on a genuine pre-estimate is an objective one although the court may have some regard to the thought processes of the parties at the relevant time.

The Judge also noted that only four cases had been found where the LAD clause had been struck down as a penalty. Here, the Judge took evidence on how the LAD rate had come about and decided that the figure was an entirely reasonable pre-estimate of damages. The figure was close to the range of possible weekly losses flowing from delay. A genuine attempt had been made to estimate the losses. That estimate was not substantially wrong, something which may have caused the clause to fall. The difficulty in the exercise of estimating future losses makes it particularly sensible for parties to agree upon a weekly figure. The court should be pre-disposed where possible to uphold contractual terms which fixed the level of damages. Here, the contract was a commercial one made between two parties of comparable bargaining power. The level of LADs was the subject of specific debate during the course of pre-contract negotiations.

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