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Dispatch

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

Case update - Interpretation of contracts

■ **Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd**

We first reported on this case in Issue 73. That decision related to the determination of a number of preliminary issues by Ramsey J relating to a series of letters of intent between the parties. One of these came before the CA. The particular question at issue was whether the temporary agreement between the parties included most of the terms of a facilities management agreement or whether it incorporated only a very few of them.

LJ Neuberger held that the natural meaning of the words "you will provide the services under the terms of the [Draft] Contract" was that the draft contract governed the terms upon which the services were to be provided under the temporary agreement. The fact that the parties still wished to negotiate the terms of the Contract because they did not want to commit to its precise terms for some three years did not mean that they were not prepared to be bound by those precise terms over a short two month period while the negotiations continued. This was the natural primary meaning the words would convey to an ordinary speaker of English, whether they be a lay-person, businessman or lawyer.

The case is of particular interest because of the comments made by LJ Neuberger about the interpretation of provisions in commercial contracts. He made it clear that the contract is not to be assessed purely by reference to the words that the parties have used within the four corners of the contract. The words must also be construed by reference to the factual circumstances of commercial commonsense. However, he cautioned that:

"It seems to be right to emphasise that the surrounding circumstances and commercial commonsense do not represent a licence to the Courts to rewrite a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. A contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree, and in that respect the words or the written contract are different from the surrounding circumstance or commercial commonsense which the parties cannot control, at least to the same extent."

The CA took the view that whilst factual circumstances and commercial sense are relevant, they do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. Therefore here, the CA concluded that the right course was to remit the matter back to the Judge to enable him to decide which of the terms of the facilities management agreement did indeed apply to the temporary arrangements evidenced by the letters of intent. In other words, it would be necessary to decide which terms of the facilities management agreement were inconsistent with the temporary arrangements in place.

Adjudication - CIC Procedure - Late decisions

■ **Epping Electrical Company Ltd v Briggs & Forrester (Plumbing Services) Ltd**

This was an adjudication enforcement case which came before HHJ Havery QC. The adjudication was conducted under the CIC procedure (3rd Edition). The adjudicator requested and was given an extension of time of 7 days, until 21 November 2006, to reach his decision. On 21 November, the adjudicator told the parties that his decision was complete but at the same time sent them an invoice for half of his fee. The adjudicator said that he would issue his decision once the fees were paid. The parties disagreed with this and positions were reserved. When the decision was eventually released, on 23 November, it was in Epping's favour.

Paragraph 25 of the CIC procedure provides that if an adjudicator fails to reach a decision within the time permitted, that decision shall nevertheless be effective if reached before the referral of a dispute to any replacement adjudicator. Epping argued that the decision was reached within the time period agreed by the parties and even if it was not, it should in any event be enforced in accordance with Rule 25.

B&F relied upon the Scottish case of *Ritchie v Phillips* (see Issue 59) where a decision, under the Scheme, was not enforceable because it was out of time. Of course there is a divergence in the authorities. See for example the comments of Mr Justice Jackson in *M. Rhode Construction v David* (see Issue 71) where he said that a slight delay was not fatal. The Judge felt that although he was strictly not bound by the Scottish decision, as it was a decision of an Appellate Court and as the HGCRA applied both in England & Wales and Scotland, he ought to follow it.

The Judge then considered the effect of paragraph 25 of the CIC procedure. He felt that it was inconsistent with the mandatory nature of section 108(2) of the HGCRA which provides a time limit for the reaching of a decision. Accordingly, he decided that the provision was ineffective, which meant that the Scheme would apply in place of the adjudication provisions of the contract, in other words the entire CIC procedure. Further the Judge considered that whilst B&F had consented to an extension of time until 21 November 2006 that consent was conditional upon the decision being issued by that date. That condition was not fulfilled and as a consequence, the adjudicator had reached his decision out of time and it could not be enforced.

Recovery of management time and staff costs

■ **Aerospace Publishing Ltd & Anr v Thames Water Utilities Ltd**

Inevitably, if a party suffers a loss caused by a tort, that party will incur wasted staff and management time when seeking to remedy or mitigate that loss. The question as to whether a claimant is then entitled to recover that wasted managerial and staff time is not always an easy one to answer. For example, does the injured party have to establish a loss of profit (i.e. to show that income generating opportunities were lost and/or additional expenses were incurred) before it is entitled to recover this time? Indeed, in issue 70 we discussed the decision of Mrs Justice Gloster in the case of R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA. That decision was discussed and approved here by the CA.

This case was an appeal following a quantum hearing. Liability had been admitted. Following a mains water pipe burst, considerable quantities of water had entered the premises occupied by the claimants who were publishing companies. The water caused significant loss and damage to the claimants' archives, in particular to an extensive archive of aviation photographs and the reference material. As part of their claim, the claimants had sought their costs in respect of the diversion of staff work necessarily done in relation to, and consequent upon, the flood. The claim was in two parts, one in respect of the claimants' employees and one in respect of 2 ex-employees who had returned to work on a freelance basis.

In relation to the freelancers, Thames Water said that the work they carried out was an item of costs. LJ Wilson agreed that the assessment work done by them was directly referable to the work carried out as part of the preparations of the claim. Thus, that part of the claim would fall to be assessed as part of the overall costs of the action. The second part of the claim, that part referable to employees' work, related to work carried out in the months and years after the flood in respect of works of salvage and reorganisation. It was work which was reactive to the flood. The claimants contended that in the absence of the flood, their employees would have concentrated upon their conventional activities, out of which the claimants would have made money.

Thames Water said that such a claim must be strictly proven; it cannot simply be inferred. It was their view that the claimants had not demonstrated that the employees had been diverted from other relevant revenue generating activities. Having considered the authorities, LJ Wilson set out the following guidelines:

(i) The facts and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the Claimant to adduce is not adduced, he is at risk of a finding that they have not been established;

(ii) The Claimant also has to establish that the diversion caused significant disruption to its business;

(iii) Even though it may well be that strictly the claim could be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the Defendant can establish the contrary, it is reasonable for the Court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the Claimant in an amount at least equal to the costs of employing them during that time.

On the facts here, the CA considered that the diversion of the time of a significant number of the claimants' employees was set out in sufficient detail and adequately established. Accordingly, there could be no sensible challenge to a conclusion that their business was disrupted and the claim succeeded. Thus, the CA has given valuable guidance as to what you need to do to prove a claim for wasted management time. The CA made it quite clear that if the relevant detail is not produced, then the risk lies with the claiming party.

The key is detail. How much time is claimed? How and why were the staff diverted from their work activities? And remember that the records must be sufficient such that a third party – be they judge or adjudicator - can make clear sense of them many months (or maybe years) after the event.

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