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The construction law specialists

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Dispatch

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

Adjudication and compliance with the pre-action protocol

Anglo Swiss Holdings Ltd & others v Packman Lucas Ltd
[2009] EWHC 3212 TCC

Packman were owed architects fees. An adjudication took place, where the Claimants put forward detailed arguments to the effect that nothing was due and actually there had been an overpayment. The adjudicator found in favour of Packman because no withholding notices had been served. He did not therefore consider the arguments and issues raised about the overpayment.

In due course proceedings were brought by the Claimants claiming that Packman had been overpaid. Packman sought a declaration that these proceedings should be stayed on the grounds that the terms of the Pre Action Protocol for Construction & Engineering Disputes had not been followed. Paragraph 1.2 of that Protocol states that:

"A claimant shall not be required to comply with this Protocol before commencing proceedings to the extent that the proposed proceedings… (iv) relate to the same or substantially the same issues as had been the subject of recent adjudication under the 1996 Act…"

Mr Justice Akenhead noted that:

"Part of the logic for this exclusion must be that in the adjudication process the parties will have exchanged information about their claims or defences along the lines of the Letter of Claim and Response called for in the Protocol and therefore it would be unnecessary and burdensome for the parties to have to go yet again through the process of submitting claim and response through the Protocol process."

He therefore concluded that although the adjudicator had decided that it was unnecessary to decide whether or not in fact there was an overpayment or decide what was actually due, the parties did exchange evidence and argument about those issues. Therefore Packman was aware of what the Claimants were asserting on these issues before the proceedings were commenced. The question of how much was actually due to Packman under the contracts with the Claimants was one of the issues in each of the adjudications. The situation here, therefore came within one of the accepted exceptions to the requirement that the Protocol should be followed. Further given the exchange of information during the adjudication process on these issues, it would have been, in the Judge's view both unnecessary and a waste of costs and resource to require the parties to go through that process again through the protocol. Packman made a further application to stay the proceedings, this time on account of the failure of the Claimants to honour the decision of the adjudicator. Despite Judgment on the enforcement application having been entered, no payment had been made. Mr Justice Akenhead noted that:

(i) The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it;
(ii) In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings;
(iii) The power is one that is to be used sparingly and in exceptional circumstances; and
(iv) Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably.

The question he then had to decide was, whether the established refusal to honour or satisfy a previous adjudication decision and court judgement about the very subject matter of the court case which Packman now sought to have stayed, would justify a stay of that case pending payment. Having considered the facts of the case, the Judge decided that this was a situation which justified the ordering of a stay until the adjudication decisions were honoured. He said so for the following reasons:

(i) The Claimants were simply ignoring the contractual and statutory requirements that they should honour adjudicator's decisions until the final resolution of the underlying disputes;
(ii) By ignoring these requirements, the Claimants were avoiding the "pay now argue later" approach of the HGCRA. This altered the commercial balance. If Packman had been paid, it would have had the money in hand which would put it in a stronger commercial position in relation to the Claimants. Pursuing these proceedings without honouring the adjudications gave the Claimants an advantage which the HGCRA does not permit.
(iii) The bad faith comes in putting forward claims which they either knew were significantly exaggerated or claims in respect of which they have no knowledge whether and if so to what extent they are good claims.
(iv) It was clear that the Claimants have no difficulty instructing lawyers to act for them in the current claims. Therefore, there was no good reason why the Claimant or those behind the Claimants could not honour the decisions and judgements against them; and finally.
(v) The parties are not on the equal footing in which they should have been if the Claimants had honoured their contractual commitments.

Adjudication - natural justice

Jacques & Anr v Ensign Contractors Ltd

[2009] EWHC 3383 (TCC)

In defending enforcement proceedings, Ensign suggested that the adjudicator did not apply the rules of natural justice by refusing to read or take into account an earlier decision. It was said that the adjudicator must, by inference, have failed to consider the arguments and defences put forward in that earlier decision. By not reading that earlier decision, he could not have understood or considered the defences which were put forward fully or effectively. Mr Justice Akenhead summarised the legal position:

(i) The adjudicator must consider defences properly put forward by a defending party in adjudication;
(ii) However, it is within an adjudicator's jurisdiction to decide what evidence is admissible, helpful or unhelpful. If, within his jurisdiction, the adjudicator decides that certain evidence is inadmissible, that will rarely (if ever) amount to a breach of the rules of natural justice.
(iii) Even if the adjudicator's decision (within his jurisdiction) to disregard evidence as inadmissible was wrong in fact or in law, that decision is not a breach of the rules of natural justice.
(iv) There is a need to distinguish between a failure by an adjudicator to consider and address a substantive (factual or legal) defence and an actual or apparent failure to address all aspects of the evidence which go to support that defence. The adjudicator needs to address the substantive issues, whether factual or legal, but does not need (as a matter of fairness) to address each and every aspect of the evidence.

Here the Judge was satisfied that the adjudicator did not fail to apply the rules of natural justice. For example, although the adjudicator had said he was going to disregard the earlier decision, the contractor still had what was termed as the "fullest opportunity" to submit any further evidence he wished to in light of that ruling. Looking at the adjudication as a whole it was also clear that on every material point in issue in relation to the final account, the contractor not only had the opportunity, but took that opportunity, to submit evidence and argument. Indeed, the adjudicator had reduced the employer's claim by some 70%. The decision was duly enforced.

Adjudication - the slip rule

O'Donnell Developments Ltd v Build Ability Ltd

[2009] EWHC 3388 (TCC)

The question which arose before Mr Justice Ramsey was whether the adjudicator was entitled to correct his decision. Following the issuing of his decision, O'D wrote to the adjudicator noting two errors:

(i) the adjudicator had included in his calculations a sum paid for loss and expense which was made after the date of valuation; and
(ii) the retention was calculated at 3% of the gross value of the Works including and not excluding loss and expense.

BAL objected, but the adjudicator proceeded to correct his decision. It is well known that generally an adjudicator's decision will be enforced even if it contains an error of law or fact. The key is whether an adjudicator had jurisdiction or not.

That general rule is subject to the slip rule which provides that an adjudicator can correct an accidental error or omission providing that the correction is made within a reasonable time.

The issue here raised what the Judge termed a threshold question, namely as to how far the court can interfere with an adjudicator's exercise of his power under the slip rule. Or to put the question another way, if an adjudicator has jurisdiction under the slip rule, to what extent can the court review the exercise of that jurisdiction by the adjudicator? BAL submitted that the court needs to be satisfied that a slip, properly so defined, has occurred. If there is no slip then the adjudicator does not have jurisdiction. BAL further suggested that it was only if the parties, in effect, agreed on the slip that the slip rule could be applied. The Judge did not consider that this was correct.

Mr Justice Ramsey noted that if the adjudicator were to exercise a slip rule when there was no express or implied slip rule, that would clearly be a decision which was outside his jurisdiction. However, if the adjudicator is asked by one party to correct a slip and he accepts that an error has been made within the slip rule then if the adjudicator makes an error of fact or law in so doing, the Judge considered that such an error would not take the exercise of the slip rule outside his jurisdiction. Although, if the adjudicator is asked by one party to correct a slip which the other party agrees is a slip within the slip rule but in operating the slip rule he makes an error of fact or law, then the Judge did not consider that the court can interfere in that decision.

Here, it was accepted by BAL that the slip rule was an implied term of the Sub-Contract. The adjudicator was asked to correct a slip and accepted that he had made an error within the slip rule. Accordingly, the Judge did not consider that the court could or should interfere with the exercise of the adjudicator's powers within his jurisdiction. To do so would be to seek to interfere in a case where he has answered the right question. The decision, as corrected, was therefore enforced.

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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