Fenwick Elliott
Solicitors

Dispatch

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

Pre Action Protocol

■ **TJ Brent Ltd v Black & Veatch Consulting Ltd**

B&V alleged that Brent had failed to comply with the Construction Pre-action Protocol. The facts of the case do not really matter. Of more importance are the comments made by Mr Justice Akenhead about this type of application. First of all, the Judge said that there was no need for the Letter of Claim to provide information in "ultimate detail" unless it was critical to the claim. The court should ask whether the absence of information was such as to prevent or make it difficult for a defendant to respond in detail:

"What the Court should do in considering the Pre-action Protocol is to look at the matters in substance, not as a matter of semantics… and not for technical non-compliances with the letter of claim requirements in the Pre-action Protocol."

Here the Letter of Claim, provided a clear summary of the facts on which the claim was based and identified so far as possible the principal contractual terms and statutory provisions relied on as well as the nature of the relief claimed. The Judge also commented that whilst it was not incumbent upon a defendant as a matter of practice or procedure to have to raise the issue of the Pre-action Protocol process once the Particulars of Claim were served, the delay here, some 7 months had passed, served to undermine the stance taken in the application. Further, for a defendant to succeed in this type of application, it would have to establish that there was some realistic prospect, prior to the issue of the proceedings, of (i) a mediation taking place and (ii) some prospect (but no certainty or even necessarily probability) that a resolution would be achieved.

A court would need to consider what would have happened if there had been an attempt at alternative dispute resolution during the period when the Protocol process would have taken or did take place. Not only must a court consider whether there had been non-compliance, it must also consider the extent to which the failure to follow aspects of the Protocol might have prevented a resolution of the dispute. The onus of proof is on the defendant to show that a settlement would or could realistically have been achieved at that stage. In this case, B&V's unwillingness to attend any meetings or discuss any matters without prejudice in any forum, suggested to the Judge that settlement was unlikely.

Mr Justice Akenhead also referred to his earlier decision in *Orange v Hoare Lea* (see Issue 93) where he made it clear that the Overriding Objective was concerned with saving expense, proportionality, expedition and fairness and where he said:

"The court should avoid the slavish application of individual rules, practice directions or protocols if such application undermines the overriding objective."

Here, in substance, B&V was very well aware, before these proceedings commenced, what the nature of the claim was against it. It did not know every detail but it knew in substance and it was able to deal with it in substance. Therefore B&V was able to work out what its defences were in some detail. The Judge cautioned that a court should be slow to allow the rules to be used in such circumstances for one party to obtain a tactical or costs advantage where in substance the principles of the Protocol have been complied with.

Adjudication - contracts evidenced in writing

■ **T & T Fabrications Ltd and (2) T & T Fabrications (a firm) v Hubbard Architectural Metalwork Ltd**

T & T sought to enforce the award of an adjudicator. As Judge Wilcox noted, it was clear that there was a contract between T&T (the firm) and Hubbard in relation to the installation of various metalworks. In September 2006, the assets and liabilities of T&T (the firm) were assigned to T&T (the company). On 12 November, T&T (the firm rather than the company) commenced adjudication. It was not possible for the firm to be the beneficiary of any Decision made by the adjudicator because the rights and remedies had been assigned to the company.

Judge Wilcox noted that the identity of the parties was clear. T&T (the company) had given the necessary authority for proceedings to be brought. The real issue was whether there was a contract in writing between T&T (the firm) and Hubbard. The contract was a simple one, and did not contain adjudication provisions. However, it was a construction contract within the meaning of the HGCRA and so T&T argued that the Scheme had been implied. Hubbard argued that there was not a contract in writing within the meaning of s107 of the HGCRA. In particular, Hubbard argued that two terms, relating to the provision of drawings and timing of the works, had not been recorded in writing. T&T provided witness statements that denied these assertions.

Judge Wilcox considered the evidence put forward by the witnesses. The evidence was conflicting, and so in the Judge's view it was not possible to resolve quickly in a summary judgment application. The Judge said that in applications such as this, the Court was not in a position to adjudicate upon the weight of evidence and the credit of witnesses on paper unless the claims seemed somewhat absurd or unlikely. That was not the case here. A full hearing would be required. There was credible evidence to suggest that the two material terms might have been agreed, but they were certainly not reduced to writing. Hence there was an arguable case on jurisdiction as the contract may not have complied with s107. The Judge therefore refused to summarily enforce the Decision. The Judge also commented on the costs incurred. The claim referred to adjudication was a small one and it had taken 3 to 4 years for the dispute to be brought before an adjudicator. Even then it was not summarily unenforceable.

Arbitration

- **Taylor Woodrow Construction v RMD Kwikform Ltd**

TW engaged RMD to design, supply and erect scaffolding. In 2000, the scaffolding collapsed and consequently TW made a claim for some £600k and RMD, in turn, asserted a claim for £180k. TW's solicitors wrote to RMD in January 2003 enclosing a draft Particulars of Claim. The solicitors asked whether RMD wished to rely on clause 26 of the sub-contract which provided that disputes should be referred to arbitration, or whether it would agree to the matter being litigated. In December 2006, TW commenced court proceedings. RMD then sought to stay the proceedings to arbitration under section 9 of 1996 Arbitration Act. RMD claimed that it had not been served with a Notice of Arbitration, and had not been asked to agree the appointment of an arbitrator. TW relied on its solicitor's letter as its Arbitration Notice in accordance with clause 26.1. Clause 26.1 said this:

"If any dispute question or difference arises ..., it shall, subject to the provisions of this clause, be referred to the arbitration ...of a person to be agreed between the parties or failing such agreement within a period of 14 days of one party giving to the other notice in writing of such dispute ...a person appointed upon the application of either of the parties by the President ...of the Chartered Institute of Arbitrators."

Mr Justice Ramsey held that if it was agreed that arbitral proceedings could be commenced on receipt by the other party of a notice referring disputes to arbitration, then that would be an agreement for the purposes of section 14(1) of the 1996 Act. However, here clause 26.1 did not amount to such agreement. It merely stated that any dispute, question or difference shall be referred to arbitration. Given the lack of agreement, section 14(2) of the Act applied and the arbitral proceedings would be commenced when one party served a notice in writing requiring the agreement to the appointment of an arbitrator under section 14(4). However, the Judge continued that the solicitor's letter did not make it objectively clear that TW was referring the dispute to arbitration or that, it was requesting RMD to commence the process of agreement of an arbitrator. Instead the letter was simply made in the context of seeing whether RMD would insist on arbitration. Therefore the letter was not sufficient to commence arbitration proceedings and the application by TW for the appointment of an arbitrator was invalid.

Expert Determination

- **Owen Pell Ltd v Bindi (London) Ltd**

Pell applied for summary judgment to enforce the decision of an expert. A dispute had arisen as to Pell's entitlement to payment under his final account. The parties agreed to have their dispute determined by an independent expert appointed by the RICS. The expert was duly appointed, who following submissions directed that the parties prepare a Scott Schedule. A site visit was arranged. Separate meetings were held as Bindi were not prepared to have a joint inspection. The expert decided that Pell was entitled to the sum of £55k. Bindi refused to pay. Bindi claimed that there was an implied term in the expert determination agreement that the decision would be of no effect if the expert failed to conduct himself in accordance with the principles of natural justice, conducted himself in such a way as to give the appearance of bias or made an obvious error.

Bindi had commissioned a report from their own expert. The Judge felt that the new expert's comment was inappropriate. Although, the expert had had access to many of the papers that were available to the original expert, he did not have access to precisely the same material as was available to the first expert. Further expert evidence is not needed to decide whether actual or apparent bias is made out. As the Judge noted, there can be no criticism over what happened at the site meeting, as Bindi had not wanted a joint inspection to take place. In Judge Kirkham's view, on a true construction of the agreement, the expert was required to consider matters relevant to Pell's entitlement to payment based on its final account and to identify the basis of any entitlement on the part of Bindi to apply contra charges. This was what he had done and the decision was duly upheld.

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