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Legal Update

Spring 2009

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Welcome to the Spring 2009 edition of SLS's Construction and Engineering Legal Update

SLS Reported Decision – The Court of Appeal gives guidance on 'disclosable facts' under a Claims Made insurance policy

Laker Vent Engineering Ltd v Templeton Insurance Ltd [2009] EWCA Civ 62. Templeton Insurance Ltd ("Templeton") appealed against a decision that it was bound to indemnify Laker Vent Engineering Ltd ("LVE") under a legal expenses insurance policy. LVE submitted a claim to Templeton in which it sought an indemnity for legal expenses in connection with a dispute with GWUG. Templeton rejected the claim on the basis that LVE had failed (1) in its duty of good faith to disclose a material fact or circumstances; and (2) to comply with the claims notification provision. Templeton had identified five material facts which it said were known (or ought to be known) to LVE before or at the time of renewing its policy. The alleged disclosable and material facts related to an escalating dispute between LVE and GWUG concerning progress of the contract works. Templeton alleged that such facts were 'material' to a prudent underwriter and it was induced by their non-disclosure to renew the policy. Templeton argued that LVE failed to give notice in writing immediately it was aware of any cause, event or circumstance likely to give rise to a Construction Claim as required by the policy. The trial judge rejected the notion that any difference or dispute between the contractor and employer in a building contract that might possibly give rise to a formal process of dispute resolution must be disclosed as a 'material fact'. The judge held that the existence of disputes between a contractor and employer would only be material to be disclosed if there were "*features of the relationship which, viewed objectively, show a real risk of escalation to the point of formal dispute resolution procedures beyond the risk ordinarily inherent in any complex construction contract*". The judge found that the state of the relationship between LVE and GWUG "*had not reached the stage where it was properly to be regarded as a material circumstance required to be disclosed to Templeton*". The judge held that as an insurer of legal expenses risk, Templeton would be presumed to know that disputes about the timing and quality of work and payment were endemic between contractor and employer in the construction industry. The Court of Appeal dismissed Templeton's appeal and affirmed the trial judge's conclusions. The Court held that the trial judge's finding that the dispute had not progressed to the extent that it ought to have been disclosed as a material fact was not obviously wrong and there was no evidence that Templeton's underwriter had been induced to agree to renewal because he was not told the facts of LVE's and GWUG's relationship.

Julian Ives of SLS Solicitors successfully acted for Laker Vent Engineering Ltd.

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Taking an unreasonable position in mediation may result in adverse costs

Earl of Malmesbury v Strutt & Parker [2008] 118 Con LR 68 QBD. The claimant had succeeded on liability in relation to a negligent valuation in connection with leases of land used by Bournemouth International Airport as a car park. The parties subsequently agreed to go to mediation on the quantum aspects of the case. The claimant offered to accept £9 million in settlement but was ultimately awarded £900,000. The court held that the claimant's position was unreasonable and caused the mediation to fail. The court held that unreasonableness in the actual mediation process could be the same as refusing to go to mediation. The claimant's costs totalled £1.84 million but their unreasonableness was reflected in the costs order, which gave him 80% on liability and 70% on quantum. This is the first case in which a court has been asked to consider the cost consequences of a party who agrees to mediate but then subsequently adopts an unreasonable position in that mediation process.

Wembley related litigation rolls on...Clauses which survive the Works

Brookfield Construction (UK) Ltd v (1) Foster & Partners Ltd (2) HOK Sport Ltd [2009] EWHC 307. The claimant, Brookfield Construction (UK) Ltd ("Brookfield") (formerly Multiplex) sought a declaration as to the validity and effect of a particular aspect of a contract with the defendants Foster & Partners Ltd and HOK Sport Ltd, who together constituted a consortium called World Stadium Team ("WST") responsible for providing architectural services. Brookfield's claim for declarations arose in the context of a delay claim worth in excess of £250 million against Mott MacDonald. Mott MacDonald submitted that the defendants might have been partly responsible for delays and Brookfield sought to use a clause in the contract to obtain relevant information from WST in order to test the validity of Mott MacDonald's responses.

The court had to consider whether the obligation which required WST to provide information on its Services survived completion of those Services. In contrast to standard forms of building and engineering contracts which contain obligations on the part of the contractor or consultant to provide information, the particular clause before the court promised access to personnel as well as access to documents for 'review'. The judge held that as a matter of construction, because the particular provision used the word 'review', which implied a look back at something in order to examine it critically, the obligation on WST did not cease when the Services were completed. The judge granted the declarations as sought by Brookfield.

Can an adjudicator determine the value of an interim payment when the notice of adjudication refers to a 'final account dispute'?

OSC Building Services Limited v Interior Dimensions Contracts Limited [2009] EWHC 248 (TCC). The claimant, OSC sought summary judgment on its claim to enforce an adjudication decision against IDC. IDC engaged OSC to carry out drainage and site works at a medical centre. OSC made numerous applications for payment, some of which were described as a 'draft final account'. A dispute over the applications for payment arose and OSC referred the matter to adjudication. In its Notice it referred to a dispute "*in respect of the final account*" and sought a further sum ascertained as due to OSC by IDC. The adjudicator decided that a sum was due to OSC as an interim payment whilst making it clear he was not determining the value of OSC's final account. IDC refused to comply with the decision on the basis that the adjudicator had no jurisdiction to decide a sum was due on the basis of an interim certificate when the notice referred to a final account. The judge accepted there was a difference between a final account and an interim payment but concluded that, on the basis of what was referred to the adjudicator, he was entitled to decide a sum due on the basis of an interim payment. The judge held that the draft final account was not the final account

Itself, and that it was important to understand the substance of the document rather than the label given to it.

An adjudicator can recover his fees from a party who questions his jurisdiction

Christopher Michael Linnett v Halliwells LLP [2009] EWHC 319 (TCC). This case raises an important question concerning the ability of an adjudicator to recover his fee from a responding party to an adjudication when that party raises questions of jurisdiction. Linnett, the claimant, had been nominated by RICS in relation to a contractual dispute between Halliwells and ISG. Halliwells failed to respond to the adjudicator's invitation to agree his terms and instead challenged the adjudicator's jurisdiction on the basis that the referral was served out of time. The adjudicator rejected the jurisdictional argument and subsequently issued his award against Halliwells. The adjudicator then raised his invoice, which Halliwells refused to pay, contending that it was not liable directly to the adjudicator for his fees and expenses, having objected to his jurisdiction. Halliwells argued that the adjudicator could only recover his fees from the referring party, as there was no contract between Halliwells and the adjudicator. The adjudicator argued that Halliwells was liable for his fees as it was fully involved in the adjudication proceedings. The court agreed. Halliwells was liable for the adjudicator's fees, as by participating in the adjudication, it had entered into a contract formed by conduct.

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Adjudication and Company Voluntary Arrangement (CVA) – the relevant principles

Mead General Building Ltd v Dartmoor Properties Ltd

[2009] EWHC 200. Mead sought to enforce an adjudicator's decision, Dartmoor resisted the enforcement submitting that a stay should be granted on the basis that Mead was subject to a Company Voluntary Arrangement ("CVA"), and there was reason to believe Mead would not be in a position to pay any part of the judgment sum if, in subsequent arbitration, the arbitrator concluded it had been overpaid. In deciding whether to grant a stay, the court identified four relevant principles:

- (1) the fact that a claimant is the subject of a CVA will be a relevant factor for the Court to consider;
- (2) the existence of the CVA will not require the Court to infer that the claimant would be unable to repay sums paid out as a result of an adjudicator's award;
- (3) the CVA and claimant's current trading position will be relevant factors;
- (4) it is relevant whether or not a claimant's financial position is wholly or significantly due to the defendant's failure to pay the sums awarded by the adjudicator.

The Court refused to grant a stay, finding that on the evidence, there was no reason to believe that Mead would not be in a position to pay back any part of the judgment sum. The court accepted that the primary reason why Mead found itself in such financial difficulties was a result of Dartmoor's actions. The court held that it would not allow Dartmoor to take advantage of the financial difficulties it substantially caused, in order to avoid paying sums due under an adjudicator's decision.

SLS would like to congratulate Joseph Otoo, one of its solicitors, on receiving the Society of Construction Law Annual Prize for best dissertation submitted in 2008 as part of the MSc Construction Law & Dispute Resolution at King's College London on the topic of international arbitration.



Whether a developer is entitled to summary judgment on LADs as a debt

Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd

[2008] EWHC 3029 (TCC) (QBD (TCC)). The defendant, Modus Corovest (Blackpool) Ltd ("Modus") engaged the claimant, Balfour Beatty Construction Ltd, to carry out the design and construction of works at a shopping centre. The contract incorporated the JCT SFBC with Contractors Design (1998) with amendments. A dispute arose as to whether Balfour Beatty had performed work that entitled it to additional payment which was referred to adjudication. Balfour Beatty sought summary judgment on two separate claims, the first being the enforcement of the adjudicator's decision and the second based upon an interim payment in its favour. Modus challenged enforcement, submitting that (1) it was not obligated to pay the sums due under the adjudicator's decision because he had failed to give a reasoned decision (the adjudicator in his decision described it as "not reasoned"); (2) Balfour Beatty was only entitled to amounts that were "properly due" under the contract and Modus was therefore entitled to set off its claims for liquidated damages despite not having served a withholding notice; (3) it was entitled to summary judgment on its liquidated damages claim because it had provided notice to Balfour Beatty in accordance with cl. 24.2.1 of the contract, yet Balfour Beatty had not yet served a withholding notice; (4) since its agent had fixed the completion dates, the sums claimed in its notice were due as a debt. The question for the court was whether, under a JCT Contract, a developer was entitled to summary judgment on the payment of liquidated damages as a debt in court. The court enforced the adjudication decision whilst rejecting Modus's counterclaim for summary judgment on its liquidated damages. The court found that, although the adjudicator had stated that his decision was not reasoned, such words were not conclusive as in fact his decision contained an explanation as to how the decision was reached. It was further held that Modus was not entitled to set off liquidated damages against amounts owed under the contract and in the absence of a withholding notice. The court further held that, if the dates fixed by an employer's agent were in dispute, the employer could not be entitled to summary judgment for liquidated damages calculated in reliance on those dates.

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Upcoming Events

30 April 2009 at 8.30am : SLS London Breakfast Briefing – Letters of Intent at MWB Business Exchange, Cannon Street, London

14 May 2009 at 7.30am : SLS Liverpool – Recession Busting Tips at Hard Days Night Hotel, Liverpool

21 May 2009 at 7.30am : SLS Leeds Breakfast Briefing – Recession Busting Tips at the Met Hotel, Leeds

For further information please contact Devinia Porter on 07947 805 008 or email dporter@sls-solicitors.co.uk

SLS Solicitors is a leading niche international construction and engineering practice with offices in London, Liverpool and Leeds and internationally. If you have any comments or questions regarding this Legal Update, or require specific advice on any matters discussed herein, please contact Devinia Porter (on 0113 3888080 or at dporter@sls-solicitors.co.uk) or any of the above named. *This Legal Update is prepared for the general information of our clients and other interested persons. It should not be acted upon in any specific situation without the appropriate legal advice.*