Fenwick Elliott
Solicitors

# Dispatch

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

## Adjudication

### Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd

Tally declined to pay the sum of £95,483.78 plus interest and the adjudicator's fees arguing that there was no construction contract between the parties or if there was a contract, that the contract was different in content to the contract found to exist by the adjudicator.

HHJ Thornton QC found it was clear that both parties contended that there was a written construction contract. However, Pegram claimed that it was one based on its own conditions of sale whilst Tally claimed that it was one based on the JCT Prime Cost Standard Form of Contract 1998. There were no adjudication provisions in the Pegram standard terms thus on its case, the Scheme would apply. Tally had in the adjudication accepted that there was a contract in being for the refurbishment of the defendant's retail clothing store. Hence, Tally was estopped from adopting a different position in the enforcement proceedings.

Here, the Judge found that the parties had entered into a construction contract in such a way that its terms were not clearly and unquestionably capable of being identified. The reason was that the negotiations consisted of a series of offers and counter offers. No complete set of contract documentation was identified. Therefore, the parties had not produced a construction contract whose terms enabled either party to give notice at any time of the intention to refer a dispute to adjudication. As the mandatory requirements for section 108 of the HGCRA had not been complied with, the Scheme applied. Therefore, the Adjudicator had been correctly appointed and had correctly applied the Scheme.

### Dr Bowles v Mohammed

Mohammed contracted to carry out works to Dr Bowles' residence. Disputes arose and Dr Bowles instigated successful adjudication proceedings under Article 6 of the JCT Minor Works contract. Mohammed refused to pay and Dr Bowles served a statutory demand. Mohammed sought to set the statutory demand aside.

One of the main questions before the court was whether the adjudicator's decision created a debt that could form the basis of the statutory demand, and if so what was the nature of that debt. The Registrar held that, in respect of jurisdiction, the adjudicator had determined that issue and it was not for the bankruptcy court to look behind that decision. More importantly, the Registrar noted that although the applicant could have applied to set aside the adjudicator's decision or sought a declaration on jurisdiction, he had not.

Therefore the adjudicator's decision was a debt that was sufficient to form the basis of a statutory demand. The nature of that debt was the binding contractual obligation on Mohammed to pay the sum quantified by the adjudicator's decision, unless and until varied by arbitration or legal proceedings. It was not disputed on substantial grounds. As a result the application was dismissed with costs.

## Mediation/Costs

### Leicester Circuits Ltd v Coates Brothers plc

At both first instance and before the CA, Coates were successful. They sought their costs. The trial at first instance commenced on 4 February 2002. On 4 January 2002, Leicester agreed to mediate the dispute on 10 January 2002. Coates, on the instruction of their Insurers withdrew from the mediation. Judge LJ, following the *Dunnett v Railtrack* decision, said:-

*"We do not for one moment assume that the mediation process would have succeeded, but certainly there is a prospect that it would have done if it had been allowed to proceed. That therefore bears on the issue of costs."*

Thus although Leicester had to pay the costs of the Appeal which it lost, Leicester did not have to pay the costs of Coates in relation to the trial at first instance for the period after 1 January 2002.

## Other Cases of Interest

### Harvey Shopfitters Ltd v ADI Ltd

Harvey carried out refurbishment works at flats owned by ADI. The tender document referred to the IFC Standard Form. The architect wrote to Harvey stating that "*it is the intention of our client…to enter into a contract with you…I confirm that the conditions of contract will be those of the JCT intermediate form of building contract 1994…if, for any unforeseen reason, the contract shall fail to proceed and be formalised, then any reasonable expenditure incurred by you in connection with the above will be reimbursed on a quantum meruit basis*". The works were completed, without any formal contract being drawn up.

The issue which came before Recorder Uff QC was the status of contract between the parties. The Recorder found that the words "*failed to proceed and be formalised*" must be read together. It would be surprising if the parties had intended the failure to formalise the contract document to lead to the result that the careful process of tendering and pricing should be cast out in favour of the uncertainty of a quantum meruit.

Reading the tender and all the documents upon which it was based together, it was clear that the parties intended to contract on the IFC conditions which thus formed part of the agreement made between the parties. Further, the parties behaved as though their relationship was governed by the IFC conditions, particularly in relation to pricing and certification of the work and the certification of completion and extensions of time. Therefore, Harvey would be estopped from denying that the IFC conditions applied to the works.

This case is interesting because it is a rare example of a dispute, which was originally referred to adjudication ending up in a full court hearing. In January 2001, Harvey brought enforcement proceedings. ADI raised a jurisdictional argument, which was not decided but by agreement paid the sum in dispute into court. The case decided here was thus a re-hearing of the original dispute.

## Health & Safety

Walter Lawrence (Civil and Mechanical) Limited have been fined £10,000 (plus costs of £25,000) following an incident where a water bowser left in the street by the company was tampered with and rolled down a slope crushing a boy against a car.

The unauthorised movement or damage of the bowser had not been considered in the company's risk assessment, in spite of the fact that it had suffered several episodes of vandalism whilst working on the estate.

### R v Yorkshire Sheeting & Insulation Ltd

Here, a worker on a roof of commercial premises had inadvertently stepped on a roof light. It gave way and the worker fell onto a concrete floor below and subsequently died. The premises were owned by a third party who employed the co-defendant as its main contractor. The co-defendant engaged YSI as the roofing subcontractor. YSI submitted a method statement and risk assessment to the co-defendant which indicated that the risk of falling from the roof would be low. YSI said they would put safety nets under the roof.

The prosecution claimed that the risk assessment was in error and that workers had been wrongly permitted access to the roof area before the safety net. There was nothing marking off the netted from the non-netted area. All roof lights should have been covered. The workers should have been instructed not to appraoch uncovered lights outside the netted area. At first instance YSI was fined £100,000 and ordered to pay costs of £8,950. The co-defendant was fined £10,000.

YSI appealed. The CA said that the trial Judge had placed too greater emphasis on seeking to apportion overall liability between YSI and co-defendant instead of assessing the degree of culpability. Here the failure to ensure safety on the site was, to a significant extent, due to a lack of liaison between all those involved. However, the principal responsibility did remain that of YSI. They were the retained specialist roof contractor and a substantial fine was still required. However the fine was excessive and reduced to £55,000.

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