

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

Dispatch

When to bring Part 8 proceedings

RSK Environment Ltd v Hexagon Housing

Association Ltd

[2020] EWHC 2049 (TCC)

Bringing Part 8 proceedings, RSK claimed declaratory relief that, if and insofar as RSK assumed a common law duty of care to Hexagon in respect of the ground investigation and report, the nature, scope and extent of such duty was circumscribed by the limitations of liability provisions contained in RSK's proposal document. The Court was not asked to construe the meaning and effect of RSK's terms and conditions, including the limitations on liability, for the purpose of this Part 8 claim. However, the Court was asked to determine whether the nature and scope of any duty of care would be limited by those terms and conditions as a matter of principle.

Hexagon opposed RSK's claim for relief stating first of all that the use of the Part 8 procedure was inappropriate. Mrs Justice O'Farrell agreed. The problem for RSK was that the contractual matrix was in dispute and the Court did not, because Part 8 is a summary procedure, have before it the evidence needed to resolve that dispute. The Court has been asked to assume that there was no contract between RSK and Hexagon but RSK's position was that there was such a contract. The existence of a direct contract between the parties could impact the nature and scope of the duty of care at common law.

The Judge was clear that a Court cannot determine these issues in a vacuum, that is without proper findings as to the existence of any contract between the parties, the terms and conditions of any such contract and the proper construction of such terms. This could not be done at a summary hearing. In those circumstances, the claim was: "simply not suitable for determination by way of Part 8 proceedings".

Virtual hearings: part 2

Gubarev & Anr v Orbis Business Intelligence Ltd & Anr
[2020] EWHC 2167 (QB)

In last month's *Dispatch* we included a warning from a case where the failure to shut down a laptop meant that a Judge's private comments were broadcast to others on a hearing. This month, a warning not to share links to court hearings, however easy it may seem to do. Here, three days of a hearing were live streamed to a number of individuals outside the jurisdiction without the Court's permission and without any application being made for such permission. At least seven people had used a Zoom link in remote locations to access the trial. Warby J had stated in an Order that:

"I note that there is no application for transmission to participants, outside the second courtroom. But the general

position with regard to video and audio hearings in Court is that:

(1) it is permissible to make video and audio recordings and transmit them to a second courtroom, or other location in England and Wales which is designated as an extension of the Court.

(2) exceptions have been made for live streaming from the Supreme Court, Court of Appeal, and certain sentencing remarks: but

(3) otherwise, live streaming of video and audio is prohibited..."

As the hearing was not going to be conducted wholly remotely, the provisions of the Coronavirus Act 2020 which enable the Court to permit live streaming in certain circumstances were not relevant. When the case came to the hearing, because of the Covid-19 social distancing requirements and working restrictions, a second court room was used and a feed was provided to that court, using Zoom.

During cross-examination, the Judge noticed that one of the remote witnesses was on one of the video screens and that he could obviously hear what was going on. This was contrary to the prohibition made in the Order. After investigation, the Court accepted that the breach of the Order had come about because of a failure to investigate and understand what could and could not be done in compliance with the Court Order. The Court noted that a hearing:

"is not a live-streamed event unless the Court decides that it is both lawful and appropriate to make it such. It is not an event, even if it is taking place in court, that can be lawfully made open to any remote party that the participant parties, let alone the service provider, chooses to let in."

In the normal way, a judge can see and hear everything that is going on in court. For example, this means that a judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. This control should extend to the recording of images and sounds of what goes on in court and what is then used outside court. Given that, once live streaming or any other form of live transmission has taken place, that ability to maintain control will be diminished and the opportunity for misuse (via social media for example) will be correspondingly enhanced.

Accordingly the Court warned that it was critical that those who have responsibility for the conduct of proceedings understand the legal framework within which those proceedings are conducted, and that the Court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the Courts are obeyed.

Adjudication, final dates for payment

Rochford Construction Ltd v Kilhan Construction Ltd [2020] EWHC 1941 (TCC)

Rochford brought a Part 8 claim against Kilhan, in respect of Interim Payment Application 9, which Rochford disputed was ever properly due and owing to Kilhan. The adjudicator concluded that the due date of IPA 9 was 20 May 2019, being the date on which the notice was served, and that the final date for payment was 30 days from that due date, being 19 June 2019. As Rochford had neither served a Payment Notice within five days of the due date nor a Pay Less Notice no less than seven days prior to the final date for payment, the sum was owing in default. Rochford claimed that as Kilhan had not submitted an invoice until October 2019, its notice was within the period allowed for a pay less notice.

Rochford refused to pay the sums due so Kilhan brought Part 7 adjudication proceedings to recover the payment, and that payment was satisfied by Rochford shortly before the hearing. Rochford, had originally hoped to have the Part 8 proceedings heard at the same time as the enforcement proceedings, but Mr Justice Fraser refused to allow that because it would lead to an adjournment of the original hearing:

"The question therefore becomes: should the winner in the adjudication have to wait to have its opposed enforcement application heard, to a date much later in the term when the court can accommodate a whole day hearing? In my judgment, not only would that be the wrong approach, it is contrary...to the approach of the TCC. I would go so far as to say it would be wrong in principle to adopt such a course."

Rochford said that the adjudicator did not, but the Court should, give effect to the express terms of the subcontract which required (i) Kilhan to issue its Interim Payment Applications on the last day of each month; and that (ii) the final date for payment should be fixed by reference to Kilhan's service of its invoice.

Did the contract provide an adequate mechanism for determining how and when payments became due? Rochford said that there was a clear requirement in the subcontract that application for the payment must be made on the last day of each month. The contract particulars stated: "Application date end of month". That meant literally, the date at the end of the month. Rochford accepted that on the odd occasion the last day of the month might fall on a non-business day, but the proper construction of the subcontract would be that any application would potentially need to be submitted either on the last business day of any month or in good time to enable the last business day to be met.

Mrs Justice Cockerill felt that this argument depended "upon reading far too much" into a phrase which was not, absent additional material, clear and unambiguous. Did it mean "on the end of the month", "by the end of the month", "after the end of the month", "the final business day" or "the final calendar day"? What if the final day of the calendar month is not a business day? The parties' own dealings did not help as they demonstrated applications being submitted after the end of the month. Further, the context in which the wording appeared was under a "brief description of subcontractor works to be carried out". That, said the Judge, was "not really a part of the contract to which one would look naturally for key terms".

This mattered because the term in question was not simply a term which said "submission end of month" but a term which was in its nature a condition precedent in the sense that if Kilhan did not submit by such a date, the claim in respect of this period could not be brought at this time".

The contract also contained the wording: "payment terms thirty days from invoice as per attached payment schedule" and "valuation monthly as per attached payment schedule end of month". No payment schedule was produced, but Mrs Justice Cockerill considered that the words "end of the month" were best seen in this context as pertaining to the period for the application rather than as a condition precedent to the entitlement to make a claim for the period". This meant that the Scheme applied. The due date implied by the Scheme is the date of the making of a claim by the payee. This meant that any payment notice had to be issued not later than five days after the due date.

Given the reference in the contract to the invoice, the Judge considered that it was "tolerably clear" that the parties contemplated the invoice and payment certificate coming together sometime after the claim was notified, and that that would be at or close to the due date. Thus, the 30-day provision seemed to have been intended as a final due date provision. However, practically, given the absence of the payment schedule, the Judge did not consider that the provision could survive. The Judge stressed the need for certainty and the need for the scheme of the parties to be workable.

So when was Kilhan to issue its invoice? The Judge thought that it was "counterintuitive to put the stress on [an] invoice which does not form the necessary constituent part of the statutory Scheme", in order to excuse the non-service of the payment certificate, which does form part of the statutory Scheme. Absent a proper date for the payment certificate, it would be set at five days after the due date. Here, given the absence of any provision for the timing of the invoice, apart from the non-existent schedule, the Scheme's provisions effectively have to act as a substitute because what the parties had was unworkable:

"Pegging the final date to service of an invoice, which is itself pegged to a payment certificate, is simply impractical."

The Judge accepted, albeit "with some diffidence", that properly construed, section 110 of the HGCRA required a final date for payment provision to fix a time period, albeit that that might itself depend on an event to fix the due date. While a due date can be fixed by reference to an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism. This was important as the payer must be certain how much time they had in which to serve a Pay Less notice, and the final date for payment was the critical date in that step.

It may therefore be prudent to check whether the final date for payment in your contract is fixed by reference to a set period from the due date and not by another event, for example the issue of an invoice.

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.

Edited by ***Jeremy Glover, Partner***
jglover@fenwickelliott.com

Tel: + 44 (0)20 7421 1986

Fenwick Elliott LLP

Aldwych House
71 - 91 Aldwych
London WC2B 4HN



www.fenwickelliott.com