



2008 CONSTRUCTION LAW UPDATE

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A New Perspective on *Hadley v Baxendale*?

1. The House of Lords' recent decision in *Transfield Shipping v Mercator Shipping* [2008] 3 WLR 345 has, at the very least, added a gloss to the rule in *Hadley v Baxendale*. Each of the five Law Lords gave opinions in *Transfield* and not all of them agreed on the reasoning (although they did agree on the result). However, at least three of the Law Lords in *Transfield* found that before considering whether a type of damage falls within either of the two limbs of *Hadley v Baxendale*, one must first decide whether the loss for which compensation is sought is of a kind or type for which the contract-breaker ought fairly to be taken to have accepted responsibility (see Lord Hoffmann at paragraphs 12 to 23, Lord Hope at paragraphs 30 and 32, Lord Rodger at paragraph 63¹ and Lord Walker at paragraphs 78 and 87).

2. Although a shipping case, this will be highly relevant to a number of construction cases including (for example):
 - (1) Claims by developers that they have suffered loss arising from a fall in the property market as a result of a contractor's delay;

 - (2) Claims by contractors that they have lost business as a result of late payment.

Reinwood v Brown

3. This dispute has spawned two sets of appeals arising out of a contractor's determination of his contract.

¹ It is not clear from paragraph 63 whether Lord Rodger agrees with this additional gloss or not.

4. The first appeal was based on the fact that the contractor contended that he was entitled to determine the contract on the grounds that the employer was in default by failing to pay a sum due by the final date for payment. It went to the House of Lords [2008] 1 WLR 696 who held that an extension of time did not have retrospective effect so as to render invalid a previously issued withholding notice (seeking to deduct liquidated damages from an interim payment) and an interim payment made in accordance with it.
5. The second round of appeals has so far made it to the Court of Appeal [2008] EWCA Civ 1090. In the second round, the contractor contended that it was also entitled to determine the contract based on an earlier default on the part of the employer. The issues in the appeal, turning on the validity of VAT assessments and objections to VAT assessments are worth noting but not much more!

Non-Payment as Repudiatory Breach

6. Note the Court of Appeal's decision in *Alan Auld v Rick Pollard* [2008] BLR 419 where an engineer terminated a consultancy agreement for consistent late payment of his fees. This case contains a very useful summary of the relevant authorities. Further, at paragraph 20, Tuckey LJ stated:

“The context in which the breaches in this case occurred is important. This was not a transaction in which the parties had a raft of mutual obligations to perform. Dr Pollard was to do the work for the authority through the claimant and the claimant was to pay him for it. It was Dr Pollard's only source of earned income. Although this was not a contract of employment, the analogy is a close one. The judge found that the term as to the time for payment lay at the heart of the agreement. The breaches of this term were substantial, persistent and cynical. Not one payment was made in time; most were made inordinately late; by the end of May 2006 over £21,000 was owing. These breaches occurred against a

background of repeated complaints by Dr Pollard and broken promises by the claimant. Dr Pollard was entitled to assume that he would be treated in the same way for the remainder of the project which still had a year or so to run. As Dr Pollard said he was being used to fund the claimant's business. The judge suspected that this was because he was seen as a soft target. In these circumstances, I think the judge was perfectly entitled on the facts as she found them, to conclude that the claimant was in repudiatory breach of the agreement, which entitled Dr Pollard to bring it to an end, as he did on 7 June 2006."

How could we ignore Wembley?

7. The great dispute between Multiplex and Cleveland Bridge finally reached a final decision from Jackson J [2008] EWHC 2220 (TCC). Chapter 4 of the Judgment is useful because it addresses the not uncommon situation that arises in construction cases where non-expert witnesses purport to give opinion evidence. At paragraph 672, Jackson J stated:

"in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience. For example, an engineer after describing the foundation system which he designed may (and in practice frequently does) go on to explain why he believes that this was appropriate to the known ground conditions. Or an engineer brought in by a claimant to design remedial works (which are subsequently challenged as excessive) may refer to his experience of rectifying comparable building failures in the past. For example, such evidence may be given in cases about concrete failure through ASR (a world wide problem)."

8. The Judge's decision on costs is also noteworthy [2008] EWHC 2280 (TCC). It deals with the common situation where one party wins on a number of issues but may not necessarily be the overall winner.

Extension of Time Claims

9. The dominant cause approach was endorsed in *Steria v Sygma* [2008] BLR 79, paragraph 31.

10. However, a recent Scottish decision appears to have taken the dominant cause approach one step further in that the Court of Session Outer House has found that it is still possible to grant an extension of time in respect of a Relevant Event even if (i) that Relevant Event occurs after an event which is not a Relevant Event takes place and (ii) the non-Relevant Event causes delay. This case is *City Inn v Shepherd* [2008] BLR 269 (see, in particular, paragraphs 16-22).

11. There are a number of important points which arise out of this judgment:
 - (1) It is still important to consider whether the Relevant Event caused delay to the critical path (see, for example, paragraphs 49-51 and 80-85 of *City Inn* where the Court considered causation on the facts and whether particular Relevant Events had in fact caused delay and, if so, how much delay had been caused). *City Inn* does not permit some form of hypothetical analysis of delay; it still requires consideration of the facts.

 - (2) Even if it can be established that the Relevant Event occurred after the event for which the contractor was not responsible, it still has to be established that the Relevant Event was a concurrent cause of delay. The mere incidence of a Relevant Event will not be enough to entitle a contractor to an extension of time in circumstances where it cannot be established that the Relevant Event impacted upon the critical path (see, for example, paragraphs 157 to 158).

- (3) *City Inn*, being a decision of the Scottish Courts, is not binding on the English Courts, although it is highly persuasive. Accordingly, it remains to be seen whether the concept of apportionment will be adopted into English Law. Nevertheless, I do not consider *City Inn* to be particularly controversial especially because it ultimately turns on an assessment of what is fair and reasonable and still requires the Architect to consider the Relevant Event's causative potency.

Costs of an Arbitration which took place without jurisdiction

12. *Crest Nicholson v Western* [2008] BLR 426 is a useful decision for two reasons:

- (1) It contains detailed consideration of the NHBC Buildmark scheme; and
- (2) Akenhead J also held that the court has no jurisdiction to make any order in relation to costs incurred by the parties in abortive or invalid arbitration proceedings, since there is no statutory power to do so.

13. This decision should have wider application, for example, in connection with adjudications.

Procurement

14. In *Letting International v LB Newham* [2008] EWHC 1583 (QB), Silber J considered an argument that the London Borough of Newham had acted in breach of the Public Contracts Regulations 2006. The Judgment contains a very useful review of the Regulations and the relevant domestic and European case law. It makes clear that:

- (1) The requirement of transparency means that all criteria used to enable a contracting party to determine which tender will be accepted have to be disclosed.
- (2) In resisting a claim for failure to comply with Regulation 30, it is not sufficient for the authority to establish that disclosure would have made no difference to the outcome. A claimant can bring a claim if as a result of a failure to disclose the relevant criteria, there was the loss of a significant chance of obtaining the contract.

Pre-Action Protocol

15. Do not apply the Pre-Action Protocol too literally. The Court takes a pragmatic approach to compliance with the Pre-Action Protocol. It is only concerned with matters of substance and will not concern itself with matters of technical non-compliance. See the decisions of Akenhead J in *Orange v Hoare Lea* [2008] EWHC 223 (TCC) and *T J Brent v Black & Veatch* [2008] EWHC 1497 (TCC).

Liability for the “Borrowed Servant”

16. In *Biffa Waste v Maschinenfabrik Ernst Hese GMBH* [2008] EWCA Civ 1257, the Court of Appeal considered an argument that the employees of one company had effectively been transferred to another company so that the transferee company was vicariously liable for the acts of the employees, rather than their actual employer. This is a useful decision because it considers the issues that arise in this area in a construction context. In particular, the Court of Appeal made plain that the mere fact that an architect may

supervise the work of a contractor's employees does not mean that he has "control" over them for the purposes of becoming vicariously liable for their acts, particularly where they are skilled labourers; exceptional facts are required for a contractor to be vicariously liable for the negligence of his sub-contractor.

And Finally...

17. In *Leriche v Maurice* [2008] UKPC 8, the Privy Council confirmed what we all hopefully knew already in the context of claims for interest. The general principle is that a party who has wrongfully withheld money due to another ought not in justice to benefit by having that money in his possession and enjoying its use, when that money ought to be in the possession of another who is entitled to its use. Building contracts form a classic case of this kind, and prima facie interest should be awarded on moneys found due to a claimant unless there is some reason to the contrary in the circumstances of the case.

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