That was the year that was

Ian Pease takes a look at the major cases of 2007

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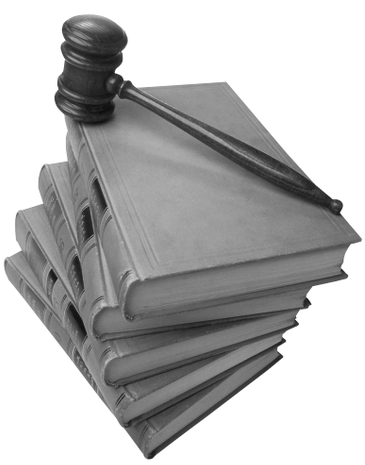
It is perhaps somewhat premature to write a 'year in review' column in November. Nonetheless, 2007 has already provided a veritable feast of interesting construction cases that deserve a second look.

Not 'on message'

Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd [2007], a case I commented on back in May, was without a doubt the case of the year for a number of reasons. It was a Lords decision with numerous controversial aspects, which dealt with a Housing Grants, Construction and Regeneration Act 1996 (the Act) adjudication and involved a standard form building contract (the JCT Standard Form of Building Contract with Contractor's Design 1998 edition).

The facts involved a construction company going into administration but not before an interim payment had become 'finally due' to it, the employer not having served the relevant notices under the Act (ss109, 110 and 111). The controversy surrounded whether a term of the contract could reverse the position that would otherwise subsist.

The decision of the House was distinctly 'off message', going as it does against the tenet that the lower courts have been following since the inception of the Act, that contract terms are not to be used to circumvent its effect. The decision was that, upon determination of the contract, the 'finally due' interim payment was no longer payable because of the terms of the contract. Some thought that it was a decision very much 'on its own facts' (related to insolvency), but of course that too is a matter of opinion, and there has already been a follow-on case (*Pierce Design International Ltd v Johnston* [2007] – see below), which in itself merits a place in the top ten not merely by association, but also because of Judge Coulson's acknowledgement that he thought the principle the Lords had established was sufficiently wide to be binding upon him on different facts. Judge Coulson managed a nifty sidestep, but at the cost of giving the original judgment greater kudos, thereby ensuring that the argument is sure to resurface.



Watch this space

Pierce Design involved exactly the same clause as in *Melville Dundas*, but the facts were distinguishable (the contractor was not insolvent and 'withholding notices' could have been served). However, the judge, eschewing this route, commented that *Melville Dundas* was binding upon him. He did, in the end, find a way of making the payment to the contractor, but this was done by way of interpreting the contract and not by any finding that no clause could override the Act. The starting point was that JCT clause 27.6.5.1 was effective (*Melville Dundas* was binding). However, that clause has a proviso that the contractor can still be paid its money in respect of 'amounts properly due to be paid' and 'which the employer has unreasonably not paid' if 'those amounts had accrued 28 days or more before the determination of the contract'. The judge found that, no withholding notices having been served, the sum was unreasonably not paid and, on the facts, the right to payment had accrued more than 28 days before the determination. Hence the proviso was effective.

Déjà vu

Construction lawyers will remember the 'complex structures' argument that the House of Lords raised in relation to the recoverability for economic loss (*D & F Estates Ltd v Church Commissioners for England* [1989]) only to later pour scorn on the idea (*Murphy v Brentwood District Council* [1990]). One wonders if the Lord Hoffmann comment in *Melville Dundas* that '[the Act] must be construed in a way which is compatible with the

operation of [the contract]' will find a similar retraction at some point in the future (of course, after many cases have been fought over the point).

Time gentlemen please...

Probably because of adjudication's compressed nature, the obligations as to its starting and finishing have been much debated this year. The controversy as to the finish (the delivery of the adjudicator's decision) dates back to 2003 when Judge Seymour decided in *Simons Construction Ltd v Aardvark Developments Ltd* [2004] that even if the decision was given out of time, it was still binding and enforceable by the court. However, in the following year the Scots' Inner House took a more rigorous view of time limits (*Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005]), ruling out a decision taken out of time. The scene was therefore set for a trend-setting decision south of the border. In fact the first in the series came at the end of 2006 when Judge Coulson decided[1] that a decision given out of time was a nullity (unless this was waived) and therefore could not be enforced. That brace of decisions was adopted, after the turn of the year, by Judge Havery[2] with a brace of his own. The final nail in the coffin of laxity was hammered by Judge Thornton (*Mott MacDonald Ltd v London & Regional Properties Ltd* [2007]) in dispatching not only a late but also a biased decision.

Prevention is better than cure (but not for employers)

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] is another major judgment arising from the multifarious disputes on the Wembley Stadium. In essence, the case revolved around the trade-off that the law makes between an employer's right to liquidated damages and a contractor's rights to have its time extended for completion if the employer causes it delay. These corresponding rights should be dealt with in the contract, but what if the delaying act is not covered by the extension of time clause? And, in particular, what happens if the contractor has not complied with the contractual notice provisions in time? The extension of time cannot then be allowed. Is there then a delay that is down to the employer but for which no extension can be given? Is time then 'at large', and are liquidated damages then not available to the employer? An Australian case (*Gaymark Investments v Walter Construction Group* [1999]) appeared to favour this scenario. However, Jackson J in *Honeywell* was having none of it:

> Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England.

Notes

(1) *Hart Investments Ltd v Fidler & anr (No 1)* [2007]. See also *Cubitt Building & Interiors Ltd v Fleetgrade Ltd* [2006].

(2) *Epping Electrical Company Ltd v Briggs and Forrester (Plumbing Services) Ltd* [2007] and *Aveat Heating Ltd v Jerram Falkus Construction Ltd* [2007].

However, as I noted in an article on the case in April, the choice for the judge in a *Gaymark*-type situation lies between over-compensating the con-tractor by ruling 'time at large' and over-compensating the employer with some liquidated damages that, in equity, it should not get. In the final analysis *Honeywell*, albeit that contractual notice requirements are important for all the reasons that Jackson J outlines, fails to adequately address this collision of legal principles.

Lord here comes the flood

This was not a year for droughts. Quite the contrary, there are two cases in the top ten on flooding. The first (a Davies Arnold Cooper case: *Trustees of the Tate Gallery v Duffy Construction Ltd* [2007]) arose from a flood at the Tate gallery. The court had to analyse the common contractual terms 'flood' and 'bursting or overflowing of water tanks, apparatus or pipes' that appear in the JCT contract's insurance provisions.

In short, when considering bursting, the following are relevant factors:

(i) whether the escape of the water was caused by internal pressure;

(ii) whether the pipe had been broken; and

(iii) whether the escape of the water had been a sudden or violent incident.

From a practical insurance and property law point of view, *Duffy Construction* was an important case, but perhaps the more interesting inundation was *Pearson Education Ltd v The Charter Partnership Ltd* [2007]. Here an architect had specified an inadequate drainage system – that much was admitted. However, by the time of the flood in question this had been already discovered by the previous owner of the building (P1), which did not let the current owner (P2) know. There was then another flood. Was the damage caused to the current owner's property derived from the original negligence by the architect?

This question goes all the way back to the tests set out in the father of all tort cases, *Donoghue v Stevenson* [1932]. There the House of Lords said products should 'reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination'. That is, where a negligent defect is patent the defendant is not liable in negligence (there is no duty of care). This accords with the co-related legal principle of *novus actus interveniens* (a new intervening act breaking the chain of causation).

The Court of Appeal was unconvinced that the architect should be absolved from his liability merely because:

- it was reasonable to expect an occupier (P2) to inspect a property before entering into occupation (the duty of care point); or
- an occupier should reasonably have been expected to carry out an inspection (that would have revealed the defect) and its failure to do so (or to do so with reasonable skill and care) broke the chain of causation (the *novus actus* point).

On the facts, the architect was not quite able to make out its case; the missing link was to whom the defect was patent, in this case P1 and not P2. By analogy with *Donoghue v Stevenson*, it was not the drinker of the lemonade (P2) that knew of the snail, it was just the café owner (P1).

Much the same arguments has arisen in *Baxall Securities Ltd v Sheard Walshaw Partnership* [2002], and the court in *Pearson* has suggested that the matter was appropriate for the House of Lords' consideration.

This is the year that will be…

The Pandora's Box that *Melville Dundas* has turned up in construction adjudication is sure to be tested in the coming year.

The other striking trend is the willingness of the courts to withdraw from the field of play. Adjudication was instigated to deal with the problem of who holds the money on an interim basis. It is now being used to decide complex money and time disputes in the final account. Just listen to Judge Coulson in *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2007]:

> This is a final account dispute... it was suggested that this dispute would be too complex for an adjudicator. I am bound to say that I reject that submission completely. There is nothing in the papers to support it. On the contrary, it seems to me that this was a relatively common type of construction dispute which an adjudicator would have no difficulty in grasping and deciding. ■

Aveat Heating Ltd v Jerram Falkus Construction Ltd
(2007) 113 Const LR 13

Baxall Securities Ltd v Sheard Walshaw Partnership
[2002] BLR 100

Cubitt Building & Interiors Ltd v Fleetgrade Ltd
(2006) 110 Const LR 36

D & F Estates Ltd v Church Commissioners for England
[1989] AC 177

DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd
[2007] All ER (D) 43 (Jul)

Donoghue v Stevenson
[1932] All ER 1

Epping Electrical Company Ltd v Briggs and Forrester (Plumbing Services) Ltd
[2007] 1 BLR 126

Gaymark Investments v Walter Construction Group
(1999) NTSC 143

Hart Investments Ltd v Fidler & anr (No 1)
[2007] BLR 30

Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd
[2007] 1 WLR 1136

Mott MacDonald Ltd v London & Regional Properties Ltd
(2007) 113 Const LR 33

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)
[2007] 1 BLR 195

Murphy v Brentwood District Council
[1990] 2 Lloyd's Rep 467

Pearson Education Ltd v The Charter Partnership Ltd
[2007] 1 BLR 324

Pierce Design International Ltd v Johnston
[2007] BLR 381

Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd
[2005] 1 BLR 384

Simons Construction Ltd v Aardvark Developments Ltd
[2004] 1 BLR 117

Trustees of the Tate Gallery v Duffy Construction Ltd
[2007] 1 BLR 216