Ian Pease provides an overview of the important cases and judicial highlights of 2008

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A triumph of certainty over equity

Reinwood Ltd v L Brown & Sons Ltd [2008]

First is a case I wrote about in March: *Reinwood Ltd v L Brown & Sons Ltd* [2008]. It leads for two reasons: first because it concerns payment (the famous 'lifeblood of the enterprise' – Lord Denning in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974]) and secondly because it is the House of Lords dealing with a construction matter (which is fairly rare).

The facts, briefly, were these: the Joint Contracts Tribunal (JCT) 1998 provided for liquidated and ascertained damages (LADs) if the contractor had not reached practical completion by the completion date, as extended. These could be deducted from any payment to the contractor once two conditions were satisfied. First the architect had issued a certificate of non-completion, and secondly the contractor had been notified of the deduction (clause 24.2.1).

The contractor missed the completion date and the architect immediately issued a certificate of non-completion. When the architect issued the next interim certificate (number 29) the employer served the contractor with a notice under clause 24.2.1 and also a withholding notice under clause 30 of the contract, which, in compliance with s111 of the Housing Grants, Construction and Regeneration Act 1996, was an 'effective notice of intention to withhold payment'. Then, just before the final date for payment of interim certificate 29, the architect granted an extension of time, which would have the effect of substantially reducing the LADs. The question was whether the employer's withholding notice remained effective despite the fixing of a new completion date and the cancellation of the certificate of non-completion on which the withholding notice was based.

In the judgment of the House of Lords (concurring with the Court of Appeal) the withholding notice remained effective notwithstanding the extension of time and the cancellation of the certificate of non-completion. The judgment can be regarded as a fairly straight bat given that clause 24.2.3 states:

> ... notwithstanding the issue of any further certificate of the Architect under clause 24.1 any requirement of the Employer which has been previously stated in writing in accordance with Clause 24.2.1 shall remain effective unless withdrawn by the Employer.

However, the decision has caused controversy in that for the sake of a few days the extra cash flow to the contractor was retarded. It seems that the House of Lords regarded certainty more highly than the precept of cash flow.

Too many secrets

Emm G Lianakis AE & ors v Dimos Alexandroupolis & ors

Attempting to be consistent in my criteria, my second choice comes from the European Court of Justice: *Emm G Lianakis AE & ors v Dimos Alexandroupolis & ors* [2008]. It is not just the level of the court that makes it noteworthy but also the fact that it relates to public procurement and specifically to Council Directive 92/50/EEC, concerning the coordination of procedures for the award of public service contracts. Given that much of the procurement that will take place during the current downturn will be generated

by public bodies, these regulations will be of some importance.

Article 32 of the Directive requires contracting authorities to ensure that there is no discrimination between different service providers. Article 36 then sets out the criteria on which a contracting authority may base the award of contracts, including:

> Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the contract notice the award criteria which it intends to apply, where possible in descending order of importance.

The Municipal Council of Alexandroupolis did this when it issued its contract notice. However, later, during the evaluation procedure, the 'Project Award Committee' further defined the weighting factors and set out sub-criteria. The unsuccessful tenderer argued that award criteria could only be established at the outset of the tender process and could not be further defined during evaluation.

The Court found that the Directive did not allow the contracting authority, during its tendering procedures, to later stipulate such additional weighting factors and sub-criteria that had not been set out in the contract notice.

Transparency is the name of the game here; the Directive was brought in as part of the Single Market reforms of the early 1990s to ensure that local rules and regulations did not skew competition across the European Community. This case is a welcome reminder that the precept of transparency still holds good.

Lord, here comes the flood

Tyco Fire & Integrated Solutions (UK) v Rolls-Royce Motor Cars Ltd [2008]

April is the wettest month, and so it seemed this year, with a substantial Court of Appeal decision on the effect of a joint names insurance policy when there has been a flood resulting from an (assumed) act of negligence. In *Tyco Fire & Integrated Solutions (UK) v Rolls-Royce Motor Cars Ltd* [2008] the policy required that:

> The Employer shall maintain, in the joint names of the Employer, the Construction Manager and *others* including, but not limited to, contractors, insurance of existing structures, and in the name of the Employer, the Construction Manager, the Contractor and his sub-contractors of any tier, insurance of the Works. [Emphasis added.]

The contractor maintained that it was covered under this clause and that, on

the basis of existing authority (the case of *Co-operative Retail Services Ltd & ors v Taylor Young Partnership & ors* [2002]), this relieved it from any claim for negligence.

The first question was therefore whether the clause covered the contractor. The Court concluded (rather strictly, it must be said) that it did not. In one sense this case does not lay down any overriding principle, nor can it override *Co-operative Retail Services* in relation to the wording in the JCT standard form. Nevertheless it is likely to lead to greater litigation in the future by co-insureds under joint names policies.

'Substantial, persistent and cynical'

Tesco Stores Ltd v Constable & ors [2008]

Also meriting at least a footnote is the April case of *Tesco Stores Ltd v Constable & ors* [2008]. This is of interest in relation to public liability insurance since it holds that the losses covered must arise from a tort (rather than a contract) and even then will not cover economic losses sustained. As Tuckey LJ succinctly put it:

> A public liability policy provides cover against liability to the public at large. By contrast private liability arises from contracts entered into between individuals. Public liability in this sense arises in tort; it does not and cannot arise only in contract. As a general rule a claim in tort cannot be founded upon pure economic loss.

That is how Tuckey LJ referred to the failure to pay for services in the case of *Alan Auld Associates Ltd v Rick Pollard Associates & anor* [2008]. This was one of those cases in which the parties are arguing over whether the contract has been justifiably terminated for repudiatory breach. I highlight it because, in these financially hard times, any judgment by the Court of Appeal concerning payment is important. Of course terminating while alleging repudiation by the other party for failure to pay (or other alleged fundamental breach) is a high-stakes game. Get it wrong and the boot is on the other foot – you are in breach yourself. This is what was alleged against Dr Pollard in this case.

The parties had entered into an oral contract where it was not agreed that time of payment was of the essence of the contract. However, the judge found, among other things, that the claimant knew that this contract was Dr Pollard's only source of income and this allowed Tuckey LJ to construe the relationship as analogous to that between employer and employee, where a failure to pay by the employer will usually be held to be repudiatory. When he set this background against the 'substantial, persistent and cynical' failures to pay on time that extended over two years, the court could find that the cumulative effect of the breaches was sufficiently serious to justify the innocent party in bringing the contract to a premature end.

This was a high-stakes decision that went with the underlying merits. The novelty was in Tuckey LJ's analogy to an employment relationship, which perhaps allowed an easier finding of repudiation. Three scenarios can give rise to a repudiation:

(1) where the parties have agreed that any breach of the term will justify termination;

(2) where one contracting party walks away from the contract and shows an intention no longer to be bound; and

(3) where the cumulative effect of the breaches that have taken place is sufficiently serious to justify the innocent party in bringing the contract to a premature end.

Of these, by far the most certain is the first and the recommendation must be to have a written contract and to include such a term.

The tip of the iceberg: caveat practitioner

Hedrich & anor v Standard Bank London Ltd & anor [2008]

Hedrich & anor v Standard Bank London Ltd & anor [2008] is remarkable not for the Court of Appeal's decision itself but rather for an unseen change that is sweeping litigation and particularly disclosure – practitioners should take note. It goes by the abbreviation of ESI (electronically stored information) and, having just undertaken a large disclosure exercise myself, I have come to appreciate its importance first-hand, together with the new techniques involved.

In times past a solicitor could discharge their disclosure obligation to the court by collecting, reviewing and disclosing their client's hard copy files. I would suggest that this is now the vast minority of the relevant material. Questions should now focus on computer networks, hard drives and backup tapes. Failure to address these will lead the practitioner into the problems that Mr Zimmer faced in this case, where the bank applied for a wasted costs order against him as solicitor for one of the parties to the litigation. The case was unsuccessful, in that the bank was unable to show a *prima facie* case of negligence against him. It must be said that the bank's choice of a summary remedy such as a wasted costs order was probably a tactical error. However, that is by-the-by, and the truly concerning feature of the case is that the solicitor had failed to address in a proper and timely manner the need to enquire after the client's ESI. As a reminder to practitioners, the solicitor's obligation is set out by Sir Robert Megarry VC in *Rockwell Machine Tool Co v EP Barrus (Concessionaires)* [1968]:

> Accordingly, it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at

> an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.

Sir Andrew Morritt VC in *Douglas & ors v Hello! Ltd & ors (No 3)* [2003] made it clear that this applies equally to ESI.

A case of double cross?

Yeoman's Row Management Ltd & anor v Cobbe [2008]

Yeoman's Row Management Ltd & anor v Cobbe [2008] sounds like a case of both sides in the transaction being 'commercially aware'. On the one side were property owners eager to develop their land, on the other an experienced property developer. It was agreed orally that the developer, at its own expense, would apply for planning permission to re-develop; that on the grant the property would be sold to the developer for an agreed price; that the developer would then build out in accordance with the planning permission; and finally, on sale of the units, the developer would pay to the former owners a certain percentage of the gross proceeds of sale. The parties fell into disagreement when, after planning permission, the owners sought to 're-negotiate' the agreement. However, as Lord Scott remarked, there was not a fully finalised deal, and the developer expected, after the grant of the planning permission, that there would be a:

> ... successful negotiation of the outstanding terms of the contract for the sale of the property to him... and that a formal contract, which would include the already agreed core terms... as well as the additional new terms agreed upon, would be prepared and entered into.

The question was, given that there was no contract in writing (see s2(1) of the Law of Property (Miscellaneous Provisions) Act 1989: 'A contract for the sale or other disposition of an interest in land can only be made in writing'), how could the developer frame his claim?

He primarily chose proprietary estoppel and/or constructive trust and was successful both at first instance and before the Court of Appeal. However, the House of Lords took a different view. Proprietary estoppel and constructive trust claims are both claims to a proprietary interest in the property. Lord Scott characterised the estoppel thus:

> An 'estoppel' bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a 'proprietary' estoppel – a sub-species of a 'promissory' estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action.

Alan Auld Associates Ltd v Rich Pollard Associates & anor
[2008] EWCA Civ 655

Biffa Waste Services Ltd & Anor v Maschinenfabrik Ernst Hese GmbH & ors
[2008] EWCA Civ 1257

Co-operative Retail Services Ltd & ors v Taylor Young Partnership & ors
[2002] UKHL 17

Douglas v Hello! Ltd & ors (No 3)
[2003] EWHC 55 (Ch)

Emm G Lianakis AE & ors v Dimos Alexandroupolis & ors
C-532/06 (ECJ, 24 January 2008)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd
[1974] AC 689

Hedrich & anor v Standard Bank London Ltd & anor
[2008] EWCA Civ 905

Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd
[1934] 1 KB 191 CA

Read v J Lyons & Co Ltd
[1947] AC 156

Reinwood Ltd v L Brown & Sons Ltd
[2008] UKHL 12

Rockwell Machine Tool Co v EP Barrus (Concessionaires)
[1968] 1 WLR 693

Tesco Stores Ltd v Constable & ors
[2008] EWCA Civ 362

Tyco Fire & Integrated Solutions (UK) v Rolls-Royce Motor Cars Ltd
[2008] EWCA Civ 286

Yeoman's Row Management Ltd & anor v Cobbe
[2008] UKHL 55

The problem was that Lord Scott could not find the fact or facts that the owners were said to be barred from asserting or denying. Legally the agreement was unenforceable for want of writing, so the owners could legitimately make that assertion. The owners could also legitimately assert that the developer lacked any proprietary right in the land. Lord Scott concluded that proprietary estoppel requires 'clarity' as to these matters if it was not to 'lose contact with its roots and risk becoming unprincipled and therefore unpredictable'. The unconscionable behaviour of the owners was insufficient by itself to found such a claim.

Likewise a constructive trust did not fit the facts of this case, arising, as it often does, from a joint venture involving the acquisition of a piece of land and its exploitation where, for example, one of the joint venturers subsequently seeks to retain the land for their own benefit. Here the land was never acquired in such a manner.

In reality Lord Walker summed it up succinctly:

> Mr Cobbe's case seems to me to fail on the simple but fundamental point that, as persons experienced in the property world, both parties knew that therewas no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability.

Hence the developer was thrown back on his alternative personal claim for unjust enrichment – where he was successful. However, the question was how was the *quantum meruit* was to be measured. Was it the difference in the value of the land now that planning permission had been obtained? Lord Scott thought not:

> The planning permission did not create the development potential of the property; it unlocked it. The appellant was unjustly enriched because it obtained the value of Mr Cobbe's services without having to pay for them.

Truly, madly, extremely hazardously

Biffa Waste Services Ltd & anor v Machinenfabrik Ernst Hese GmbH & ors [2008]

The last remarkable appellate case of the year is *Biffa Waste Services Ltd & anor v Maschinenfabrik Ernst Hese GmbH & ors* [2008]. Put shortly, the dispute arose from a fire caused during construction work to a waste disposal depot. A supplier of part of the plant (Outokumpu Technology) had retained some welders to undertake welding as part of its installation. The trial judge had held Outokumpu liable on two bases for the negligence of those welders. First, the welding activities were 'ultra-hazardous' and hence, under the principle in *Honeywell & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934], Outokumpu had become liable for the negligence of its independent contractors. Secondly, because Outokumpu had taken on an obligation to supervise the welding work, the welders had become 'borrowed employees' and as such Outokumpu was vicariously liable for their negligence.

The decision is of obvious interest in the construction field, with its propensity for sub-contracting and its (potentially) 'ultra-hazardous' activities. Few would want to take on the vicarious liabilities of apparently independent contractors.

The Court of Appeal held that the trial judge had wrongly equated supervision with control. The right to supervise did not ordinarily import an entitlement to instruct how to do work, and this was particularly the case where the labour was skilled – as here. Further, only in exceptional cases would liability arise for the negligence of a sub-contractor.

Turning to the rule in *Honeywell* (liability for ultra-hazardous acts) the Court found this principle 'anomalous' and so unsatisfactory that it ought to be confined to 'truly exceptional' situations. 'Ultra-hazardous' should be given a very narrow construction, and should be applied only to activities that are exceptionally dangerous whatever precautions are taken. As the Court said:

> Much in life is 'inherently dangerous' even crossing the road, unless precautions are taken. That is particularly true of work on a construction site. What principled basis is there, therefore, for distinguishing between operations that are not inherently dangerous and those that are? We would respectfully echo the wise words of Lord Macmillan in *Read v J Lyons & Co Ltd* [1947]. Commenting on the suggested distinction between activities dangerous in themselves and those that are not, he said, at 172:
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> 'In truth it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. In my opinion it would be impracticable to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter. In a progressive world things which at one time were reckoned highly dangerous come to be regarded as reasonably safe. The first experimental flights of aviators were certainly dangerous but we are now assured that travel by air is little if at all more dangerous than a railway journey.'

Hence, if not completely dead, the principle in *Honeywell* must definitely only be applicable to a form of activity that is exceptionally dangerous whatever precautions are taken. The construction industry can, I think, breathe a sigh of relief. At least until the time comes to build the next generation of nuclear reactors… ■