Follow my leader

Pierce Design International Ltd v Johnston [2007]

Ian Pease is an associate partner at Davies Arnold Cooper, he specialises in construction and engineering law

Precedent is a marvellous (and flexible) thing. As readers will know, just before the summer break the construction industry was mulling over the effects of *Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd* [2007], the first House of Lords decision on the Housing Grants, Construction and Regeneration Act 1996. The fight came down to the question: did the Act curtail the parties' freedom of contract, or were they still free to contract out of its provisions?

In the past nine years the lower courts had, under the Court of Appeal's close scrutiny, been following the first line. Indeed, decisions going in the opposite direction had been swiftly snuffed out on appeal. For example, in *Bovis Lend Lease Ltd v Triangle Development Ltd* [2003] HHJ Anthony Thornton QC had considered the effect of almost exactly the same clause as in *Melville Dundas*. In *Bovis* one of the principal questions was whether the employer was entitled to withhold payment against an adjudicator's decision on the ground that the employment of the contractor had been determined. He held that where the contractual terms clearly had the effect of allowing a deduction from 'a payment directed to be paid by an adjudicator's decision, those terms will prevail'.

This idea – that effectively the parties could contract out of the effects of the Act – was firmly stamped upon in the Court of Appeal decision in *Ferson Contractors Ltd v Levolux AT Ltd* [2003], where it was held that the contract must be construed so as to give effect to the intention of Parliament that adjudicators' decisions must be complied with. Hence any clauses that offend against this principle must be struck down if they cannot be made congruent with that intention.

Of course, these cases relate to contractual opt-out in relation to adjudicators' decisions, whereas *Melville Dundas* was an insolvent company's receiver seeking payment under an interim certificate against which the employer had issued no 'withholding notice' (see s111 of the Act). However, the question is the same: which is to prevail, the contractual provision or Parliament's requirements as expressed in the Act?

We now have the first of the follow-on cases from *Melville Dundas*, namely HHJ Coulson QC's decision in *Pierce Design International Ltd v Johnston*, decided in July. It shuffles the factual scenario in that the contractor was not insolvent, rather the contract had merely been determined by the employer for alleged failure to perform. Nevertheless, the contract (a JCT 1998 Standard Form With Contractor's Design) contained the same clause as in *Melville Dundas* dealing with the financial consequences that then follow:

> **27.6.5.1** Subject to clauses 27.5.3 and 27.6.5.2, the provisions of this Contract which require any further payment or any release or further release of retention to the Contractor, shall not apply, provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the Contractor of any rights under this Contract in respect of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the Employer could first give notice to determine the employment of the Contractor or, where clause 27.3.4 does not apply, which have accrued 28 days or more before the date of determination of the employment of the Contractor.

The Court had to decide two issues: first the *Melville Dundas* point, ie whether this clause was in conflict with

You can't teach an old rule new tricks
Ruttle Plant Hire v Secretary of State for the Environment, Food and Rural Affairs [2007]

The rule in *Henderson v Henderson* dates back to 1843 and exists for good commercial and legal reasons. It is sometimes called issue estoppel or *res judicata*. It was stated by the Vice-Chancellor in that case in the following terms:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time… It is plain that litigation would be interminable if such a rule did not prevail.

Ruttle Plant Hire v Secretary of State for the Environment, Food and Rural Affairs [2007] was a novel and ingenious argument to extend the rule to amendment of pleadings. After the judgment in relation to some preliminary issues, the claimant sought further amendment of its pleadings consequent, it said, upon that judgment. The defendant sought to characterise the amendment as a re-grouping and re-formulating of the case in the aftermath of the preliminary issues trial, arguing that those matters should have been pleaded before, and that hence *Henderson* applied.

Neither the judge nor counsel could find any cases to back up this new proposition, and the judge concluded that *Henderson* would remain a rule preventing re-litigation alone. It was inappropriate to transplant *Henderson* into the field of amendment of pleadings. It was focused upon a different juridical problem.

the intent of Parliament in the Act; and secondly whether the proviso in the clause ('provided that clause 27.6.5.1…') was effective in this instance so that the clause itself would permit payment to the contractor.

On the first question, one feels the Court was constrained by the *Melville Dundas* decision. The House of Lords had closely considered basically the same clause and had ruled that it would be 'absurd to impute to Parliament an intention to nullify clauses like 27.6.5.1' and that 'section 111 must be construed in a way which is compatible with the operation of clause 27.6.5.1'. That is, you meld the Act to accord with the contract and not vice versa.

Of course, this was said in the context that, in *Melville Dundas*, the 'withholding notice' could physically not have been served before the 'final date for payment' because of the chronology of events in that case. This 'impossibility' argument was therefore a powerful point of distinction between the two cases. The second factual distinction was similarly powerful, namely that in *Melville Dundas* the money paid to the contractor would not affect the intention of Parliament to improve and maintain cashflow to contractors because, in that case, it would pass straight to the creditors. The Court could have adopted both these factors to distinguish *Melville Dundas* on its particular facts, to give it a 'narrow construction'.

However, the judge passed by both these 'life rafts' with the aside that:

> I am aware that many commentators take the view that Lord Neuberger's approach [the minority view] is more in line with the oft-stated purpose of the 1996 Act: to improve and maintain cashflow to contractors and sub-contractors. But, as I reminded Miss Garrett during the course of her submissions, that was not the view of the majority... I am bound by that decision. It is not for me to endeavour to restrict the clear consequences of the decision in *Melville Dundas*.

That was not, however, the end of the matter, as the judge still had to construe the proviso in the clause itself that it was not to apply:

Reference point

For further insights into *Pierce Design* and *Melville Dundas*, see Jake Davies's article in issue 194 ('Payment issues reconsidered') and Ian Pease's column in issue 191.

> ... in respect of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and... which have accrued 28 days or more before the date of determination of the employment of the Contractor.

He found that there had been sums properly due that had not been paid (a breach of contract) and that these had accrued more than 28 days before determination, and finally, given that there had been no withholding notices, those sums were 'unreasonably not paid'. Result: the clause, on its terms, still allowed payment to the contractor.

The judgment is clever in not going head to head with the Lords on their construction (controversial though it is), but rather seeking a construction that, while being, as the judge said, 'fair and commercially balanced', also:

> ... has the additional benefit of meeting head-on many of the concerns which have been expressed about the approach adopted in *Melville Dundas*, to the effect that the decision might allow an unscrupulous employer to use determination as a way of avoiding his responsibility to make interim payments. ■

Bovis Lend Lease Ltd v Triangle Development Ltd
[2003] 1 BLR 31

Ferson Contractors Ltd v Levolux AT Ltd
[2003] 1 BLR 118

Henderson v Henderson
(1843) 3 Hare 100

Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd
[2007] 1 BLR 257

Pierce Design International Ltd v Johnston
[2007] All ER (D) 324 (Jul)

Ruttle Plant Hire v Secretary of State for the Environment, Food and Rural Affairs
[2007] EWHC 1773 (TCC)