Fenwick Elliott
The construction law specialists

Issue 143 May 2012

Dispatch

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

Costs: failure to mediate

Mason and others v Mills & Reeve (A Firm)
[2012] EWCA Civ 498

One of the issues that the CA had to consider was an appeal by the successful party against the decision to impose a costs penalty for having refused to participate in a mediation. This refusal was despite the fact that proposals for ADR had not just been made by the claimants but also the trial judge. The position of the defendant was that the claim had no merit, a view that had been vindicated at the trial. The view, however of the trial judge was that claimants' prospects of success "*was at variance with the result in the judgment in a number of respects.*" He in particular noted that a successful mediation would have avoided the risk of "collateral reputational damage" to the defendant and also that mediation would have allowed both parties to gain a better understanding of the weaknesses of their cases something which might have encouraged a settlement. This led the trial judge to hold that:

"It seems to me that the Defendant's attitude in simply refusing even to contemplate the possibility of mediation on the grounds that the claim was utterly hopeless was an unreasonable position to take. Accordingly, I consider that the Defendant's attitude to mediation is a factor that should be brought into account in making an overall assessment of what costs order should be made."

The CA did not agree with this approach. Davis LJ stressed that the trial Judge had found that the defendant had been "vindicated" in its assessment of the strength of the claimants' case which meant that its position, maintained throughout, had been shown to be justified. Further the Judge did not explain what "weaknesses" in the respective cases would have been revealed in a mediation. It was also not said that if identified, their revelation could have led to a mediated settlement. In addition Davis LJ did not understand why avoidance of "collateral reputational damage" to the defendant should have been considered a relevant factor, counting against the defendant. A settled professional negligence claim was capable, in some instances, of leaving behind reputational damage. Some professional defendants might, entirely reasonably, wish publicly to vindicate themselves at trial in respect of claims which will have been publicly aired by the commencement of proceedings. It would be unfortunate if claimants in cases of this kind could be encouraged to think that such a consideration as identified by the judge could enhance their bargaining position.

David LJ also had concerns in respect of the judge's assessment that the possibility of a mediated settlement was "not unrealistic". At all stages the parties "in reality were a hundred miles apart." The claimants had sought £750k and costs. The defendant's best offer had never been more than a "drop hands" approach.

It was therefore difficult to see how a mediation could have had reasonable prospects of success. Further, unlike many cases, nothing changed to necessitate a re-evaluation on the question of liability. Davis LJ concluded that:

"A reasonable refusal to mediate does not become unreasonable simply by being steadfastly, and for cause, maintained. "

The key historic decision in these types of cases is , of course, the *Halsey* case (see Issue 47). Davis LJ noted that the CA here was concerned to make clear that parties were not to be compelled to mediate saying that ADR was not appropriate for every case. The CA in *Halsey* also identified the situation where a party reasonably believes that he has a strong case as being the type of situation where ADR might not be appropriate, otherwise there was scope for a claimant to use the threat of costs sanctions to extract a settlement even where the claim is without merit. This was the situation here. The unsuccessful party (the claimants) was not therefore able to show that the successful party (the defendant) had acted unreasonably in refusing to agree to mediate. This lead the CA to reassess the original costs order, that the claimants pay 50% of the defendant's costs. This could only be done with what was described as a broad brush which lead the CA to increase the percentage of costs awarded to the defendant to 60%.

Pre-Action Protocol: the wp meeting

Higginson Securities (Developments) Ltd v Hodson
[2012] EWHC (1052) TCC

This was a small value case, being a claim for less than £70k partly for professional negligence and partly for repayment of overpaid fees. A Letter of Claim was sent under the Pre-Action Protocol in March 2011. There were then delays and in December 2011 Hodson's solicitors sent a Response which vigorously denied the claim and called for the claim to be withdrawn. No meeting was suggested by or on behalf of either party. Proceedings were then issued in February 2012. The response of Hodson's solicitors was to say that the Protocol had "not been exhausted: the next step is a without prejudice meeting (or meetings) of the parties" and that if proceedings were served, they intended to apply to stay the proceedings. This is what happened. The position of Higginson was that it was clear from the blanket denial of any liability that Hodson had abandoned the protocol and as such there was no merit in holding a without prejudice meeting. Higginson further suggested that a mediation would most likely succeed if the parties had full knowledge of one another's case and evidence and suggested that the best time for without prejudice negotiation would be after witness statements and expert reports had been exchanged; however Higginson also said on more than one occasion that it was willing to meet before if Hodson so wished.

Hodson duly issued its application to stay the proceedings "to enable the parties to comply with the Pre-Action Protocol which came before Mr Justice Akenhead. Hodson's position was that there was a clear non-compliance with the Protocol, that the issue of the proceedings before a without prejudice Protocol meeting was unjustified. Higginson argued that the Protocol meeting was not an absolute requirement and that in any event it was incumbent on both parties to bring one about. Mr Justice Akenhead was clear that the Protocol was not to:

"be used as a weapon or tactic. Both parties must seek to co-operate during its implementation. In relation to low value claims, such as this one, it is important that the parties proceed reasonably expeditiously, do not drag the process out and keep the costs of the exercise to a reasonable minimum.."

The Judge also noted that the wording of the Protocol does not state that a meeting is absolutely mandatory; it does however say that "normally" a meeting should take place. The "default option" is that a meeting should take place unless there is a reasonably good reason for such a meeting not to take place and it must be incumbent on both parties to seek to set up a meeting. The Judge was not surprised that Higginson took the view that a meeting was unlikely to produce anything, given the absolute and uncompromising rejection of the claim by Hodson in the Protocol response. However, it was still open to Hodson to suggest a meeting, it did not. The Judge further noted that once Higginson had started proceedings, it sought to adopt a sensible and pragmatic approach. This was rejected. Here, the pragmatic response for Hodson would have been to seek to reserve the costs of and occasioned by any purported non-compliance with the Protocol, then secure a without prejudice meeting and, pending that, secure an extension of time for service of the Defence. If there had been changes in the claim between the Letter of Claim and the Particulars of Claim then these could have been discussed. The Judge dismissed the application and ordered that Hodson serve a Defence within 14 days and that there then be a short stay of 4 weeks for either a without prejudice meeting or mediation.

Adjudication: was there a dispute?

Working Environments Ltd v Greencoat Construction Ltd

[2012] EWHC (1039) TCC

Greencoat engaged WE to carry out the mechanical services installation as part of substantial fitting out works at existing office accommodation. The sub-contract incorporated the JCT SBCSub/A 2005 Standard Building Sub-Contract Agreement Revision 2 2009 terms. Provision was made for WE to apply for payment on the second to last Friday of each month and for Greencoat to issue a payment certificate within one week thereafter; the final date for payment was to be 45 days after receipt of an invoice by WE. WE submitted Application No 10 for payment for a net sum of £488k. This included breakdowns as to how that figure was reached. Greencoat certified that a net sum of only £16.6k was due, again providing breakdowns against various heads of work done, variations and withheld items. Under the sub-contract, payment was due by 14 January 2012 On 8 December 2011, WE's consultants confirmed that they did not accept Greencoat's assessment. They started adjudication proceedings 6 days later.

Greencoat said that the adjudicator effectively had no jurisdiction on the basis that no or no material dispute had crystallised because the date for payment had not yet accrued, and because relief for payment was sought which the adjudicator could not award because the obligation to pay had not arisen. The adjudicator replied saying "I also doubt that the fact that payment is not yet due is a good point".

The Judge agreed saying that it was clear that there was a dispute as to whether £488k or some other sum was due. The Judge noted that it would be illogical to say that there cannot be a dispute about an interim valuation of work unless, until and after the valuation falls due for payment. The fact is that here there was a dispute about the interim valuation and that dispute was referable to adjudication. Any dispute would cover the items put forward for withholding, as effectively Greencoat was arguing that the items and quantum then claimed could and should be deducted, whilst WE was arguing that they could and should not be deducted.

There were however two items totalling approximately £25k which were not part of or within the confines of the dispute as they had not been mentioned before they emerged 22 days into the adjudication process. The Judge was of the view that, he was able to sever that part of the decision where the adjudicator did not have jurisdiction and reduce the total sum due accordingly. To act in this way was entirely consistent with the principles set out in the *Cantillon v Urvasco* decision where Mr Justice Akenhead himself had noted that:

(c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).
(d) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

So far as costs were concerned, the Judge decided that WE had succeeded, substantially, having recovered just over 90% of its claim. Whilst there was substantial argument in relation to jurisdiction and Greencoat had won some of these arguments, this was not a case for reducing by percentage the overall entitlement to costs.

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, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.com