



# Dispatch

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*Dispatch* highlights a selection of the important legal developments during the last month.

## Adjudication

### ■ Diamond & Others v PJW Enterprises Ltd

This is a Scottish decision of the 2nd Division of the Inner House (in effect the Court of Appeal) on an appeal from a decision of Lady Paton discussed in Issue 25. This case was important because it provided judicial confirmation that there was nothing to stop a claim of professional negligence being made in an adjudication. The appeal did nothing to reverse this conclusion. LJ Clerk confirmed that an adjudicator did have the power to award damages. Agreeing with Lady Paton, he said that the statutory references to adjudication of "a dispute under the contract" and of "any dispute under the contract" must "comprehend a dispute on a claim that there has been a breach of contract. The power to adjudicate on such a dispute implies...the power to award damages if the breach is proved."

Diamond also claimed that the Adjudicator had failed to take into account relevant material. Again, LJ Clerk agreed with Lady Paton. Whilst the Adjudicator had not mentioned various references that were given to him, the Court held it wrong to conclude from this that he had failed to take them into account. It was an Adjudicator's duty under paragraph 17 of the Scheme to consider any relevant information submitted to him by either party. The Court held that it should be assumed that he did so unless his decision and his reasons suggested otherwise. Here, it was clear from the appendix to the decision that the Adjudicator had taken the various references into account.

Finally, LJ Clerk also agreed that the Adjudicator had made an error in law by failing to specify what degree of skill and care was applicable and by failing to provide a cogent reason why Diamond's allegedly wrong decisions amounted to a breach of contract. However, following cases such as *Bouygues*, the Judge concluded that as the correct question had been answered, the decision was not reviewable on the ground that the answer was incorrect. This was not a case where the Adjudicator had failed to understand the question that was remitted to him even though the decision was described as "inept".

### ■ London & Amsterdam Properties Ltd v Waterman Partnership Ltd

This case also concerned a professional negligence claim, this time in relation to an alleged failure to release design information which it was said caused delays to a steelwork package contractor. L&A said that it had had to pay the steel contractor an additional £1.3 million as a result and claimed that money from Waterman. L&A primarily relied on the fact of the settlement with the steelwork contractor. Waterman said that it did not have sufficient particulars to respond to the claim in relation to either liability or quantum. L&A refused to provide this additional information. In adjudication proceedings, L&A were awarded approximately £700k.

However, HHJ Wilcox decided that there had been a significant breach of natural justice. Not only had L&A not revealed full particulars of its case in relation to causation and quantum prior to the adjudication, L&A had also sought to adduce additional evidence right at the end of the adjudication process. This latter information was not made available until after Waterman had responded in the adjudication. Waterman were not therefore able to take account of it. HHJ Wilcox, who felt that the decision to withhold quantum evidence was deliberate, held that this amounted to an evidential ambush.

Although the Judge stressed that mere ambush in itself, however "unattractive", does not always amount to procedural unfairness, he did decide that there was a triable issue on the question of whether the decision by the adjudicator to accept the additional late evidence was a breach of natural justice and also as to whether the adjudicator had acted impartially as required by s108 of the HGCRA. With the late evidence, the Judge held that the adjudicator should either have excluded the new statement or given Waterman a reasonable opportunity to deal with it. As L&A had declined to provide an extension of time, the only option available was to exclude the additional statement.

The Judge also said that had L&A provided the information when it was first requested, the parties would have been able to consider their differences "in a sensible commercial way reflecting the legal strengths and weaknesses of their respective positions before adjudication commenced. The Claimant chose not to." As the dispute here was complex, involving the evaluation of the activities of many parties over many years and issues of professional negligence, the Judge suggested that such a dispute was best suited to arbitration or litigation.

#### ■ Costain v. Strathclyde Builders Ltd

Costain obtained an adjudicator's decision in its favour calling for Strathclyde to pay forthwith an amount withheld as liquidated and ascertained damages in respect of various interim certificates. In resisting enforcement, Strathclyde said that there had been a breach in the principles of natural justice. Three days before the decision was due, the adjudicator wrote to the parties and asked for an extension of four days to reach his decision. The reason for this was that he wanted to discuss one point with his appointed legal advisor. The result of these discussions was not made known to the parties, nor were they told of the terms of discussions that had taken place. Neither party made a request to be told the terms of the discussions nor to see the result. Neither party was invited to comment on the advice and neither party requested the opportunity to do so. Nevertheless, Strathclyde said that the advice given was material to which the adjudicator was minded to give significance. Therefore, the failure to disclose the substance of that advice and invite comment was a breach of the principles of natural justice.

Lord Drummond Young set out nine principles that applied to natural justice and adjudication. The overriding principle was that each party be given a fair opportunity to present its case. If an adjudicator takes specialist advice and that advisor produces an opinion then this must be disclosed for comment. It does not matter if that advice is from a legal advisor or a programmer. To succeed in alleging a breach, a party must demonstrate the possibility of injustice, not necessarily that actual injustice had occurred. Here, there had been a breach of the principles of natural justice. The adjudicator had not indicated what he had discussed with his legal advisor and so it was not clear whether it was a matter that had been adequately dealt with by the parties' submissions.

#### Court of Appeal Cases- Contributory Negligence

#### ■ Sahib Foods Ltd (in liquidation) v. Paskin Kyriakides Sands

The defendant architects had been found liable for a fire which destroyed Sahib's food factory. The CA revisited the Judge's conclusions on contributory negligence. The Judge had concluded that if the area where the fire started had

been protected by non-combustible panels, then despite a number of negligent acts and omissions by Sahib which caused the fire, the factory would not have burnt down.

The CA considered the Law Reform (Contributory Negligence) Act 1945 and said the correct question to ask is whether the claimant suffered damage "as a result partly of his own fault and partly of the fault" of the defendant. If the answer is yes, any damages must be reduced to such an extent as the Court thinks reasonable giving consideration to the claimant's share in their responsibility of the damage caused.

Here, the damage sustained by Sahib as a result of the spread of the fire was the result partly of its own fault in causing the fire and partly of a failure by PKS to take reasonable care to protect the premises from the spread of fire, it being reasonably foreseeable that a fire might begin as a result of negligence on the part of Sahib or its employees. That said, Sahib also had a responsibility to take reasonable care to avoid a fire breaking out and PKS could reasonably have expected Sahib to take steps to avoid the negligence which caused the fire. Accordingly, the CA held that Sahib should only be able to recover one-third of its damages attributable to the spread of the fire.

#### Fenwick Elliott News

We are pleased to announce that on 1 January 2004 Nicholas Gould, formerly an Associate, became a partner. Nicholas is also the Senior Research Fellow at King's College London, Centre of Construction Law, and a practising mediator. He has experience in a range of dispute resolution techniques both in the UK and internationally.

*Dispatch* is produced monthly by Fenwick Elliott, the leading construction law firm which specialises in the building, engineering, transport, water and energy sectors. The firm advises domestic and international clients on both contentious and non-contentious legal issues.

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Fenwick Elliott

Solicitors

353 Strand  
London WC2R 0HT

T +44 (0)20 7956 9354  
F +44 (0)20 7956 9355  
Editor Jeremy Glover  
jglover@fenwickelliott.co.uk  
www.fenwickelliott.co.uk