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Dispatch

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

Mediation

Corenso (UK) Ltd v The Burnden Group plc

Corenso supplied Burnden with coreboard from its French factory. Proceedings were issued by Corenso in February 2001 seeking recovery of £140,000. Burnden, having issued a counterclaim in the sum of £300,000, made a Part 36 payment into court in March 2001 of £64,000 and increased this to £90,000 shortly before trial. As there were less than 21 days to go until trial, the permission of the court was needed to accept this. As the parties were unable to agree costs amongst themselves, it was also necessary for the court to decide the question of costs.

Prior to making the Part 36 offer which was eventually accepted, Burnden had made offers to attempt to resolve the dispute by mediation. Burnden thus submitted that Corenso should be liable for its own and some of Burnden's costs. Corenso maintained that as it had substantially succeeded in the action, which had included a counterclaim, it should have its costs up to the date of its acceptance of the Part 36 offer in the usual way.

Reid J acknowledged that there were a number of recent authorities (see for example *Hurst* v *Leeming* and *Leicester Circuits* v *Coates* - Issues 24 and 33) where costs penalties had been imposed following a refusal to mediate. He agreed that it is possible that a failure to engage in mediation may have adverse costs consequences.

However, here, the Judge noted that there is more than one form of ADR and characterised the negotiations engaged in by the parties, including without prejudice meetings with lawyers present, as a form of ADR. Hence, whilst there had been a failure to mediate there had not been a refusal to engage in trying to settle this case outside of the courts. As far as costs were concerned, the Judge focused on the conduct of Burnden who had only made a realistic offer to settle at a very late stage. This was more significant than the conduct of Corenso who preferred without prejudice negotiations to a process of dispute resolution involving a third party.

The Judge thought the following was important:

"...ADR is not synonymous with mediation. The requirement on parties is to attempt to resolve their differences without resorting to court by alternative dispute resolution. In some cases, the only available way may be mediation. In other cases, it may well be that negotiation or attempts to use [a] honest broker, may be equally appropriate. So long as parties are showing a genuine and constructive willingness to resolve the issues between them, it does not seem to me that a party will be automatically penalised because that party has not gone along with a particular form of alternative dispute resolution proposed by the other side."

Arbitration

Van Oord & ACZ Ltd & Anr v The Port of Mostyn Ltd

Van Oord, a joint venture, entered into a contract to carry out works for Mostyn in connection with the development of a riverside berth. One of these contracts, a marine works contract, was subject to the ICE conditions and the HGCRA. Clause 66(7) provided that an adjudicator's decision was binding until the dispute was determined by legal or arbitral proceedings. By clause 66(9)(b), any challenge to that decision had to be made within 3 months of delivery of the decision. Notice of any challenge, by clause 68(1), was to be served in writing at the contractor's principal place of business.

Following an adjudicator's decision, Mostyn referred the dispute to arbitration. The notice to refer took the form of a letter sent to the Morecambe office of Van Oord. It was received on 16 April 2003. The notice needed to be served by 17 April 2003. Van Oord said that their principal place of business was the Newbury office and that the notice was not received at the Newbury office until 22 April 2003. Thus, the notice was invalid and Mostyn was out of time to challenge the adjudication decision.

HHJ Kirkham looked at all of the circumstances of the case. For example, one cause of the confusion as to addresses was that Van Oord's adjudication notice gave

the address as being the Newbury address, but representatives of Van Oord wrote from the Morecambe address raising queries about the effect of the adjudicator's decision. The Engineer served his notices at Morecambe and Van Oord dealt with all contractual matters from Morecambe.

On the day the notice was received at Morecambe, Wednesday 16 April 2003, the notice was faxed to the office of the claims consultant who was acting on behalf of Van Oord. It was also sent to the barrister's chambers where a conference was taking place that day in connection with the adjudication and any subsequent proceedings. The following day, 17 April 2003, representatives from Van Oord attended at the Morecambe office. On 22 April 2003, a letter was sent returning the arbitration reference noting that the notice had been found that day amongst various papers. This was of course at best misleading.

HHJ Kirkham noted that one purpose of the contractual provisions as to the service of notices is to ensure that one party knows what the other party wishes to communicate. Here, the day before the expiry of the time limit, Van Oord knew that the arbitration referral had arrived and knew of its content. It had even come to the attention of the very person who was responsible for dealing with claims and other contractual matters.

At the time the notice was served, Van Oord's principal place of business was Morecambe, from where the commercial manager ran a significant aspect of the joint venture's business, including notification and the pursuit of claims. It was thus held that the notice was validly served, within time.

This case was decided on its own facts. If you find yourself in a similar situation, check the contract first.

Other Cases of Interest - Plant Hire

Hewden Tower Cranes Ltd v Yarm Road Ltd & Anor

This case arose out of the collapse in May 2000 of a tower crane at Canary Wharf. The crane had been hired by Yarm from Hewden. The crane collapsed in the course of an exercise called climbing (i.e. where the height of the crane is increased by adding new sections). Before this can be carried out preparatory works must be carried out. This preparatory work was carried out by Yarm's operatives, whilst the climbing was carried out by Hewden.

Three men died following the crane's collapse and others were seriously injured. There was also significant damage to property and substantial delay and disruption to the construction works. Yarm brought a claim against Hewden as a result of the delay and disruption. Both parties said the other was responsible and the case turned on the interpretation of the contract which included the CPA Model Form. The key clause was 13 which covered the hirer's responsibility for loss and damage. Clause 13(c) stated:

"(c) Notwithstanding the above the Owner shall accept liability for damage, loss or injury due to or arising…

(ii) during the erection of any plant, where such plant requires to be completely erected on the site, always provided that such erection is under exclusive control of the owner or his agent…"

HHJ Seymour QC held that the climbing of the tower fell within the meaning of "erection of any plant" in clause 13(c)(ii) and that when the crane was being climbed it was under the exclusive control of Hewden. Hewden appealed. By a majority the CA agreed with the trial judge. There was no dispute about whether the initial putting up of the crane was an erection of plant within sub-clause (c)(ii). The question was whether the same is true of the fitting of the further sections of the mast which were added on each successive climbing operation.

Sir Martin Nourse suggested that he could not see why adding sections of the mast should not also be regarded as coming within the definition, either as other items of plant or as accessories for the crane in its initial state. Pill LJ agreed, finding that the climbing operation came within the meaning of "erection" in clause 13(c)(ii). It had all the hallmarks of erection as that word is commonly used. It could not be said that the erection operation of the crane was completed by the initial erection when up to 27m of plant was later to be added to the height of the crane by the climbing operation.

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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