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Dispatch

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

Mediation

Shirayama Shokusan Co. Ltd & Others v Danovo Ltd

This case arose out of a dispute between the long lease holders of County Hall and the owner/operator of the Versace Art Gallery housed on the first floor. Danovo had a 20 year sub-lease from the sixth Claimant, Cadogan Leisure (Investments) Ltd. A number of disputes had arisen between the parties, including claims for trespass, the service of a Section 146 Notice under the Law of Property Act, mis-representation, and accusations of dishonesty.

Danovo suggested mediation in correspondence, but the other party refused. Danovo therefore applied to the Court for an Order, that notwithstanding this refusal, the parties be ordered to mediate. Mr Justice Blackburn, having regard to both the Commercial Court Rules and the CPR, decided that the Court did have jurisdiction to direct ADR or mediation even where, as here, one party did not want to mediate. The overriding objective of the CPR states that cases should be resolved in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. Further, CPR1.4(2)(e) actively encourages both the parties to use ADR and the Court to facilitate the use of such procedures.

The Judge made this Order, even though one party did not want to use ADR primarily because of the fact that the parties were in a long term relationship and so were likely to have to continue to live together. They had, for example, a shared interest in the success of the Gallery under the rent arrangements under the sub-lease. He therefore felt that any mediation might also be able to deal with the wider matters between the parties. The Judge also considered that whilst there would be nothing lost in an attempt to mediate there was potentially much to be gained.

He therefore ordered the parties to attempt mediation and set a tight timetable which called for the mediation to take place in the second week of January which was just over a month after the hearing of this application.

Court of Appeal Cases- Construction of Insurance Policies

Pilkington United Kingdom Ltd v CGU Insurance Plc

Pilkington manufactured the glass panels installed in the roof and vertical panelling of the Eurostar terminal at Waterloo. A small number of these panels were defective. Pilkington were joined to proceedings commenced by Eurostar against the contractor and the professional team and contributed £330,000 to an overall settlement and incurring in excess of £700,000 in legal costs. Pilkington recovered £700,000 from their professional indemnity insurers, and sought in the region of £500,000 from CGU under the terms of their products liability insurance. The Judge at first instance found in favour of CGU on the construction of the terms of the policy, and Pilkington appealed.

To succeed, Pilkington had to demonstrate that their loss arose from "*physical damage to physical property not belonging to the insured*". The CA thus had to decide whether this potential future damage was physical damage for the purposes of the policy, so as to bring the loss arising from the preventative measures undertaken by Eurostar, and passed on in part to Pilkington, within the cover provided by the policy.

Lord Justice Potter said that the words of the policy must be given their ordinary meaning and reflect the intention of the parties and the commercial sense of the agreement. Where a literal construction leads to an absurd result, this should be rejected if an alternative, and therefore more reasonable construction can be adopted. In the case of ambiguity, the construction which is more favourable to the insured should be adopted - the contra proferentem rule.

Here the CA held that the policy was designed to protect Pilkington against liability for physical damage to physical property belonging to others, not to provide an indemnity in respect of the quality and/or fitness of glazing that Pilkington supplied. Thus the liability of Pilkington's insurers was limited only to addressing actual physical damage caused by the defective glazing.

Cases from the TCC - Timesheets

JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs

Following the outbreak of foot and mouth disease in 2001, JDM entered into a contract with DEFRA to construct burial sites and infrastructure works. Under the contract, JDM was to be paid a reasonable rate for such labour and materials as it provided. JDM produced timesheets to back up its claim for fees. DEFRA said they were unreliable. The problem with the timesheets was that although the documentation was verified by JDM (or its subcontractors), they had not been counter-signed, as required by the contract, at the time by a DEFRA representative.

The procedure which JDM had agreed to, involved a DEFRA representative being based on each site who would record the times and activities carried out by each individual or an item of plant. The sheet would then be signed each day by that representative and a nominated JDM employee. In practice, many sites had no DEFRA representative. Even where there was such a representative, often the timesheets were not verified or authenticated.

HHJ Thornton QC set out a number of considerations in relation to placing weight on the timesheets. These included that JDM was an experienced service provider for the government and had no reason to inflate/overcharge. The timesheets were prepared under the contract and pursuant to a contractual requirement of accuracy and reliability. Records were also being made to enable JDM to fulfil its obligations under the working time regulations. JDM had no reason to think that the timesheets would not be verified or authenticated. The timesheets and invoices were contemporaneous. The production of the timesheets was the only reasonable means for JDM to prove its entitlement.

Therefore, the Judge concluded:

"It would be to allow DEFRA to take advantage of its breach of contract if DEFRA was to be allowed to make any more extensive challenge to the time sheets than it could have done following their verification by one of its site based representatives. Thus, for any time sheets now in issue which had not been verified by DEFRA on site, DEFRA now has the evidential burden of showing that the contents of the time sheet were inaccurate. In practical terms, therefore, DEFRA is restricted in its attack on the time sheets to showing that they contain arithmetical or other patent errors, that they are subject to some general error such as not allowing for deductible meal breaks, were fraudulently produced or were produced by a process which was inherently unreliable such that no weight may be placed upon them."

Health & Safety

Nishimatsu Construction was fined £700,000 (and ordered to pay £145,000 in costs) following an explosion on the Docklands Light Railway which destroyed part of a school football pitch. The reason why the fine was so high was because, as Judge Ian Karsten, said:

"*This is a breach of duty which put many members of the public at risk and that inevitably leads to the conclusion of a substantial penalty as required.*"

Nishimatsu were responsible for the construction of the project, which included choosing compressed air to pressurise the tunnel. Apparently, no relevant calculations into the ability of the ground cover above the tunnel to withstand proposed compressed air pressures had been undertaken or commissioned. It was felt that had such calculations been commissioned then the accident in this instance would not have occurred.

In a separate case, Conder Structures Ltd was fined £100,000 plus costs of £60,000 following the death of a ground worker when two structural steel columns were blown down in the wind. The columns had been left free standing because the erectors had been unable to stick stabilising wedges between the columns base plates. The design had been calculated using a wind speed of 20 mph, the bolts failed in winds of 30 mph.

The fine was split into two halves. Conder were fined £60,000 for a breach of section 3(1) of the Health and Safety at Work Act 1974 and £40,000 for breaches of duties under the Construction (Design and Management) Regulations.

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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