Fenwick Elliott
Solicitors

Dispatch

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

Cases from the Court of Appeal - ADR

Reed Executive plc ("Reed") & Anr v Reed Business Information Ltd ("RBI") & Others

Following an appeal in a trade mark case, Reed wanted to make use of the *Halsey* principles (see Issue 47) to suggest that RBI should be deprived of its costs on the grounds that it had acted unreasonably in refusing to try and resolve the dispute through ADR including rejecting the use of the CA mediation scheme. The issue was complicated by the fact that Reed wanted to rely upon without prejudice negotiations at the costs hearing.

LJ Jacob held that negotiations or offers which have taken place expressly on the "*without prejudice save as to costs*" basis (also known as Calderbank offers) are admissible on that question, but only on that question. However, he continued that parties who have negotiated on a wholly "*without prejudice*" basis will have done so in the expectation that whatever they say will not and cannot be used against them even on the question of costs and he referred to the 1898 case of *Walker v Wilsher* as justification for this.

Thus the question was whether *Halsey* had changed that rule. LJ Jacob thought not, saying that the court could not order disclosure of "*without prejudice*" negotiations against the wishes of one of the parties to those negotiations. He recognised that this might mean, in some cases, that the court when it comes to the question of costs would not be able to decide whether one side had acted unreasonably or not in refusing mediation.

However, as he pointed out, any party can make open or Calderbank offers to attempt ADR. He stressed that there was no "*shame or ... weakness*" in this. Then the court can consider the reasonableness or otherwise of going to ADR and any relevant correspondence can be made available to the court, under the Calderbank procedure, but only when it comes to consider costs.

The CA then considered the open information. Neither side had asked for a stay for the purposes of attempting ADR on the allocation questionnaire even though that questionnaire positively raises that particular option question. The CA held this to mean that each party was positively saying that there was no point to attempting such a procedure at any time up to and including trial.

The key point relied upon by Reed related to the costs of the appeal. Reed openly invited RBI to make use of the Court of Appeal's mediation scheme. RBI declined. LJ Jacob held that that refusal was reasonable. At the time Reed (who had been successful at first instance) would have been negotiating from a position of considerable strength. In fact, according to LJ Jacob, the starting point of any negotiation of any ADR process for Reed would have been to follow the maxim of a former leading barrister (now a judge) who used to say when he was at the Bar "Always try to negotiate with your foot on the other man's neck".

There were two other relevant factors. First, Reed had proposed ADR at a very late stage. Second, the case was full of novel points and RBI, who had other disputes with Reed in other jurisdictions to consider, had a reasonable belief in its prospects in the appeal - a belief which turned out to be justified.

Cases from the TCC

Gemma Ltd v Gimson & Anr

This case came about following a dispute over the construction of a luxury home in Essex. The builder was seeking payment and the owners counter-claimed for the costs of completing the job and remedying defective work. The owners were successful and as part of their claim sought damages for inconvenience, loss and anxiety.

HHJ Thornton QC characterised this case as one of the worst cases of distress. Relationships had broken down and extreme hostility was shown by the builder who was a neighbour. HHJ Thornton QC therefore awarded a sum of £10,000. This was broken down into a payment of £50 per week for the two adults for the period of the dispute and lump sum payments of £250 for each of the four children.

Health & Safety

Michael Humpheryes v Nedcon UK Ltd and Storage Engineering Services

This was a personal injury case for injuries caused to MH after he tripped on floor studs at a construction site. Nedcon manufactured a shelving system for the warehouse and SES had been subcontracted to install it. The shelving system required studs to be set into the concrete floor. As part of that design, Nedcon identified the location for the floor studs in the bulk storage area. SES installed these studs but did not install any barriers or warning signs to indicate the presence of the studs. Whilst the employees of SES were on a tea break, MH, who was carrying out snagging work, tripped. He had not been in that area for sometime and was unaware that the studs had been fixed to the floor. As MH walked into the area, he caught his foot on a stud and fell. As a result of his injuries, MH was unable to return to work in the steel erection industry, since he could no longer carry out heavy work.

MH claimed that both Nedcon and SES had been negligent and breached their duties under the Construction (Health, Safety & Welfare) Regulations 1996 and in particular regulations 4(2), 5 and 15 which require that a safe place of work is provided to allow pedestrians to move about a site safely. Both SES and Nedcon denied negligence and claimed that the other was responsible. SES's quotation had included provision of safety measures such as barrier tape. However, these had not been used on this occasion.

The issue before the court was who was in control of the site. Nedcon was required to be on site each day and was responsible for health and safety measures. Therefore it was part of Nedcon's job to monitor the safety aspects of SES's work. However, SES was a professional installer and therefore it had responsibility for its work and a degree of control over the way it was carried out.

There were inconsistencies about whether or not Nedcon gave instructions to SES on the morning of the accident to put tape around studs and barrier off the area. SES said that tape and barriers were in a work van on site but they were not used. No instructions had been received from Nedcon in relation to the use of tape and barriers. However, the court noted that SES could see that the studs represented a hazard and that it would have been sensible to put tape on them and barrier off the area. The court held that both Nedcon and SES had failed to discharge their duties posed under the regulations. They were required to erect barriers and place warning signs or tapes to ensure that it was clear that the studs were a hazard.

The suggestion that MH had been contributorily negligent failed. The court did not accept that there were any reasons apparent to MH why he could not enter the bulk storage area through the door he used and there was no requirement that MH should keep his eyes on the ground to look for hazards.The court held that both defendants were negligent as they failed to erect barriers or place warning signs. Those failures meant that there was not a safe work site. However, the court determined that the greater responsibility lay with Nedcon and two-thirds of liability was apportioned to it with one third being apportioned to SES

Adjudication

Rossco Civil Engineering Ltd v Dwr Cymru Cyfyngedic

At an enforcement hearing, DCC argued that the adjudicator had ordered payment to the wrong contractual entity. DCC had entered into a contract with Rossco Civil Engineering partnership, which was subsequently incorporated to become the claimant. The adjudication had proceeded on the basis that the party was a limited company, although at some time previously during the currency of the works it had been a partnership.

Notwithstanding that it had been raised by the adjudicator, no point on this had been taken during the adjudication and no point on this had been taken during the initial stages of the enforcement proceedings. It was only on the submission of a defence that the argument emerged for the first time that the proper party was the partnership. Further, correspondence between the parties' legal representatives revealed that DCC had considered seeking security for costs. This was viewed as an acknowledgement that the claimant was a company.

Thus the court held that DCC was estopped by both convention and representation from denying that the contract was with the claimant company.

Dispatch **is produced monthly by Fenwick Elliott LLP, 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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