Fenwick Elliott
Solicitors

Dispatch

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

Costs - Failure to Mediate & Part 36 Offers

■ **P4 Ltd v Unite Integrated Solutions Plc**

P4 claimed some £70k. In his judgment, Mr Justice Ramsey decided that P4 was only entitled to recover £387. He therefore had to decide liability for costs. It was common ground that, having failed to beat a payment into court made by Unite, P4 would have to pay Unite's costs from the date of that payment. However, P4 argued that there should be no order for costs for the whole period for two reasons. The first was Unite's failure to provide P4 with information in relation to Unite's payments to its subcontractor. The second was a refusal by Unite to mediate.

In respect to the first submission, the Judge accepted that there was a failure to provide relevant information to P4 which was of importance during the pre-action protocol stage. In relation to the refusal to mediate, the submissions focussed on the judgment in the case of *Halsey v Milton Keynes* (see Issue 47).

Unite felt that the dispute involved a long term relationship and there were allegations of bad faith. Therefore, this was the type of dispute which most probably could not be successfully mediated. Unite said that it had a strong case, as could be seen from the end result. Unite also said that it did make settlement offers but these were rejected - P4 held an unrealistic view of the merits of its case. Further, the costs of the mediation would be disproportionately high. P4's offers to settle were increasing and the parties were becoming further and further apart. In short, the mediation would not have lead to a settlement

Mr Justice Ramsey considered that this was a case where the sums in dispute whilst significant were not large. There were a number of factual issues arising. The Judge considered that the nature of the case made it a classic example of a case which lent itself to ADR. At the time the mediation was proposed, there were no allegations of bad faith. These came later. The case fell within the category of dispute where the courts will continue to encourage the parties to seek ADR.

In relation to the merits, the failure by Unite initially to provide certain documents, meant that P4 may have felt they had a stronger case than they actually did. If the documents had been provided to them at an early stage in the context of discussion or mediation, this may have had a strong bearing on the case.

The Judge accepted that the parties exchanged written offers and views and information on the case. However, the Judge said he did not consider that letters from solicitors which make offers can be a proper substitute for the process of ADR:

"which involves clients engaging with each other and a third party, such as a mediator, to resolve a dispute. In such circumstances, the aspirations of each party are soon brought within realistic bounds and a situation which one party makes increasing unrealistic offers is avoided. There was no proper engagement in the correspondence on the central issues and concerns which are usually the focus of ADR, three such things as position papers and mediations."

The costs of the mediation, in the view of the Judge, were small as compared with the costs of going to a full contested hearing. In addition, the parties should take into account the management time and cost incurred by both parties in dealing with the action.

The Judge also considered the attitude of the parties. P4 were not intransigent. This was a case where there was a dispute for a comparatively small sum. The potential in such cases is for cost to be disproportionate. There were a number of uncertain factual and legal issues. Mediation may have assisted parties to continue and build on their long standing commercial relationship. The ADR would have had a better prospect of success if Unite had provided the documents sought by P4 at an early stage.

What then was the effect of all this on costs? The Judge had to take into account both the Part 36 offer and the unreasonable failure to agree to mediate. He dealt with the situation by awarding P4 its costs up until the time of the date of the Part 36 offer. Unite were awarded its costs thereafter.

Update - Public Disclosure of Pleadings

■ **Statutory Instrument 2006/1689**

In Issue 75 we reported on the introduction of new rules which gave the public and press wide access to Statements of Case and other pleadings. At the time it was unclear whether the new rules would be applied retrospectively, thereby enabling people to access pleadings in cases filed before 2 October 2006. Following court proceedings initiated by the Law Society, it has now been agreed that the new disclosure rules will only apply to new claims.

Arbitration

■ **Sinclair v Woods of Winchester Ltd**

This application before HHJ Coulson QC was an application to seek permission to appeal on two questions of law arising out of an arbitrator's award. As the Judge set out, for such an application to succeed, the point of law:

(i) must be a true question of law and not a complaint about any finding of fact dressed up as a point of law - a party cannot seek permission to appeal on a finding of fact no matter how wrong it might seem;
(ii) must substantially affect parties' rights;
(iii) must be obviously wrong, or a point of general/public interest which is at least open to serious doubt; and
(iv) must be a just and proper point for the Court to determine.

The Judge also quoted with approval the words of HHJ LLoyd QC in Vascroft v Seaboard Plc where he stated that the Court "*should read an arbitral award as a whole in a fair and reasonable way. The Court should not engage in minute textual analysis.*"

The first alleged point of law related to concurrent causes of damage to flat roofs. This part of the application failed. The Judge said that a question of law should be capable of being expressed in a sentence. Here, it was set out in a lengthy paragraph of submission.

Further, the point raised was a matter of causation namely what was the operative cause of the problem with the flat roofs. The arbitrator decided that whilst some areas were attributable to the Defendants, they did not cause the underlying problem with the flat roofs. The design of the flat roofs meant that they were doomed to fail. Questions of causation are mixed questions of fact and law. The Judge reiterated that, in any event, when considering causation, there is no formal test. The Courts rely on common sense to guide decisions as well as whether any alleged breaches are a sufficiently substantial cause of the loss.

The second alleged question of law also failed. This related to liability for defective specialist design. Certain items were installed in accordance with the design of the heating system which was part of the specialist design work carried out by the Respondent's nominated subcontractor. In other words, if a main contractor sub-contracts works to a nominated sub-contractor, and then a nominated sub-contractor carries out design work as well, is the main contractor, (without more), liable to the employer for that design work? The Judge said the answer to that question was emphatically no.

Where an employer nominates a specialist sub-contractor to carry out work, one of the reasons for this is that the sub-contractor will be performing a specialist design function in addition to the actual carrying out of the works on site. In such circumstances, the design work performed by the specialist sub-contractor is usually, and ought to be, subject of a direct warranty from the specialist sub-contractor to the employer.

If the carrying out of the work on site is sub-contracted by the main contractor to the nominated sub-contractor, the extent to which the main contractor is liable for defects in the work-manship of the nominated sub-contractor, will depend on the precise terms of the various contracts. Here, the main contract documents did not include any obligation on the part of the defendants to perform any design work at all. A main contractor cannot acquire design liability merely because he is instructed to enter into a sub-contract with a nominated sub-contractor who is going to do some design work on behalf of the employer.

Case Update - Adjudication

■ **Quietfield Ltd v Vascroft Contractors Ltd**

We reported on this case in Issue 69. There were two adjudications. The first was a dispute about whether Vascroft was entitled to an extension of time on the basis of matters set out in two letters. This claim was dismissed. Quietfield then began their own adjudication, claiming LAD's for delay by Vascroft. Quietfield relied upon the first decision. Vascroft's defence, a 400-page document, sought to trace the critical path and analyse the delays caused by a number of relevant events. A significant amount of the information was new. The adjudicator declined to consider the defence saying that this matter had already been determined in the first adjudication. Mr Justice Jackson held that as Vascroft's defence included new evidence it was on different grounds to those previously considered in the first adjudication. Therefore he refused the enforcement application. The matter came before the CA, which upheld the original decision. More than one adjudication is permissible provided a second adjudicator is not asked to decide something which has already been decided. For example, where the only difference between disputes arising from successive applications for an extension of time is that the later application makes good the earlier shortcomings of the first, then in most cases the dispute will be substantially the same. That was not the case here.

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