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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

(Compulsory) Mediation

DKH Retail Ltd & Ors v City Football Group Ltd

[2024] EWHC 3231 (Ch)

In *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, the CA determined that the court had power to order unwilling parties to engage in alternative dispute resolution. In line with that case, the CPR were amended with effect from 1 October 2024. The overriding objective now includes promoting or using alternative dispute resolution and, under R 3.1, the court's case management powers include the express power to order the parties to use and facilitate the use of ADR.

In light of these changes, the claimants here sought an order for mediation, noting that there had been a "*sea-change*" in the approach of the courts to ADR. The case was a trade mark dispute and the core issue was whether promotional branding appearing on professional sports players' kit was likely to be seen by the public as branding denoting the Superdry brand or as branding denoting Manchester City's sponsor, Asahi Super "Dry" 0.0% lager.

The claimants said that their case was one where the court should exercise its power to order a mediation. The dispute was capable of resolution; it was not *"a particularly complicated one"* and there were *"several variables in the dispute between the parties which might allow an out-of-court compromise (and which might not be available in a judgment of the court)"*.

There had not been any mediation to date, although there had been unsuccessful settlement negotiations:

> *"A short, sharp mediation of one day before the end of December may well allow the parties to avoid at least some of those costs. This would also potentially save court time and resources."*

The defendant agreed that there was no dispute about the power of the court to order mediation, but said it should only do so where there was a realistic prospect of success. This was not the position here. Both parties wanted their position to be judicially determined. Even if the claimants said they were prepared to compromise, the defendant wished to know "*once and for all*" whether it could place particular branding on football kit and other clothing. Mediation was not realistically likely to lead to settlement.

The defendant also noted that in a witness statement, the claimants had said that they would not be prepared to allow the Superdry brand to be shown as the sponsor on any particular club's kit. It was noted that: "*football supporters are notoriously tribal, and that the claimants have already received abuse by reason of the association of the words 'Super' and 'Dry' with Manchester*". It was very late in the day to seek the order; the parties had already spent significant sums and the trial was imminent. This was not a case where the defendant was being obstructive. Mediation would fail. This was a case where a ruling was needed.

Miles J noted that:

> *"in many cases, the parties' positions in the litigation are diametrically opposed and it may easily be said that each party requires a judicial determination. But nonetheless the parties come through ADR to recognise the desirability of settling for less than their strict legal rights and compromising their positions. Experience shows that mediation is capable of cracking even the hardest nuts. The process sometimes succeeds in cases where the parties appear at first to have intractable differences."*

The judge further noted that the dispute was self-contained. Any "*mediation would be able to focus on possible solutions rather than raking over historical grievances*".

Whilst it was late in the day to be seeking an order, there may be some advantage as the parties' positions would have been crystallised. It is sometimes said that the proposed mediation is premature. That could not be said here.

Miles J also saw some force in the suggestion that these were commercial parties with experienced solicitors and that, if there was realistically to be a settlement, one would have expected it already to have been reached.

The judge continued that experience shows that bringing the parties together through mediation can overcome an entrenched reluctance of parties to negotiate, even where sincere:

> *"The purpose of mediation is to remove roadblocks to settlement. I am unable to accept the submissions of the defendant that a mediation here has low prospects of success and that adjudication by a court is necessarily required. The range of options available to the parties to resolve the dispute through mediation goes beyond the binary answer a court could provide. There may be solutions other than yes or no."*

Any mediation here would be "*short and sharp*". The documents would be brief and the defendant had not suggested that mediation would significantly disrupt the parties' preparations for trial.

Accordingly, the judge was satisfied that this was a case where the parties should be ordered to mediate with a view to seeking, if possible, to resolve the dispute between them. The parties were further asked to report the outcome to the court as soon as possible after the mediation was complete.

And there was a postscript to the judgment. On 13 January 2025, the parties notified the court that they had settled their dispute.

BSA: Remediation Contribution Orders

Grey GR Ltd Partnership v Edgewater (Stevenage) Ltd & Others

CAM/26UH/HYI/2023/0003

In the case of *Triathlon Homes v Stratford Village* (*Dispatch*, Issue 284), the First-Tier Tribunal ("FTT") agreed that Section 124 of the BSA focused *"on the practical outcome of the things which have been done, or are to be done, rather than any interpretation which tends to narrow the scope of the remediation provisions"*. Therefore, a Remediation Contribution Order ("RCO") could be made in respect of costs incurred in preventing risks from materialising or in reducing the severity of building safety incidents. The FTT then went on to explain that it could only make an RCO if it considered it *"just and equitable"* to do so.

Vista Tower is a 16-storey block of flats in Stevenage. The block was converted from offices into flats in 2015. In 2018, Grey GR purchased the freehold. The conversion had included combustible panels in the external walls, and a lack of cavity barriers and fire stops. In December 2020, a waking watch was implemented.

Although Grey had started some remediation work, its progress was so slow that the government successfully obtained an RCO in May 2024. Grey GR brought its own RCO application in order to seek recovery of its costs from the original developer and companies associated with it. This led to there being, somewhat unusually, 96 respondents. In short, each of the 96 were potentially associated with one another, as they shared at least one director with the developer, the first respondent.

Section 124 (3) of the BSA provides that:

> *"A body corporate or partnership may be specified as a person required to make payments only if it is — (a) a landlord under a lease of the relevant building or any part of it, (b) a person who was such a landlord at the qualifying time, (c) a developer in relation to the relevant building, or (d) a person associated with a person within any of paragraphs (a) to (c)."*

Following a hearing in November 2024, the FTT awarded an RCO in the sum of £13.26 million, and held that it was *"just and equitable"* to make that RCO against the landlord company and a number of the other parties. Of the 95 other parties, 75 were deemed to be *"associated persons"* as further defined by Section 121 of the BSA.

When it came to the *"just and equitable"* test, in Section 124 of the BSA, the FTT noted that it was deliberately wide *"so that the money can be found"*. One of the main purposes of the BSA (or *"this new jurisdiction"*) was to ensure that the *"pot is filled promptly"* so that *"remedial work can be carried out and/or public money from grant funding can be recovered promptly"*.

The FTT agreed that the developer was a key target, *"at the top of the hierarchy of liability (or waterfall)"*. They were in no doubt that an RCO should be made against Edgewater in view of the nature of their residential conversion works and the relevant defects in this building.

The FTT also noted that the power to make RCOs against corporate bodies was both *"a radical departure from normal company law"* but did not *"pierce the corporate veil"*. This was because it did not expose the individual members to unlimited personal liability. Therefore, impecuniosity or otherwise of any of the respondents was not a significant reason for or against making an order.

There was not an automatic presumption that any associate must be made liable. There must be some circumstances that suggest additional linking factors. Here, the FTT noted that with many respondents, their evidence and disclosed documents appeared *"incomplete and in parts unreliable"*, something which was not to their advantage. This was not a case where the wide association provisions had caught many completely unrelated companies who were operated by others and merely happened to have the wrong director at the wrong time.

The particular factors the FTT took into account in deciding whether the companies were associated (or not) included:

(i) The business of each of the companies who were *"associated"* involved the property, property development and/or building sectors.

(ii) Most of those with the "Edgewater" name were presented to potential funders and/or third parties as if they were part of a group.

(iii) The Respondents were all linked by family connections.

(iv) The Respondents were likely to be linked by financial or other dealings and their records were opaque and/or did not appear reliable. Here, it appeared that many of the relevant Respondents were not actually run as carefully separated SPVs but *"as part of a fluid, disorganised and blurred network or structure"*, (albeit that the FTT noted that this was because of *"poor and disorganised practice, not dishonesty"*.)

In total, 76 respondents were held to be jointly and severally liable for the £13.26 million. One reason for this was that it was not a *"just and equitable"* approach that the applicant should be confined to a limited share from each relevant Respondent, or should have to wait to see whether a given Respondent was solvent (or how much they could pay) before they moved on to the next.

However, this approach resulted in the FTT not making RCO's against every company just because of the name. With Respondent no. 2, some 20% of the shareholding was linked to family members, but this left some *"properly declared"* 70% to 80% of shares held by others who appeared genuinely independent. Further, the FTT accepted the detailed explanation given by a witness of a separate development. Therefore, it was not just and equitable to make an RCO here, even if it had been limited to, say, 20% of the total payable by the others. In the situation here, the RCO needed to be as simple as possible.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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