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

Dispatch

Mediation: stay of court proceedings

Ohpen Operations UK Ltd v Invesco Fund Managers Ltd
[2019] EWHC 2246 (TCC)

Mrs Justice O'Farrell had to consider here whether the claim had been issued in breach of a contractually agreed tiered dispute resolution procedure and, if so, whether the proceedings should be stayed, pending referral of the dispute to mediation. The dispute related to a framework agreement for the development and implementation of a digital online platform. Clause 11 provided for the following:

- Internal Escalation: where the parties agreed to use reasonable efforts to resolve any dispute amicably through ordinary negotiations and then by reference to Contract Managers.
- Escalation to the respective executive committees.
- CEDR mediation.
- If the mediation was unsuccessful, then either party may commence court proceedings.

The Judge referred to a number of cases which recognised that a contractual agreement to refer a dispute to ADR could be enforceable by a stay of proceedings, including *Holloway v Chancery Mead* (see *Dispatch* Issue 90) where Mr Justice Ramsey said:

"the ADR clause must meet at least the following three requirements: First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."

Mrs Justice O'Farrell set out the following principles for where a party seeks to enforce an ADR provision:

"i) The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.
ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.
iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties.
iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes."

The Judge noted that here, clause 11 set out different procedures for the resolution of disputes during different phases of the agreement. The parties consciously decided to put in place separate and distinct dispute resolution procedures that would apply at different stages of the project. And the Judge found that the agreement contained a dispute resolution provision that was applicable to the dispute between the parties and created an enforceable obligation requiring the parties to engage in mediation. There was a mandatory requirement to operate the dispute resolution procedure in clause 11 before the parties became entitled to institute proceedings. Although the term "condition precedent" was not used, the words used were clear that the right to begin proceedings was subject to the failure of the dispute resolution procedure, including the mediation process.

The parties had referred the dispute to their executives and held a "without prejudice" meeting. The dispute remained unresolved. The next step was for the parties to use the CEDR Model Mediation Procedure. This was a sufficiently clear and certain mechanism to be enforceable. Mediating under the CEDR model procedure produced a process that does not require any further agreement by the parties to enable a mediation to proceed. For example, the rules for selection of the mediator and conduct of the mediation were set out in the CEDR rules. Finally, the Judge noted that there was a:

"'clear and strong policy' in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement."

Accordingly, it was appropriate for the court to stay the proceedings to enable a mediation to take place. However, the Judge noted that the prospects of a settlement would be improved if the parties' positions were made clear and she ordered that pleadings be served so that the substantive issues may be clarified before the mediation took place.

Early Neutral Evaluation

Lomax v Lomax
[2019] EWCA Civ 1467

The question for the CA in this inheritance dispute was whether the court can only order that an Early Neutral Evaluation ("ENE") hearing takes place if all the parties agree. CPR 3.1 sets out the court's "general powers of management" and includes that the court may "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case".

The TCC Guide describes ENE in this way: "*Alternative forms of ADR include early neutral evaluation either by a judge or some other neutral person who receives a concise presentation from each party and then provides his or her own evaluation of the case.*"

The TCC Guide also notes that: "*In an appropriate case, and with the consent of all parties, a TCC judge may provide an early neutral evaluation either in respect of the full case or of particular issues arising within it.*"

It is intended to be carried out at an "early" stage of the court process. There is usually a preliminary meeting at which the procedure is agreed. Then following some pre-reading and a short "hearing" the evaluation is prepared. What passes in the course of the ENE is entirely privileged.

At first instance, the Judge concluded that the case cried "out for a robust judge-led process" by which the case might be resolved by agreement. However, she also considered that she did not have power to order an ENE because of the refusal to agree to this taking place. The defendant said that they were not opposed to any form of ADR, but they were opposed only to ENE because they considered that mediation was more appropriate. The defendant further said that the court had no power to order parties to submit their dispute to ADR which the defendant said included ENE. In support the defendant relied on *Halsey v Milton Keynes*, a case involving mediation, in which the court held that (i) to oblige unwilling parties to engage in this, as a form of ADR, would be an unacceptable obstruction of their right of access to the court; and (ii) to compel unwilling parties to have an ENE hearing would achieve nothing except to add to costs.

LJ Moylan noted that the CPR did not contain an express requirement for the parties to consent before an ENE hearing was ordered. It would have been easy to include such a constraint. The difference between ENE and mediation (and so *Halsey*) was that an ENE hearing was part of the court process. Further, ENE did not prevent the parties from having disputes determined by the court if the ENE hearing did not lead to a settlement. It did not obstruct a party's access to the court. It was "*a step in the process which can assist with the fair and sensible resolution of cases*". The Judge continued:

"Looking at the issue more generally...the great value of a judge providing parties with an early neutral evaluation in a case has been very well demonstrated in financial remedy cases. Further, the benefits referred to above have been demonstrated not only in cases where the parties are willing to seek to resolve their dispute by agreement and are, therefore, willing to engage in an FDR. In my experience... the benefits have also been demonstrated frequently in cases in which the parties are resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR."

Noting that the Judge at first instance held a clear view that the case would benefit from an ENE hearing, the CA directed that one be held as soon as possible. The emphasis on the Financial Dispute Resolution hearing or FDR may explain the difference in approach to the TCC Guide. The FDR is the second court hearing, held on a without prejudice basis, in matrimonial financial proceedings where a Judge usually gives an indication as to which elements of each party's position they prefer. This was, however, a CA case, and clearly represents further guidance from the courts about the importance of looking for alternative ways to resolve disputes.

Mediation: drafting of settlement agreements

Abberley v Abberley
[2019] EWHC 1564 (Ch)

A mediation took place where the parties, in dispute over a farm partnership, agreed heads of terms which were written out by the mediator and signed by the parties' respective solicitors. HHJ Jarman QC had to establish whether the heads of terms constituted a binding contract between the parties or was intended merely to set out some matters agreed in principle as part of a process of arriving at a full and effective compromise. Clause 1.3 of the mediation provided that:

"Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, each of the parties."

The Judge referred to the case of *RTS Ltd v Molkerei Alois Muller GmbH* (see *Dispatch* 118) where Lord Clarke said this:

"Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

The mediation commenced about 10 am. As is often the case, the negotiations continued beyond 6pm when the mediation was expected to finish. By about 8.30pm a deal was done and the mediator went to type out an agreement. The draft was lost and could not be retrieved so the mediator wrote out the heads of terms himself. All those present were invited into the room which he had been using, and when they were all there, he read out the heads of terms. The mediator and the two solicitors then signed this written document. It was after 10pm and everyone then left.

The next morning, one of the parties, copying in the mediator, said that there were three "small points" that needed to be addressed. Further emails followed from both parties which lead to one of the parties taking the position that the mediation heads of terms were not binding. The Judge considered that the heads of terms contemplated further documentation but it did not on its face contemplate a further formal agreement. That said, the Judge recognised that: "*in circumstances where it had been somewhat hurriedly written out when the draft typed version had been lost, it was in my judgment not surprising, and indeed sensible...to contemplate a more formal agreement.*" But that was not a strong indication in the Judge's view that the heads of terms were not intended to be binding. What mattered was whether or not the heads of terms were certain enough for a binding agreement. Having considered the specific facts of the dispute, HHJ Jarman QC held that:

"the essentials of each of the heads of terms were set out in the signed document with sufficient certainty to be capable of amounting to a binding agreement. The fact that attempts were then made to agree further details, and that subsequent documentation submitted for agreement contained variations of how the heads of terms were to be put into effect, does not detract from that certainty."

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