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The construction & energy law specialists

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

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Dispatch

Without prejudice correspondence, ADR

Jones v Tracey & Ors (Re Costs)
[2023] EWHC 2256 (Ch)

During submissions on costs, the third defendant wanted to refer to a letter dated 7 June 2023 from her solicitors to the claimant's solicitors, which was marked "without prejudice". The claimant said that the letter remained subject to without prejudice privilege, unlike other letters that were relied upon by the parties which were either open or marked "without prejudice save as to costs".

The third defendant's solicitors said that they were not able to explain why the letter in question had been marked "without prejudice" and, given its contents, there was no reason for the letter to have been marked either "without prejudice" or "without prejudice save as to costs". The letter was not, despite its marking, a without prejudice communication because the letter did not contain an offer to settle and was not written in an attempt to settle the claim.

Master Marsh reviewed the letter in the context of the other relevant communications between the parties which included letters making offers and discussing ADR. Here, Master Marsh observed that neither party had been specific about the form of ADR that was proposed: *"Although it is common to conflate ADR with mediation, it is not right to do so because ADR encompasses a range of approaches including Chancery FDR, ENE and conventional negotiations at a round-table meeting, or otherwise, as well as mediation."*

Master Marsh noted that the starting point was the manner in which the letter was drafted, and to consider how a reasonably minded recipient would regard the letter. The Master noted that: *"commonly: a letter which is not marked 'without prejudice' that falls within a chain of communications in the context of settlement negotiations will be treated as being without prejudice unless the opposite intention is obvious. The converse may also be true."*

Here, the letter of 7 June 2023 was in reply to an open letter which raised the possibility of ADR. It referred to an earlier open email and formed part of a chain of communications dealing with the possibility of some form of ADR. All those communications were open and obviously intended to be open. Master Marsh noted that it will usually be preferable for both parties to be able to rely upon such communications. Further, the letter did not contain an offer and did not relate to communications about a specific offer. It related to the use of ADR. It was right, therefore, to have regard to it.

The third defendant suggested that a failure by the Claimant to respond to an offer to mediate should be treated as a refusal to mediate. Here, the Master noted that:

(i) The claimant had made offers to settle well before the claim was issued to which there was no substantive response.
(ii) The third defendant's conduct of the claim was very unsatisfactory.
(iii) The claimant raised the question of ADR first. This was followed by a further offer that would have had significant benefits to the third defendant had it been accepted. Critically, the third defendant chose not to engage with the offer. The claimant was entitled to know what view the third defendant took of the offer before committing himself to a form of ADR.
(iv) The merits of the claim were weighted heavily in favour of the claimant.

That said, the Master commented that the claimant's failure to engage: "*more positively with ADR ... without providing any explanation is surprising.*" However, it was not conduct: "*such as to warrant a deduction from his costs.*" In particular, the Master referred to (a) the fact that the claimant made most of the running in relation to settlement, (b) the third defendant's behaviour in her conduct of the claim, (c) the strong merits of the claim which either were known or should have been known to the third defendant, and (d) the late stage at which the third defendant expressed a willingness to engage in ADR.

"Although the claimant did not explain his position in April and May 2023, it would not have been unreasonable to have concluded that the additional cost of mediation was not warranted. I do not consider that, on the facts of this case, it can be said that silence on the part of the claimant amounted to a refusal to undertake mediation (or some other form of ADR)."

Adjudication: payment and pay less notices

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL)
[2023] EWHC 2243 (TCC)

Lidl and 3CL, an industrial refrigeration and air-conditioning contractor, entered into a framework agreement which enabled the parties to enter into individual works orders, each of which was to constitute a separate contract incorporating both the terms of the framework agreement and the order. Under the contract, 3CL could make applications for interim payment following the achievement of defined milestones. Under AFP19, 3CL sought payment of £781,986.22.

Lidl said that AFP19 was an invalid payment application for a number of reasons, including that it failed to comply with the contract which required: (a) the identification of the milestones achieved, and amounts claimed against each; and (b) the provision of the required supporting photographs and insurance evidence. 3CL said that the requirements were not conditions precedent and, in any event, they had complied with them.

Lidl responded to AF19 by issuing "2011-PAY-7" and valuing the works at nil. 3CL said that this was, in reality, an invalid pay less notice served without a prior payment notice and that the payment terms of the contract as regards the final date for payment did not comply with the requirements of the HGCRA. Lidl said that the contract made the final date for payment conditional upon 3CL delivering a compliant VAT invoice which, Lidl says, 3CL did not do.

An adjudicator rejected Lidl's arguments and awarded 3CL the amount claimed in AFP19. 3CL brought Part 7 summary enforcement proceedings, and Lidl raised their contractual arguments by way of a Part 8 application for declarations. The Judge first considered whether there were any genuine defences to summary enforcement of the decision.

The only defence raised was an alleged breach of natural justice. Lidl said that the decision was based in part on an analysis of clause 7.4.2 of the contract, in circumstances where there was no opportunity for making submissions on the point. The relevant part of the decision was made on the basis that the reasonable recipient would have understood PAY-7 to be a pay less notice because: (a) this is what it said it was; and (b) it included a deduction for liquidated damages when under the terms of the contract, including and specifically clause 7.4.2, that deduction ought to be the subject of a pay less notice and not a payment notice. In the referral, 3CL, without referring to 7.4.2, had said that one reason why the notice should be read as a payment notice was because it stated that its net value of the works took into account the deduction of liquidated damages ("LDs")which demonstrated that it was, in content, a pay less notice. However, Lidl did not engage with this point. In considering this issue, the Judge commented that:

"It is fair to say that, in their submissions, the parties primarily indulged in detailed, repetitive and tendentious submission on the relevance of the fact that the notice was repeatedly described by Lidl's representative as a pay less notice. The adjudicator cannot have been assisted by the tenor of these submissions which has, unfortunately, become so endemic in adjudications."

The Judge considered that, although 3CL did not specifically mention clause 7.4.2, given that the Referral had specifically raised the point about the notice wrongly deducting and withholding an amount for LDs, there was clearly an issue raised in the adjudication which the adjudicator was entitled to consider. To say that the adjudicator could not even refer to clause 7.4.2 in making this decision simply because it had not been the subject of express reference by either party seemed to the Judge to be taking the requirements of natural justice too far in the context of the adjudication procedure.

Looking at PAY-7, the Judge commented that it was, in substance, a combined payment notice and pay less notice, specifying 20 reasons for "withholding payment", the majority of which were said to be where either the individual milestone had not been fully completed or where it had been completed but was non-compliant through defect or damage, and of the remainder, by far the most significant in monetary terms was the deduction of LDs, in the sum of £765k. The adjudicator was, therefore, right to say that the deduction of LDs in PAY-7 was contrary to the express terms of the contract and to confirm that the notice was in content and substance, as well as in its express description, a pay less notice and not a payment notice.

The Judge went on to consider whether the alleged failure by 3CL to comply with the formal requirements of the payment application was a condition precedent rendering the application invalid. The strongest point made by Lidl here was the use of the word "*must*." This was "*a powerful indication*" that compliance with these requirements was mandatory. However, there were no words in the clause which made it clear that unless each and every one of these requirements was complied with, the payment application would not be an effective payment application and the remaining requirements of the clause would not apply. There was also no compelling reason for requiring compliance to be a condition precedent. Not only was Lidl required to inspect the works within 7 days, so that Lidl could see for itself whether the milestone had been achieved, but Lidl was only required to issue a payment notice specifying the sum it considered to be due. It was therefore entitled to have regard to any non-compliance in making its valuation.

Further, whilst it was agreed that no photographs were submitted, Lidl had not rejected any of the previous applications on the basis of a lack of photographs. In such circumstances, it was "plain" to the Judge that any challenge to the validity of AFP19 based on the absence of photographs would fail by application of estoppel by convention.

3CL then submitted that the Judge should follow the decision of Cockerill J in *Rochford v Kilhan*, (*Dispatch* Issue 243) and hold that the final date for payment provisions were not compliant with the HGCRA. HHJ Davies noted that the Judge in *Rochford* had said that the lack of any certainty as to when the due date fell or when the payment certificate should be issued meant that the regime agreed was so deficient that wholesale replacement with the Scheme provisions was the only option. While a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism. This made: "*a degree of sense given that it will be important for the payer to be exactly certain how much time he or she has in which to serve a payless notice, the final date for payment being the date which is critical to that step.*"

HHJ Davies accepted that these comments were obiter, and so not binding, but the Judge said they were also *"a careful and a reasoned decision on the law, which was a separate and an independent basis for finding as she did. Accordingly it cannot simply be disregarded on the basis either that it is obiter ..."*

Lidl argued that the final date for payment was conditional on 3CL providing a valid VAT invoice; 3CL argued that this was contrary to the HGCRA. Here, under the Payment Schedule the final date for payment was: "*either 21 days following the due date or receipt of the Contractor's valid VAT invoice, whichever is the later.*" Therefore, the final date for payment might be entirely dependent on the date of 3CL's invoice, which was not, therefore, set solely by reference to or pegged to, the due date. HHJ Davies said that the legislation set a: "*blanket prohibition on party autonomy as regards the ascertainment of the final date for payment save as to the length of the period".* In other words, under s110(1)(b) of the HGCRA, you cannot link a final date for payment to an event, rather than a particular date.

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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Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

www.fenwickelliott.com