Fenwick Elliott
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Dispatch

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

Mediation

Halsey v Milton Keynes General NHS Trust, Steel v Joy and Halliday

We have reported on a number of decisions where the courts have penalised a successful party on costs for refusing to consider ADR. The CA have now given further guidance on the circumstances in which such action will be taken, although ironically in both cases here, the CA found that the refusal to mediate was justified.

LJ Dyson began by providing guidance to the general approach which should be adopted in such circumstances. That approach was headed "General Encouragement of the Use of ADR". LJ Dyson said that if one of the parties, after the Court has explored the reasons for any resistance to ADR, remains intransigently opposed to ADR, then it would be wrong for the Court to compel them to embrace ADR. However, he said that all members of the legal profession who conduct litigation must routinely consider with their client whether their disputes are suitable for ADR. The Court's role is to encourage, not to compel, although that form of encouragement may be robust.

LJ Dyson noted that mediation provides litigants with a wider range of solutions than those that are available in litigation, for example, an apology, explanation or the continuing of an existing professional relationship. That said, he accepted that mediation can have disadvantages and was not always appropriate. Therefore there should not always be a presumption in favour of mediation.

The factors which may be relevant to answering the question of whether a party has unreasonably refused ADR include: a) the nature of dispute; b) the merits of the case; c) the extent to which other settlement methods have been attempted; d) whether the ADR costs would be disproportionately high; e) whether any delay in setting up and attending the ADR would be prejudicial; and f) whether the ADR had a reasonable prospect of success.

The key factor was that it was necessary to prove that a successful party had acted unreasonably in refusing to agree to ADR. The onus is on the unsuccessful party to show that mediation had a reasonable prospect of success. Thus it is also necessary to take into account a party's willingness to compromise and also the reasonableness of their attitudes. LJ Dyson quoted with approval a court guide used in clinical negligence cases. This requires that if a party considers that a case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of any trial and if necessary when the Judge is considering the appropriate costs order to make. Going further, it also says that the party which says a case is unsuitable for ADR shall, not less than 28 days before the start of the trial, file a witness statement, setting out why the case was unsuitable.

LJ Dyson disagreed with the weight given to the government ADR pledge as discussed in the Royal Bank of Scotland v Secretary of State for Defence (see Issue 37). That pledge was no more than an undertaking that ADR would be considered and used in all suitable cases.

In the Halsey case, the CA upheld the decision of the trial Judge that the NHS Trust should not be deprived of its costs on the grounds it refused the claimant's invitations to mediate. Whilst the subject matter of the dispute was not by its nature unsuitable for ADR, the Trust had reasonable grounds to believe that it had a strong case. The CA also believed that letters written by the claimant's solicitors were "*somewhat tactical*", and an attempt to obtain payment of a sum described as being at best "*speculative*". The Trust had also taken the view, again held to be reasonable, that the costs of a mediation would be disproportionately high compared with the value of the claim if liability was established and the costs of a trial.

In the second case, the reason for the refusal of ADR was that the issue between the parties was one of law and required a decision of the Court. Further, the successful party reasonably believed that the claim against them had no merit. The offer of mediation also came comparatively late in the litigation, just weeks before the trial, after substantial costs had already been incurred.

Adjudication

Buxton Building Contractors Ltd v Governors of Durand Primary School

Buxton carried out the construction, under the JCT IFC 98 form of contract, of a new residential block for the School. During the works, the School raised concerns about the works and maintained that as a result of Buxton's alleged failure to address the complaints, it had incurred costs in calling up maintenance teams to undertake extensive call-out duties in respect of the defects.

In the adjudication, Buxton identified the dispute as being a simple one, namely, that the certified sum was due and payable in the absence of any notice of intent to withhold payment. The dispute was a small one and the Judge, HHJ Thornton QC agreed with the approach of the adjudicator that he would decide the dispute without a hearing or meeting. However, the Judge cautioned that as the School was not legally represented and given the need for the adjudicator to ascertain the applicable facts in law, it was incumbent on him to identify fully all the issues that had arisen and then come to a decision on them. The School had served details of the sum to be withheld and the reasons for the withholding. Buxton said that the material in relation to the cross-claim was irrelevant as the notice of withholding was invalid. The adjudicator agreed and decided that the sum claimed was due pursuant to a validly issued interim certificate and that no withholding notice had been served by the School.

This was sufficient for HHJ Thornton QC to decide not to summarily enforce the decision. The decision showed that the adjudicator had not considered the nature, content, validity or quantification of the cross-claim. The Judge felt that the cross-claim could and should have been capable of being set off against the retention release. Of course, Buxton argued that despite the errors, the adjudicator's decision was still valid. However, the Judge preferred the submissions on behalf of the School that the decision had been reached without the adjudicator having considered or decided upon the content of the submissions and the documents referred to him by the School. Therefore, the adjudicator had not fulfilled his statutory duty to decide the dispute referred to him under paragraph 17 of the Scheme. The decision was:

"...intrinsically unfair in that it was arrived at following a failure to consider all the side core referred issues that were and remain in dispute. It was arrived at following a failure to take into account relevant material and information that had previously been placed before the Adjudicator."

It is also interesting that the Judge did not give directions for trial and said the parties should attempt to negotiate a settlement of all of the disputes that had arisen.

Conor Engineering Ltd v Les Construction Industrielles de la Mediterranee SA

CIM was employed to design and build a waste incineration plant. CIM subcontracted parts of the work to Conor. Disputes arose and Conor referred the matter to adjudication. The adjudicator found for Conor and declined to address CIM's claims for LADs as they had not previously been notified to Conor. He also ordered that payment be made within 14 days of the date of the decision. Following receipt of the decision, CIM issued withholding notices based on a right to LADs.

Conor said that under section 111 of the HGCRA, CIM had to serve a valid withholding notice not later than the prescribed period before the final date for payment. As there was no contractual agreement, the relevant period was not later than 7 days before the final date for payment. Conor said that the final date for payment here was as decided by the adjudicator, i.e. within 14 days of his decision. CIM said that the contract was governed exclusively by the contract term which set no time limit.

Recorder Blunt QC held that the adjudicator's decision directing that payment be made within 14 days of the date of the decision, must be taken to have decided, rightly or wrongly, that that was the final date for payment under the terms of the contract (or even under the Scheme if he thought it applied). Even if this was wrong in fact or law then that would not make his decision unenforceable. He rejected the argument that the 14-day period should run from the date when the decision was received (i.e. because it would be impossible to answer them before they were received) which was 2 days later, as the specific wording of the decision was clear.

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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