Fenwick Elliott
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Dispatch

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

Settlement Offers

■ Trustees of Stokes Pension Fund Ltd v. Western Power Distribution (South West) Plc

Prior to issuing proceedings, WPD wrote a letter to TSPF marked "without prejudice save as to costs" offering to settle the claim for £35,000. The offer was said to be open for acceptance for 21 days. TSPF did not accept the offer, which was withdrawn. TSPF issued proceedings but WPD did not make a payment into court pursuant to CPR 36 Rule 10(3). At trial, TSPF were awarded damages in the sum of £25,600. The trial judge said that the WPD offer did not afford any protection in relation to costs because it had not been followed by a payment into court as contemplated by the CPR once proceedings had begun and because it had been withdrawn.

The CA had to decide whether the trial judge was right. LJ Dyson referred back to the Access to Justice Report 1995 prepared by Lord Woolf, which was the pre-cursor to the new CPR. Lord Woolf had suggested ending the system of payments into court and proposed that it should be permissible to use a Calderbank letter in all cases. These recommendations were not adopted by the Civil Procedure Rule Committee.

LJ Dyson then considered the discretion afforded by the CPR where a claimant recovers less than the amount of an offer. A simple offer cannot automatically have the costs protection specified in Part 36. However, LJ Dyson thought that such an offer should usually be treated as having the same effect as a payment into court if the following conditions are satisfied:-

(i) The offer must be expressed in clear terms so there is no doubt about what is being offered;
(ii) It should be open for acceptance for at least 21 days and otherwise accord with the substance of a Calderbank offer;
(iii) The offer should be genuine; and
(iv) The person making the offer should clearly have been good for the money at the time when the offer was made.

If none of the conditions are satisfied, it is likely that the court will hold that such an offer affords no cost protection at all. To the extent that any of the conditions are not satisfied, the offer should be given less weight than a payment into court. However, if all the conditions are met, LJ Dyson could see no reason in principle why the effect of an offer should differ from that of a payment into court. The purpose of a payment into court is not to provide the claimant with security for his judgment if he succeeds at trial. It is to encourage settlement.

LJ Dyson also considered the effect of the withdrawal. He noted that if the offer had been accepted within 21 days, WPD would have paid TSPF's costs and there would have been no trial. TSPF would have done better than they did in fact by refusing the offer. On the material placed before the Court, LJ Dyson held that TSPF should have accepted the offer within 21 days. Therefore there were no grounds on the facts of this case for holding that the withdrawal of the offer should make any difference to the costs position.

Costs - Pre Action Protocol "Proceedings"

■ McGlinn v Waltham Contractors Ltd & Others

McGlinn issued proceedings as a result of alleged defective work in the building work carried out to his property. Before issuing the proceedings, McGlinn went through the steps prescribed by the Pre-Action Protocol for Construction and Engineering Disputes. This led to a mediation which was unsuccessful. However, the claims made by McGlinn in the TCC proceedings, did not include claims in respect of over payment and loss and expense paid to Waltham. This was even though those claims had been made at the outset of the Pre-Action Protocol procedure.

At the first case management conference, one of the defendants sought an interim payment of £20,000 in respect of costs which they claimed were thrown away at the Pre-Action Protocol stage as a result of the need to consider and respond to these claims which had been abandoned by McGlinn.

As HHJ Coulson QC noted, there is no direct authority on the question of the general recoverability of costs incurred in compliance with the Pre-Action Protocols. Had the claims been abandoned after court proceedings had been issued, then the defendants would have been entitled to their costs.

However, HHJ Coulson QC said that "save in exceptional cases", costs incurred by a defendant at the Pre-Action Protocol stage when dealing with and responding to issues which are subsequently dropped when proceedings are commenced, cannot be said to be costs incidental to those proceedings. As a matter of general principle, claims made at the time of the Protocol Procedure which were then deliberately excluded from the court proceedings bear no real relation to the subject of the litigation. Here, the proceedings had been narrowed so that there was only one real subject - namely the defective work alleged by McGlinn.

The Judge also felt that it would be contrary to the whole purpose of the Pre-Action Protocols, which are an integral part of the CPR, if claiming parties were routinely penalised if they decided not to pursue claims in court which they had included in their Protocol claim letters. The whole purpose of the Protocol procedure is to narrow issues and allow a prospective defendant where possible to demonstrate to a prospective claimant that a particular claim is doomed to failure. This is what had happened here. Thus, unless there were exceptional circumstances which gave rise to unreasonable conduct, the costs incurred by a defendant at the Pre-Action Protocol stage in successfully persuading a claimant to abandon a claim, were not therefore recoverable.

Commencing Arbitration After Adjudication

■ Lafarge (Aggregates) Ltd v Newham London Borough Council

Lafarge applied to the court under Section 67(1)(a) of the 1996 Arbitration Act seeking a determination that an award had been made without jurisdiction. The award related to a preliminary issue where an arbitrator determined he had jurisdiction to hear a claim commenced by Newham. The dispute had been referred to an adjudication and, following the adjudication, Newham sought to arbitrate the matters in dispute.

On 13 August 2004, the adjudicator sent an email attaching a letter and document entitled "Adjudicator's Decision". This was dated but not signed. The signed decision was sent in hard copy to the parties on 13 August 2004. Newham said that they did not receive it until 17 August 2004. On 11 November 2004, legal advisors for Newham sent a Notice to Concur to Lafarge. Pursuant to the contract, the Notice needed to be served within three months of the adjudicator's decision. The letter was received on Friday, 12 November 2004. The arbitrator found that the adjudicator had given his decision on 13 August 2004, the date when it was sent and received by email, and not 17 August 2004, the date the copy was received by Newham.The arbitrator also noted that under the Contract, service was not effected until the expiry of two working days after the letter had been sent. However, the arbitrator then found that Saturday was a working day for the purposes of the Contract. Therefore, the Notice was to be treated as served on Saturday, 13 November 2004, i.e. within the three months time limit.

Cooke J agreed that the adjudicator's decision was given on 13 August 2004. It also held that it was plain that whatever method of service was adopted (sending a notice by post or leaving the notice at a registered office), under the contract "*notice shall be deemed to be served two working days following service*". There were practical reasons for this - i.e. the inevitable delay if the Notice was sent by post before it came to the attention of the person dealing with the matter. Further, the server of a Notice knows that he must adopt one of the prescribed forms of service at a time which allows two working days to follow before the expiry of any relevant time limit.

Newham argued that the contract provided for permitted working hours, including Saturday. Lafarge argued that what mattered was office working hours. Cooke J looked at the permitted working hours.The Contract excluded weekend working in residential areas. The Judge held that in ordinary parlance, working days are Mondays to Fridays, excluding Christmas, Easter and Bank Holidays. Saturday, 13 November 2004 was not a working day. The earliest date service could have been effective was 15 November 2004. As a consequence, the arbitrator had no jurisdiction.

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