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Dispatch

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

Adjudication
■ Allen Wilson Shopfitters Ltd v Buckingham

In this case, the defendant sought to stay or delay enforcement proceedings to allow the possibility of being able to use the outcome of a further adjudication to reduce his liability under the original decision. HHJ Coulson QC noted that:

"adjudicator's decisions are intended to be enforced summarily and a claimant, being the successful party in adjudication, should not, as a general rule, be kept out of his money".

He continued that pursuant to CPR 40.11, a judgment must be complied with within 14 days. The existence of a further adjudication, due to conclude sometime after that date, which might give rise to a setoff or counterclaim was "wholly irrelevant" to the question of any entitlement to judgment in the enforcement proceedings".

The Judge also considered the decision of Judge Thornton QC in Verry v North West London Communal Mikvah (see issue 52) where Judge Thornton having given judgment to enforce an adjudicator's decision, said that that judgment would not be drawn up for six weeks to allow time for the defendant to start fresh adjudication proceedings and seek to have particular disputes resolved before the judgment was formally entered.

HHJ Coulson QC noted that the overriding reason for this conclusion was the fact that the adjudicator's decision, which he was asked to enforce, contained a number of admitted errors. One of those errors arose in a way that was actually unfair to the defendant. Therefore, in those specific circumstances, the best way to do justice between the parties was to delay enforcement of the judgment so the defendant could attempt to have those points rectified. Such a decision was fair and unsurprising. The same principles did not occur here. Accordingly, if you think you have a potential claim of your own, it is important that you consider whether or not to take prompt action to counter-adjudicate

Adjudication - Natural Justice
■ Ardmore Construction Ltd v Taylor Woodrow Construction Ltd

In this Scottish case, TW resisted payment of part of an adjudicator's award alleging breaches of natural justice. In the adjudication notice, Ardmore claimed they were instructed by a letter of 2 July 2003 to undertake overtime working. The Adjudicator, in his decision found that there was additional written evidence that amounted to verbal instructions or evidence that TW had requested and therefore agreed to the overtime working. TW said that, at no time prior to the issuing of the decision was the alternative overtime claim raised or discussed before the Adjudicator. They therefore had not had the opportunity to respond to these suggestions.

Lord Clarke noted that it was settled law that adjudicators must observe the principles of natural justice. However, he accepted that the Courts had taken a "*realistic and pragmatic approach to such questions by emphasising that the nature of the process, and in particular the strict time limits within which the adjudicators are constrained to operate, require that in substantial or technical, breaches of natural justice should not be taken merely to delay or avoid payment.*" Therefore the taking of such points should not be encouraged by the Courts. That said, the integrity of the adjudication system would be best protected by the Courts ensuring that "*broad standards of fair play operate in relation to the making of decisions*". A key principle of fair play was that each side is made aware of the case that has been made against them and has an opportunity to respond to it.Here, the Judge was satisfied that no prior notice was given on any case beyond the construction and effect of the July letter. TW were not in a position to investigate these matters prior to the hearing. They were not given the opportunity to place evidence before the adjudicator prior to his issuing the decision. Therefore even though the Court should generally be "*resistant to invitations to pick over adjudicator's decisions and to analyse over closely, and critically, their procedures,*" there had been a clear and substantial breach of natural justice here.

Adjudication - More than one dispute
■ Michael John Construction Ltd v Golledge & Others

MJC sought to enforce an adjudicator's decision. In his judgment, HHJ Coulson QC noted that a point which often arises as part of any jurisdictional dispute is the suggestion by the unsuccessful party that the matters referred comprised of more than one dispute. In such cases, the courts have adopted a robust approach to this and have utilised what has been called a "benevolent interpretation of the notice".

The defendants said the notice to refer was invalid because it asked the adjudicator to decide at least two disputes. The two disputes were, the correct identity of the employer and how much that employer owed. The Judge noted that this point has never yet been decided in favour of an unsuccessful defendant. He made it clear he was not going to create any such precedent here. This would be untenable as a matter of commercial-sense. The matter referred was one dispute: "How much, if anything, did the employer owe?" The Judge also rejected the suggestion that the dispute that arose was one that arose not under the contract, but in connection with that contract. Again, the matter at issue was what was the claimant owed under the contract?

An application was also made for a stay on the "*Hershel*" principles. However, it was plain on the evidence that MJC was not in a significantly worse financial position now than it was at the time the contract was entered into. Further, to the limited extent that MJC's financial condition had deteriorated, this was due, at least in part, to the failure by the defendants to honour the adjudication.

Arbitration - Service of the arbitration notice
■ Bernuth Lines Ltd v High Seas Shipping Ltd

Are you sure all your email addresses are regularly monitored? Here Bernuth applied under Section 68 of the 1996 Arbitration Act to set aside a Final Award made in favour of High Seas. Bernuth said that the arbitration had not been effectively served. The arbitration proceedings were served on an email address that appeared in the Lloyds Maritime Directory and on Bernuth's own website. However, the address was not one that had been used on any previous communication from Bernuth or High Seas. It was described as a general information email address.

The Arbitrator and those acting for High Seas sent a series of communications to Bernuth at the same email address. The Final Award was also sent there. The Arbitrator noted that no Defence was received but he was satisfied that Bernuth were aware of the proceedings as email delivery receipts had been received. Bernuth said that the emails had been sent to the Department for Cargo Bookings and so would have been ignored by the clerical staff. Bernuth were surprised and annoyed that the previous channel of communications established were bypassed. By Section 76 of the 1996 Arbitration Act, parties are free to agree on the manner of service of any documents. If there is no agreement, a Notice may be served by any effective means. If the Notice was delivered by post to a listed address, it will be treated as effectively served. However, the emails here were not confirmed by post.

Under the CPR, service by email is not allowed in the absence of express written confirmation and without the relevant email address being provided. However this was arbitration. The Judge noted that arbitration is usually conducted by businessmen with ready access to lawyers. Section 76 of the Arbitration Act is "purposely wide" and contemplates that any means of service will suffice provided it is a recognised means of communication and effectively delivers the document. There was no reason why the use of email should be regarded as different from communication by post or fax. The emails here, were received at an email address that was held out to the world as being apparently the only email address of Bernuth. No other address appeared on the web site.

It did not become ineffective service because a particular employee did not think that a serious matter would be sent to that address. The emails in question, described as being plain and straight-forward, did not bear the hall-marks of spam. The email address was listed in the Lloyds Maritime Directory as being the only email address. The Judge did not accept that, in an arbitration context, in order for service to be effective it was essential that the email address at which service had purportedly been made was previously notified to the serving party as the address to be used for such service.

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