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Dispatch

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

Are Joint Expert Reports prepared for mediations privileged?
■ Aird & Aird v Prime Meridian Ltd

The dispute between the two parties was stayed to mediation. In order to assist the mediation process, the Court ordered that the parties' architectural experts should meet on a without prejudice basis and prepare a statement of issues upon which they are agreed and not agreed. This is not uncommon. The Court Order followed the typical format of CPR 35.12. The experts duly met and a joint statement was produced.

The mediation was unsuccessful. When the proceedings recommenced, the Claimants sought to amend their pleadings in a way that was inconsistent with the views expressed by their expert in the joint statement. The Defendant objected. In reply, the Claimants said that the joint statement produced for the mediation was without prejudice and thus privileged.

As HHJ Coulson QC noted, the dispute raised two potentially competing public policies. First, the production of joint statements by experts is an important part of effective case and trial management within the TCC. It would also be contrary to the overriding objective if statements signed by the experts were to be kept secret from the Courts. However, in contrast to that, documents generated for the purposes of mediation are privileged.

The importance of what was termed "without prejudice protection" is to encourage parties to speak frankly in an attempt to settle the disputes between them. As it happened, none of the cases cited in the hearing before the Judge, dealt with the particular situation at issue here. In the normal course of events, the joint statement would not be protected by privilege once it was agreed. In other words, once the statement was signed by both experts it would become a document upon which either party could rely during the court proceedings.

What was unusual here was that the statement was produced initially for use in the mediation. HHJ Coulson QC noted that the order made was not a conventional one. It was made very much with the mediation in mind. The Claimants had proceeded on the basis that the production of the joint statement was for the purposes of the mediation.

Having met on a without prejudice basis, when the statement came to be agreed and signed, the experts agreed the removal of the words without prejudice. However the question the court had to decide was whether that agreement was only prepared for the purposes of the mediation.

The mediation agreement was in a typical form. It noted that every person involved would keep confidential all information produced for or at the mediation. However, the terms of the mediation agreement also said that evidence that is otherwise admissible or discoverable should not be rendered inadmissible simply as a result of its use at the mediation.

HHJ Coulson QC was of the view that in the ordinary case, a statement such as the one here would not be privileged. It is typically required by the order of the Court and it is used to assist the Court in the exercise of its case management and trial management functions. That the statement was used in a subsequent mediation would not make it privileged or inadmissible.

However here, the Order in respect of the expert meeting came about only because of the imminent mediation. Without the mediation, the joint statement would not have been made at all. The purpose of the statement was to facilitate the mediation. The Claimants and the Claimant's solicitor and the expert all believed the purpose of the statement was for the use in the mediation. The Defendants believed that the statement had a dual purpose.

Following existing case law, namely Smith's Group Plc v Weiss, the without prejudice tag which is usually applicable to documents provided for mediation, should only be waived in clear and unequivocal circumstances. This could not be said to be the case here.

The primary function of the statement was to assist the mediation. The Judge also noted that there was only a limited time to prepare the statement before the mediation. There were also financial constraints in respect of work carried out before the mediation. Thus the work which was carried out by the experts was more limited than it might have been if the experts had been preparing a joint statement for the Court. Accordingly, he ruled that the statement was privileged.

Does the final account override an adjudicator's decision?
■ William Verry v The Mayor and Burgesses of the London Borough of Camden

WVL sought to enforce a decision of an adjudicator in its favour in the sum of just over £532k. There had been two previous adjudications between the parties. The first related to an interim application for payment initiated by WVL; the second concerned the valuation of certain specific elements of the WVL account initiated by Camden. As part of the decision, the adjudicator had indicated the entitlement of WVL to an extension of time and the entitlement of Camden to deduct liquidated damages for non completion. This led to the total balance payable to WVL.

Prior to the service of the adjudication notice, WVL had submitted a draft final account. Before the adjudicator made his decision, the contract administrator wrote to WVL enclosing a certificate for payment based on that draft final account. This final certificate showed a balance due to WVL of only £46k. WVL initiated adjudication proceedings (number 4) in respect of the final certificate. Those proceedings were stayed by consent.

Camden, after receipt of the adjudicator's decision, sought a repayment from WVL. Camden took the final account valuation of the contract administrator and deducted from that, the amount of LADs awarded by the adjudicator. Camden also served a further notice of adjudication (number 5) seeking a decision on a claim for defects. That decision was due in approximately six weeks time.

Camden resisted summary judgment on a number of grounds, including reliance of the final certificate and the claim made in adjudication 5. The contract between the parties was based on the JCT IFC 1998 Edition. Camden submitted that WVL's entitlement to an interim payment on practical completion under clause 4.3 of the contract, as determined in adjudication 3, was superseded by the final certificate issued under clause 4.6.1.1 of the contract. The obligations to the parties were now regulated by the final certificate.

In other words, these contractual obligations overrode the contractual obligation to comply with the adjudicator's decision. WVL said that the adjudicator's decisions are there to be enforced. The final certificate was not conclusive. Under clause 4.7.1, it was no more than a statement of valuation by the contract administrator which was in any event contested by WVL.

Mr Justice Ramsay said that questions raised in this case related to the ability of a party to resist payment of sums in the adjudicator's decision on two grounds:

(i) That the sums are inconsistent with sums certified in the final certificate issued subsequent to the certificate which forms the subject matter of the adjudicator's decision; and

(ii) That the opposing party has a counterclaim for un-liquidated damages for breach of contract in respect of defects, which is currently the subject of adjudication.

Mr Justice Ramsay relied on the Court of Appeal decision in *Ferson v Levolux*. As the Judge recognised, the problem here was the process of adjudication on the certificate of practical completion overlapped with the final certification process. The Judge held that the sums due in adjudication 3 should not give way to the disputed valuation of the final certificate. In particular, the Judge referred to the binding nature of the adjudicator's decision and the agreement of the parties to comply with that decision. If payment of an adjudication decision on a sum due on an interim certificate had to be subject to the view and review of the contract administrator in a subsequent certificate, then the intention of Parliament for the purpose of adjudication would be defeated. Each successive certificate would defeat the decision by an adjudicator on the previous certificates.

The provision in the contract that compliance of an adjudicator's decision is without prejudice to other rights under the contract, should be read as requiring compliance with the decision of the adjudicator. In addition here, the final certificate had no conclusive effect given that an adjudication had been commenced within twenty-eight days of that final certificate. Provided that a matter was the subject of adjudication 3, then the final certificate could not be conclusive of that matter. The final certificate was a disputed payment certificate and had no conclusive effect.

The Judge was not prepared to order a stay in relation to the defects counterclaim. Again, the parties had agreed to comply with the adjudicator's decision. Camden had not sought to withhold sums for defects against the interim certificate. If an adjudicator decided that Camden's counterclaim was of merit then Camden would be entitled to payment on the basis of that decision. Camden not could deduct sums in the interim from an existing adjudicator's decision.

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