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

Dispatch

ADR: failure to mediate

Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd & Aviva

[2020] EWHC 1050 (Comm)

This was a judgment on costs following the dismissal of Mr Wales's claims. CBRE had not provided a detailed response to the original letter of claim. Further their response did not deny allegations that had been made about termination, something which HHJ Halliwell considered to be "*unfortunate as it could only have encouraged Mr Wales in his "erroneous impression" that CBRE had purported somehow to terminate his contract*".

Both Mr Wales and Aviva indicated a willingness to mediate. However, CBRE said they would not participate in the proposed mediation. This led Aviva to state that it had concerns about the viability of a mediation without CBRE and that such a mediation would be "*premature*". Aviva's position changed slightly, just after receiving notice that Mr Wales was about to issue proceedings, in that it said it would participate in a mediation provided CBRE did as well. This was not enough to stop Mr Wales proceeding.

Aviva suggested for the CMC that the provision for a stay to mediation be deleted from the standard directions on the basis that the "*proposed timetable allows sufficient time for the parties to engage in ADR and settlement discussions once issues surrounding clarification of the parties' pleadings have been resolved*". As required, CBRE's solicitor filed a statement explaining why CBRE had not engaged in ADR, stating that it was "*premature*" to consider arranging a mediation pending the conclusion of pleadings.

The case proceeded and at the end of May 2019, Mr Wales' solicitors proposed mediation. Again, Aviva said they were willing and suggested 17 or 19 June 2019, but there was no reply from CBRE who later said there was insufficient time to prepare as the mediation would have interfered with their preparations needed to comply with the court timetable. There were also factual issues in dispute. Witness statements were exchanged on 21 June and there was no further suggestion of mediation.

Following the trial, CBRE and Aviva were successful and so Mr Wales would usually be ordered to pay their costs unless there was good reason to the contrary.

HHJ Halliwell agreed that there was good reason to show that CBRE had unreasonably refused or declined to participate in ADR. This failure was compounded by CBRE's failure to provide a detailed response to the letter of claim in breach of the requirements of the Practice Direction for Pre-Action Conduct and Protocols. This meant that the parties were denied the opportunity to fully canvass and engage with the underlying issues. Had CBRE been willing to engage in mediation, there would in all likelihood have been a tripartite mediation in which all the material issues were properly considered and addressed. The Judge also noted that many mediations were successfully concluded without witness statements and there was no reason to believe there were features of the current dispute which would dictate a different outcome.

The Judge was therefore satisfied that CBRE should be deprived of a substantial proportion, 50%, of its costs in the period up to the date when CBRE made an offer to compromise the proceedings. The Judge considered that in acting in this way, CBRE had "*opened negotiations*" and it was incumbent on Mr Wales to explore the available settlement options with them. However, this changed when CBRE again refused to engage in mediation at the end of May 2019. From this period the Judge disallowed 20% of CBRE's costs. This was in part because the landscape had changed, in that CBRE's and Aviva's case had become stronger, although this did not mean that a mediation would have been unsuccessful.

The Judge also deprived Aviva of a part of their costs. This was because they made a late amendment which substantially altered the case Mr Wales had to meet. This not only shaped Mr Wales' initial approach to the case but also led to changes to the pleadings and wasted costs as a result of those changes. The Judge reduced Aviva's costs by 20% up until the date of the amendment.

However, it was not unreasonable of Aviva to decline to participate in a mediation. Aviva repeatedly indicated a willingness to engage in the mediation process. Further, Aviva "*reasonably*" took the view that, in the absence of CBRE, the prospects of achieving a satisfactory compromise or substantially reducing the relevant issues would be substantially diminished. Ultimately it was not prepared to enter into a bilateral mediation with Mr Wales in the absence of CBRE. However, in this respect, it did not act unreasonably at any stage of the dispute.

Adjudication & Part 8 applications

ISG Construction Ltd v Platform Interior Solutions Ltd

[2020] EWHC 1120 (TCC)

We discussed this case last month in Issue 239, where Deputy Judge ter Haar QC granted Platform summary enforcement of an adjudicator's decision. ISG then sought declarations under Part 8 that the decision of the adjudicator was: "*wrong and beyond rational justification in that the adjudicator's assessment of sums due to Platform was inconsistent with the terms of the Sub-Contract*". The purpose of the declarations was to prevent enforcement of the adjudicator's decision.

Platform started the adjudication enforcement case on 31 January 2020; ISG started the Part 8 case on 27 February 2020. On 10 March 2020, the TCC said that there was insufficient time to timetable the Part 8 Claim for hearing together with the enforcement case which raised: "*different issues for determination*". Platform's case was heard on 24 March 2020 and ISG's on 24 April 2020.

The Judge accepted that the arguments raised serious issues as to whether the approach adopted by the adjudicator was correct as a matter of construction of the contract between the parties. However he did not hear full argument on the proper approach to the contract and so he did not determine the issue.

The Judge and the parties looked at the case of *Hutton Construction Ltd v Wilson Properties Ltd* [2017] EWHC 517 (TCC) which set out the conditions that must be satisfied by a defendant who seeks to resist enforcement proceedings via a Part 8 application. There must be a short and self-contained issue which arose in the adjudication that the defendant continues to contest; the issue must require no oral evidence or any other elaboration beyond that which is capable of being provided during the time allowed for the enforcement hearing (usually about 2-3 hours); and the issue must be one which on a summary judgment application it would be unconscionable for the court to ignore.

In addition, the onus will be on the defendant to promptly issue a Part 8 application that clarifies exactly what relief/declarations it seeks. The Judge here noted that those principles were applied by Mrs Justice Jefford in *Seadown Developments Ltd v SMCC Construction Ltd* (unreported, 3 November 2017) who said that:

"It does not simply follow from the fact that the adjudicator's decision is wrong that it will not be enforced, save in the sort of particular or exceptional circumstances identified by Coulson J. in Hutton for the very reason that normally the fact that the adjudicator may be wrong does not render his decision unenforceable."

The Judge here considered whether or not the Part 8 proceedings brought by ISG raised a "*short and self-contained issue which arose in the adjudication*". As we mentioned last month, in the enforcement decision, the Judge noted that the parties were agreed on the way in which the adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the sub-contract. The problem was that the result of that approach produced a result which the Judge suspected neither party had expected. It was this which gave rise to the legal issues raised in the Part 8 proceedings as to the proper approach to the adjudicator's conclusions about valuation. Therefore ISG were raising in the Part 8 proceedings a point not raised in the adjudication.

An exception to this approach might be if there was an admitted error. There was not. In addition, there was a further issue against the Part 8 process. ISG argued that the adjudicator fell into error in that she did not determine the question of what sum was due to Platform by reference to or in accordance with the particular provisions of the contract, and, in particular, did not assess Platform's entitlement, if any, on the value of the works up to the date of termination. To make this argument good, ISG needed valuation evidence. It was no longer a short point of construction.

Finally, the declaration as sought by ISG went as far as contending that the adjudicator's construction of the contract was beyond any rational justification. However, in the Judge's view, it was impossible for ISG to succeed on that case where the adjudicator had done what she had been asked to do by both ISG and Platform.

Whilst the Judge noted that it might be possible for ISG to seek to apply to amend the Details of Claim in the Claim Form in order to request slightly different declarations, something that might be opposed, for the present purposes, the Judge simply held that:

"to grant the declarations sought with the purpose and effect of preventing enforcement of the Adjudicator's Decision would be wrong."

Duties of an expert: a reminder

DBE Energy Ltd v Biogas Products Ltd

[2020] EWHC 1232 (TCC)

This was a claim concerning the alleged breach of contract and/or negligence of Biogas in relation to the design, manufacture and supply of components required by DBE for incorporation into its newly built anaerobic digestion facility. Questions were raised over the impartiality of certain of the experts. The Judge referred to the observations of Mr Justice Fraser in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No. 2)* [2018] EWHC 1577 (TCC) that:

"it is not the place of an independent expert to identify which version of the facts they prefer. That is a matter for the court".

Here one of the experts tried to introduce inadmissible material into his expert report which was removed by Order of the court at the Pre-Trial Review. This issue was magnified by the expert's failure to take what was described as the "*clear direction*" from the court at the PTR as further inadmissible material was included in the Technical Joint Statement. This had to be subsequently removed by agreement between the parties on the second day of trial. Further, various parts of the report: "*exhibited a tendency to advocate in favour of Biogas' case*". It appeared that the expert had simply adopted Biogas' factual case without acknowledging the existence of an alternative factual position on the part of DBE. An easy mistake to make perhaps, but one which suggested to the Judge that the expert did not take proper care in his report to set out the background facts in an impartial way. This resulted in the expression of views which appeared to the Judge to be biased in favour of Biogas. Finally, the expert was, on occasion, inclined in his report to make factual findings which were matters for determination by the court.

Another expert sought to rely on material that was not available to the other side's expert, making reference to information she had received that was not in witness statements or documents before the court. Where the other expert did not have access to that information and it was not in evidence, that part of the expert's evidence was disregarded.

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.

Dispatch is a newsletter and does not provide legal advice.

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