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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

Silence in the face of an offer to mediate

Thakkar & Anr v Patel & Anr

[2017] EWCA Civ 117

This was an appeal against a costs order. One of the principal issues was the consequences of failure to mediate. The claim in question was a dilapidations claim for £210k which was met by a counterclaim of just over £40k. In their allocation questionnaires, both parties requested a stay for ADR. In the CA, LJ Jackson noted that there seemed to have been a desire to settle on both sides. Both parties initially, at least, expressed a willingness to mediate. The claimants were proactive in making arrangements for a mediation and identifying possible mediators for consideration by the defendants. The trial Judge contrasted that with the approach of the defendants who were "slow to respond to letters and raised all sorts of difficulties." Eventually, the claimants decided that no progress was possible and explained why in a letter as follows:

"Our clients have made all reasonable attempts to arrange a mediation but have been thwarted by your clients' conduct. Since April 2012 countless weeks have been lost through having to chase for responses. When your client finally gave a clear window of availability we tried to fix a mediation within that period a variety of excuses have been given as to why that date could no longer go ahead.

Understandably, our clients no longer have any confidence that a mediation can be arranged given your clients' conduct and do not feel that it is reasonable that they should continue to have to amend their travel plans and work commitments of both themselves, their surveyor, and the writer, when the likelihood is that further 'circumstances' will arise that will lead to the postponement of any future date."

The ADR stay was lifted and the trial took place. The claimants were awarded £45k, the defendants, £17k, leaving a balance owing to the claimants of £28k.

This left the question of costs. The trial Judge described the defendants as having been "relatively unenthusiastic or lacking in preparedness to be flexible" but also noted that it was the claimants who had closed down the ADR. He concluded that there were real prospects of settlement if a mediation had taken place. After weighing up all the circumstances, the Judge ordered the defendants to pay 75% of the claimants' costs of the claim. He ordered the claimants to pay the defendants' costs of the counterclaim. The defendants appealed.

LJ Jackson agreed with the trial Judge that if there had been a mediation there would have been a real chance of achieving a settlement. The dispute was a commercial one, being purely about money. The offers that had already been made were close. The costs of the litigation were vastly greater than the sums in issue. Bilateral negotiations had been unsuccessful. The Judge at first instance had said that:

"Any mediator would have had both parties in the room with him. He would have let them have their say. He would then have pointed out (a) the small gap between their respective positions, and (b) the huge future costs of the litigation. In those circumstances I would be astonished if a skilled mediator failed to bring the parties to a sensible settlement."

LJ Jackson referred to *PGF II SA v OMFS Company* (see *Dispatch 162*) where the CA held that silence in the face of an offer to mediate was, as a general rule, unreasonable conduct meriting a costs sanction. This was so, even if an outright refusal to mediate might have been justified. Here, the prospects of a successful mediation were good. The defendants did not refuse to mediate, "they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process." It was against that background that the trial Judge ordered the defendants to pay to the claimants 75% of the costs of the claim whilst recovering their costs of the counterclaim.

LJ Jackson said that this was a "tough order, but it was within the proper ambit of the trial Judge's discretion". Finally LJ Jackson made the following comment:

"The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene".

Case Update: provision of free services

Lejonvarn v Burgess & Anr

[2017] EWCA Civ 254

We reported on this case in Issue 188. This was the case where the Burgesses employed Mrs Lejonvarn, a friend and former neighbour, to assist with a landscaping scheme. The Burgesses were unhappy with the quality and progress of the work and Mrs Lejonvarn's involvement came to an end in July 2013. The Burgesses further claimed that much of the work done during the period of Mrs Lejonvarn's involvement was defective and claimed damages of £265k. Following a preliminary issue hearing in the TCC, Mr Alexander Nissen QC held that there was no contract but that Mrs Lejonvarn did owe a duty of care in tort to the Burgesses in relation to the provision of various services pleaded.

The Judge had concluded that:

"it is established that in law a duty of care extends to the protection against economic loss in respect of both advice and any service in which a special skill is exercised by a professional. The duty can extend to negligent omissions as well as the performance of negligent acts. For present purposes, the relevant ingredients giving rise to the duty are an assumption of responsibility by the provider of the service coupled with reliance by the recipient of the service, all in circumstances which make it appropriate for a remedy to apply in law...a duty of care may be found to arise even in circumstances where services are performed gratuitously and in the absence of a contract. However ... in the absence of a contract it is important to exercise greater care in distinguishing between social and professional relationships."

On appeal Mrs Lejonvarn said that the Judge should have asked whether the loss was reasonably foreseeable, whether there was a sufficient relationship of proximity, and whether in all the circumstances it was fair, just and reasonable to impose a duty of care. The CA noted that this did not appear to have been suggested to the Judge. Further, the Judge was entitled to apply the test he did. In establishing whether or not there has been such an assumption of responsibility, the court still has to enquire into whether it would be fair, just and reasonable to impose liability. This was a case which concerned Mrs Lejonvarn voluntarily tendering skilled professional services in circumstances where she knew the Burgesses would rely on the proper performance of those services.

The Judge found that Mrs Lejonvarn agreed to provide and did in fact provide a number of specific professional services acting as architect and project manager in relation to the project. The fact that the Judge found that there was no contract did not mean that the parties' relationship could not be akin to a contractual one. Although the services were being provided for free, they were professional services being provided "in a professional context and on a professional footing". Further, they were being provided in the expectation that they would lead on to Mrs Lejonvarn being paid for her services in relation to the second phase of the work. The project was also going to help in the establishment and growth of her business.

This was not a case of brief ad hoc advice but was a significant project which was being approached in a professional way. The services were provided over a relatively lengthy period of time and involved considerable input and commitment on both sides. The services involved significant commercial expenditure on the part of the Burgesses. Although there was no consideration, Mrs Lejonvarn did hope to receive payment for the soft design services that would later be provided and it was also important to the growth of her new business that she provided a good service. The benefits provided went beyond the normal bounds of friendship and the provision of gratuitous services by her should be seen in that light.

The CA therefore dismissed the appeal. The Judge was entitled to conclude that it was fair, just and reasonable to find that a duty of care had arisen. Mrs Lejonvarn was aware that the Burgesses would be relying upon her to properly perform and it was foreseeable that economic loss would be caused to them if she did not. Mrs Lejonvarn did not have to provide the services, but to the extent that she did, she owed a duty to exercise reasonable skill and care in the provision of them. The Judge had also found that a duty of care was owed to exercise reasonable skill and care in the provision of periodic inspection, attending site at regular intervals (approximately twice a week) to project manage the Garden Project. The CA defined the duty in the following terms:

"In providing the professional service acting as an architect and project manager of project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

Time pressure at the end of the adjudication period

Bell Building Projects Ltd v Arnold Clark Automobiles Ltd

[2017] ScotCS CSOH 55

This was a Scottish adjudication enforcement case. ACL said that the adjudicator had failed to give ACL a proper opportunity to respond to information supplied by BBP at the very end of the process. Further, the adjudicator had failed to address the ACL contra charge in any proper fashion. BPP said that ACL had sought to contrive a situation in which it could complain that it had been unfairly treated. ACL delayed in advising the adjudicator that certain material had not been received. ACL did not agree to the adjudicator's request for a two-day extension of time.

Lord Tyre emphasised that it is a feature of adjudication that the restricted period available to produce a decision may result in very short times being given to parties to respond to requests for information or to documents produced or submissions made by the other side. This was a complex adjudication in which the adjudicator was required to consider and give his decision on a number of issues. Three extensions of time were agreed. It was obvious that some matters would inevitably have to be left to be dealt with close to the deadline for the issuing of the decision. Here, the adjudicator had two matters still to address with a week to go. Right at the end of the time period, the adjudicator asked to see the sub-contractors' final accounts and proof of payment, and noted that he still had not seen proof of payment to the main contractor. The Judge commented that:

"ACL and their advisers chose neither to engage in that process nor to respond to the adjudicator's suggestion of a further extension of time, and cannot now complain of unfairness."

There was no obligation on the adjudicator to request additional documents. It was the responsibility of ACL, when submitting its claim, to include the necessary proof, and it might be a breach of natural justice for an adjudicator to refuse to allow the contra-charge on the grounds that it was inadequately vouched without giving an opportunity to provide further proof. However, the adjudicator did not do this. He proposed a further extension of time. That request was not agreed. ACL produced a transcript from the contractor's account which, they considered, provided the substantiation required. The adjudicator disagreed. Finally the Judge noted:

"I do not accept that the adjudicator is open to criticism for leaving this matter until the last minute and then, as counsel for the defender put it, holding the parties hostage to rolling extensions of time. Something had to be done last and, given the size of the adjudicator's task, it was highly likely that if the matter left to last gave rise to questions, they would have to be addressed within a very short time. In the event ACL was able to respond, and its complaint, in substance, was that the adjudicator ought to have been satisfied by the response. His decision to proceed to deal with, and to reject, the claim on grounds inter alia of inadequate substantiation was not therefore, in my view, a breach of the rules of natural justice."

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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