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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.

The construction & energy law specialists

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# Dispatch

## Expert evidence

### Pickett v Balkind

[2022] EWHC 2226 (TCC)

This was a case about alleged damage caused by tree roots. A week before the experts' final reports were due, Pickett's solicitors said that the structural engineering expert would not be available to give evidence at the trial, as they would be undergoing surgery, and requested consent to an adjournment. The draft application referred to a letter from the expert to the solicitors which was to be exhibited to the final statement. In that letter, the expert explained that they had gone through Counsel's comments and referred to "*suggestions/requests*" about the draft joint statement and noted that they had made "*just a couple of minor changes*". The expert also attached a word copy of the document for "*comment.*"

The final application also included this letter. Balkind's solicitors replied promptly expressing concern that there had been a breach of paragraph 13.6.3 of the TCC Guide, which states:

*"Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement."*

The solicitors referred to the case of *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) where HHJ Stephen Davies said:

*"To be clear, it appears to me that the TCC Guide envisages that an expert may, if necessary, provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide...There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial..."*

Pickett's solicitors said that the letter had been provided in unredacted form by mistake, asserted that it was privileged and sought an injunction preventing further use of the letter. The Judge held that Pickett's solicitor made an error in sending the letter unredacted, but that Balkind's lawyer did not realise this and, indeed, the error was not obvious. It was also the case that the first part of the letter revealed a potentially serious breach of the TCC Guide, which was raised immediately, but to which there was no satisfactory response. The Judge considered that it would: "promote a sense of injustice in the defendant to leave that concern hanging, unanswered." It would not, therefore, be right to grant an injunction restraining the use of the information in the letter.

The letter from the expert was exhibited in order to seek an adjournment of the trial. The claimant could have merely "referred" to the letter, but instead "deployed its contents." HHJ Matthews, therefore, considered that there had been a waiver of privilege which confirmed that it would not be right to grant the injunction sought.

## Dispute escalation clauses

### Children's Ark Partnerships Ltd v Kajima Construction (Europe) UK Ltd & Anr

[2022] EWHC 1595 (TCC)

Kajima applied to strike out or set aside a Claim Form saying there had been a failure to comply with a contractual ADR provision which was said to be a condition precedent to the commencement of proceedings. The proceedings had been commenced just a week before the limitation period expired – the parties having previously agreed a standstill period to see whether a settlement could be reached. The Claimant (or "CAP") issued their own application seeking a stay to try and resolve the dispute through ADR, to obtain further details about the claim form its "upstream claimant" and/or to go through the Pre-Action process.

The provisions of the Standstill Agreement made clear that it did not preclude (i) steps being taken under the Dispute Resolution Procedure ("DRP") in the Construction Contract, or (ii) the issue and service of proceedings in relation to the dispute between the parties, during the standstill period.

Mrs Justice Smith DBE referred to the case of *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576, where O'Farrell J had made a number of comments about the circumstances in which the court may stay proceedings where a party seeks to enforce an alternative dispute resolution provision, including:

*"The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the Parties."*

The Judge further considered that the court has an inherent jurisdiction to stay such proceedings for the enforcement of an alternative dispute resolution provision where the clause creates a mandatory obligation and where it is enforceable.

Here, the Judge considered that the DRP in setting a requirement to refer disputes to the Liaison Committee under paragraph 3 of Schedule 26 to the Construction Contract was a condition precedent to the commencement of litigation. It was not necessary for the words "condition precedent" to be used, (and they were not here), as long as "*the words used are clear that the right to commence proceedings is subject to the failure of the dispute resolution procedure*" (see *Ohpen*). But it is necessary to have more than a mere statement that compliance with the dispute resolution procedure is mandatory. The key here was clause 68.2 of the Construction Contract, which anticipated that the right to commence court proceedings was subject to compliance with the DRP. This provided for a sequence which had to be be followed before legal proceedings could be commenced.

The Judge then turned to whether the DRP was "*sufficiently clear and certain by reference to objective criteria ...*" Here, the Judge noted that there was no meaningful description of the process to be followed. Disputes were to be referred to a Liaison Committee which could make its own rules and procedures, but these were not identified anywhere and there was no evidence that the Liaison Committee had identified any rules and procedures to apply to dispute resolution in the context of the construction contract. There was no unequivocal commitment to engage in any particular ADR procedure and it further seemed that Kajima was not obliged to take part in the process (and had no right to do so). There was no procedure that would enable disputes as between CAP and Kajima to be resolved "amicably." This gave rise to an obvious lack of certainty.

The DRP was "*both unusual and surprising*." It was: *"neither clear nor certain. It does not include a sufficiently defined mutual obligation upon the parties in respect of the referral to the Liaison Committee and the process that will then ensue and it therefore creates an obvious difficulty in determining whether either CAP or Kajima has acted in breach."*

The result was that, although expressed as a condition precedent, the obligation to refer disputes to the Liaison Committee was not defined with sufficient clarity and certainty and, therefore, could not constitute a legally effective precondition to the commencement of proceedings. Further, in these circumstances, CAP's decision to issue proceedings so as to avoid expiry of the limitation period and, thereafter, to seek an extension of time to facilitate compliance with the pre-action protocol and with the contractual DRP was an "entirely sensible" approach. The Judge noted that Paragraph 12 of the Pre-Action Protocol for Construction and Engineering Disputes expressly envisaged that, if compliance with the protocol may result in a claim being time barred, then "*the Claimant may commence proceedings without complying with this Protocol*". If this happens, it was standard procedure for the court to consider staying the whole or part of those proceedings pending compliance with the protocol:

*"it is better that the parties issue proceedings on time and engage in ADR in a meaningful way at a later date when ready to do so than that they are rushed into pointless compliance with an ADR provision which will never bear fruit."*

## Payment notices

### Tierney v G F Bisset (Inverbervie) Ltd

[2022] SAC (Civ) 3

The Scottish Sheriff Appeal Court had three issues to consider:

(i) Was there a valid payment notice?
(ii) Was the valuation in substance, form, and intent a payment notice?
(iii) Was the valuation issued in accordance with the parties' contract?

The payment provisions of the Scheme for Construction Contracts (Scotland) Regulations applied. Here, the payer (Tierney) was required to provide the payment notice in accordance with section 110A(2) of the HGCRA. They did not. Where this happens, the payee (Bisset) may give such a notice. The notice must specify the sum that the payee considers to have been due at the payment due date and the basis upon which that sum is calculated. Here there was no dispute that the payee's third valuation specified the sum it considered due. There was a dispute about whether the notice specified the basis upon which that sum was calculated.

The payer criticised the detail provided saying it was restricted to a brief description of the work and the amounts sought. The amounts sought were stated as lump sums. No breakdown was provided; not even between labour and materials. The payee said that their third valuation set out an itemised breakdown of the works carried out or deducted from the original scope with a breakdown of the price charged for each line item. The line items were divided into sections for deductions and additions, the deduction of sums already paid and the application of VAT. This clearly showed how the notified sum was calculated.

Sheriff Principal Turnbull said that a payment notice must specify the sum that the payee considers to be or to have been due at the payment due date and the basis on which that sum is calculated. Here, the line items showed how the amount the payee considered to be due was calculated. Without that detail, there would simply be the amount considered due and that, alone, would not have met the requirements of the section:

*"The appellant has fair notice of the amounts claimed and what those amounts relate to ... the contents of the respondent's third valuation provided a more than adequate agenda for a dispute about valuation."*

If the payer was dissatisfied, then the remedy was to serve a pay less notice. Finally, the payer said that the third valuation was not issued in accordance with the contract, which required valuations to be issued at monthly intervals. The payee issued three valuations in February, June and November 2016. The court noted that the contractual requirement to carry out valuations monthly had no bearing on the payee's right to give the payer a notice complying with section 110A(3) where the payer has failed to give a section 110(2) notice. The payer was entitled to give such a notice, but was not obliged to. The third valuation was a valid payment notice issued in accordance with the requirements of the parties' contract.



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