Fenwick Elliott
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Dispatch

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

Adjudication -Costs

■ John Roberts Architects Ltd v Parkcare Homes (No. 2) Ltd

Parkcare abandoned its adjudication claim after both parties had incurred substantial costs. The adjudicator directed that Parkcare should pay JRA's costs plus his own fees and disbursements. These costs were assessed at £87k. Parkcare refused to pay saying that the adjudicator did not have jurisdiction to make such a direction. The contract between the parties provided that the agreement for the appointment of the adjudicator should be as set out in the CIC model procedure. However, clause 28 was deleted and replaced with the following:

> *"The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision. The Adjudicator may determine the amount of costs to be paid or may delegate the task to an independent costs draftsman."*

Here, the adjudication had been discontinued apparently because the adjudicator had decided that he had no jurisdiction to decide the dispute. HHJ Havery QC found that the meaning of clause 28 was plain. The adjudicator could only, as part of his Decision, direct the payment of legal costs. Here no decision was reached. Therefore the adjudicator had no jurisdiction to decide the question of liability for costs. JRA also suggested that a term could be implied that the adjudicator should have power to order the payment of costs. HHJ Havery QC rejected this too.

The HGCRA does not allow parties to an adjudication to claim their costs. However, it is open to parties to a contract to agree to that option. Here, the parties had agreed that the adjudicator only had jurisdiction to decide to make an award of costs as part of his decision relating to the dispute. It was wrong to imply such a term into the contract. It neither represented the obvious intentions to the parties nor was it necessary to give business efficacy to the contract.

Mediation - Costs

■ The Wethered Estate Ltd v Davis and Others

The Claimant was successful, but when the question of costs came to be determined, the Defendants argued that Wethered should not be entitled to its costs because it had refused to mediate the claim until after proceedings had been commenced. Following *Halsey*, the key question was whether the unsuccessful party could show that Wethered had acted unreasonably in refusing to mediate.

Here the Judge found that Wethered had acted reasonably in refusing to mediate. He described the conduct of the Defendants as attempting to use "a lever to procure capitulation". Proceedings began in July 2004. The Claimant agreed to mediate in January 2005. The Judge accepted that in many cases it would not be reasonable to defer mediation until the litigation was at an advanced stage. For example in *Birchell v Bullard* (see Issue 59), reference was made to the escalation of costs when proceedings were commenced.

However, here the Judge laid stress on the particular facts of the case which involved questions of construction of an agreement against a factual matrix where there was controversy about the facts. Therefore, the Judge was sympathetic to the suggestion that the mediation would have had a greater prospects of success when the matters had been formulated and pleadings and statements had been formalised. Here it could not have been foreseen when the case started, that it would take so long to reach a stage when the evidence would be complete. Significantly, the Judge agreed with Wethered that until the defence had been set out in greater detail, the nature of the dispute was difficult to fathom.

An attempt was made to admit evidence concerning what happened in the mediation. The Judge was not prepared to allow this. Mediation is an entirely without prejudice process. The privilege of that process must be maintained unless the parties agree otherwise. There was no such consent here nor had matters been raised in Part 36 correspondence.

Health & Safety

■ Mistry v Thakor and Others

Mr Mistry was walking along a pavement when he was struck by concrete cladding which had fallen from a building. He issued proceedings against the owners and the property manager ("PM") of the building. The trial Judge gave judgment for Mr Mistry against the owners of the building who in turn, having issued Part 20 proceedings, succeeded to the extent of 80% against the PM.

It was agreed that the concrete cladding had fallen as a result of corrosion. It was also agreed that the frontage of the building was in a dangerous condition and that the panels were unstable and liable to fall. The terms of engagement of the PM included a duty to make two inspections per year and an obligation to act "*in all respects and do all such things as could reasonably be expected of a professional manager of a property of this type*". The claim against the PM was that he failed to identify the dangerous state of the panels and therefore that he failed to have that dangerous state rectified. The PM wrote to the property owner in March 2000 making it plain that he would not examine the building using a scaffold. He recommended engaging a building contractor to examine the concrete panels. No mention was made of health and safety. The building owner took no action upon receipt of this letter.

The trial judge felt that, had the PM examined the panels from the scaffold then in place, the defects would hvae been plain and he would have clearly seen the corrosion. Both the trial judge and the CA agreed that although the PM had warned his clients that there may be defects in the building, this was not sufficient to have discharged his duties to his clients when those defects were not rectified and caused severe injuries to another.

A particular problem here was the fact that the PM, a chartered surveyor, would not climb the scaffolding. The CA said this was a task which they considered fell within the normal task of a chartered surveyor. Had the defects been noticed, something would have been done about them. The PM's conduct was extremely unusual. If you instruct a chartered surveyor to act as a building manager, one would normally expect him to carry out comparatively routine exercises, such as climbing scaffolding. Hence it was not sufficient for someone in his position to simply advise clients to take other advice. The CA said:

> *"Professional men are employed to do the things normally expected of them in their profession...[The building owner] did not expect that they would have to go to someone else to do this comparatively elementary task, with respect, of climbing scaffolding to inspect a building."*

Pre Action Protocol Disclosure

■ Briggs & Forrester Electrical Ltd v Governors of Southfields School for Girls and Anr

Following alleged asbestos contamination, GSSG sent B&F a detailed claim letter in accordance with the Construction Pre-Action Protocol claiming damages. B&F took issue with the extent of the contamination and the quantum claimed and sought extensive pre-action disclosure of some 55 categories of documents. This lead to an application for pre-action disclosure before HHJ Coulson QC. Under CPR 31.16, such an application may be made where disclosure before proceedings is desirable to dispose fairly or assist in resolving the anticipated proceedings or to save costs.

The Judge held that it was appropriate to exercise his discretion and grant pre-action disclosure of the quantum documents. However the other requests were too wide and the documents sought were too peripheral to the real issues in dispute. The Judge had to balance whether the documents sought would narrow the issues, cut down on expert evidence and accelerate the settlement process against the significant costs that would be incurred if the wide disclosure request was granted in full. Although there is nothing in the Construction Protocol that requires large scale disclosure, in the general CPR protocols, there is a requirement to disclose key documents. The Judge appreciated the concern that complying with the protocols can be expensive. There would be further concern if it was thought that a prospective claimant embarking on the Construction Protocol procedure would be routinely obliged to provide the sort of onerous disclosure initially sought here by B&F. Accordingly, pre action disclosure was allowed but on a strictly limited basis.

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