Fenwick Elliott
Solicitors

Dispatch

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

Mediation -

n Earl of Malmesbury & Others v Strutt & Parker

In the main claim, the Judge had held that S&P were liable. However, when it came to the question of costs, S&P argued that the usual order should not apply. In particular, they claimed that the claimants should be treated as the unsuccessful party because they only recovered a small fraction of their claim. S&P further said that the claimants' exaggeration of their claim, made mediation impossible. S&P also referred to the claimants' alleged failure to comply with the pre-action protocol. That claim was rejected. The Judge felt that the claimants had given a sufficient indication of how the claim was put. He was of the view that S&P had taken an "*over-critical attitude and looked for difficulties.*"

Usually, what happens at a mediation is confidential. Here the parties had waived their right to confidentiality. When mediation was proposed, the solicitors for the claimants said that there must be a without prejudice meeting between solicitors first and that a refusal to do so was tantamount to a refusal to mediate. They further said that it was essential that at the meeting each solicitor had instructions as to the maximum to be offered or the minimum to be accepted. As the Judge said, "*this was a curious lead in to a mediation*". Nevertheless, the meeting did indeed take place. However this mediation failed, in the view of the Judge, because of the attitude of both sides. He noted this was consistent with what happened at the trial where both parties resolutely argued their own case. He noted that:

> *"in these circumstances, where the failure to mediate was due to the attitudes taken on either side, it is not open to one party, here the Defendants, to claim that the failure should be taken into account in the order as to costs. For the avoidance of doubt, I will state that I do not intend to suggest by this that there should be a particular order as to costs incurred in connection with these "negotiations".*

There was a further mediation following the judgment on liability, before the quantum hearing. Having considered the offers made at this mediation, the Judge felt that the claimants' position at the mediation was both unrealistic and unreasonable. He felt that had the claimants made an offer which better reflected their true position, the mediation might have succeeded.

As the Judge said, the Courts have not previously had to consider the situation where a party has agreed to mediate but then has taken an unreasonable position in the mediation. In his view:

> *"...a party who agrees to mediation then causes the mediation to fail by his reason of unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the Court can and should take account of in the costs order in accordance with the principles considered in "Halsey"*

Although the quantum of the claim was substantially reduced, the position was not that simple as the claimants had, in establishing negligence, "*where it mattered most*" achieved a considerable victory. The claimants had won on liability and had recovered substantial damages, but S&P had succeeded in cutting down the sum awarded to a fraction of what was claimed. As the action proceeded, and more became known about the claim, the claimants' belief in their claim should have diminished until by the trial they should have realised that it had no real chance of re-covering the full sums claimed. Accordingly, some costs should be deducted to reflect that the claimants had sought so much more than they recovered. After carrying out a balancing exercise, the Judge decided it would do justice to order that S&P pay the claimants 70% of the liability costs. In relation to quantum, at the time the mediation took place, substantial costs had already been incurred. Therefore, taking into account the claimant's conduct at the mediation, the Judge decided that justice would be done by reducing the claimants' costs by 20%.

Case update

n Tesco Stores Ltd v Constable & Others

We reported on this case in Issue 88. Tesco appealed to the CA against a decision that it was not entitled to cover under a public liability insurance policy for economic loss. That loss was sums it had agreed to pay out for a claim made by Chiltern for loss of revenue and loss of business. The CA agreed that public liability policies do not generally cover liability for pure economic loss. Indeed, Chiltern had chosen to obtain from Tesco an extensive indemnity against economic loss of which the insurers were unaware. If Tesco had wished to cover that potential liability, it could have agreed a simple policy amendment, had insurers and Tesco been able to agree an acceptable premium.

Confidentiality in arbitration

n Emmott v Michael Wilson & Partners

This case related to confidentiality in arbitration and whether documents generated in an English arbitration could be disclosed for the purposes of proceedings in New South Wales and the British Virgin Islands. Allegations of fraud had been made in the arbitration. However, that claim was abandoned. The question which arose was whether or not documents from the arbitration could be disclosed in the other proceedings. MWP argued that this would constitute "*an unwarranted intrusion into the confidentiality of arbitrations, and had serious adverse consequences for the attractiveness of England as the seat of arbitration.*" Emmott argued that if the documents were not disclosed to the other Courts, there was a real risk that these Courts would be seriously misled which would be to his detriment.

The CA noted that the uncontroversial starting point was that arbitration is a private process. Collins LJ noted that this is implicit in the agreement to arbitrate. The caselaw has established that:-

> *"There is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose for use for any purpose any documents prepared for and used in the arbitration, or disclosed and produced in the course of the arbitration, or transcript or notes of the evidence in the arbitration of the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration."*

This privacy is almost universally recognised by the institutional rules. However, not many of the rules expressly deal with the question of confidentiality of material generated in an arbitration. The CA said that disclosure will be permissible, in limited circumstances, namely:

(i) where there is consent, express or implied;

(ii) where there is an order, or leave of the Court;

(iii) where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and

(iv) where the interests of justice require disclosure.

Here, the CA held that it was right to authorise disclosure. Unless there was disclosure, there was a danger that the Courts would be misled about the fact that the fraud claim had been dropped. Therefore disclosure was required in the interests of justice. Of course, as the CA noted, the overwhelming majority of arbitrations in England are conducted in private and with complete confidentiality. This case was an exception, and perhaps can be seen as an exceptional piece of litigation, being a dispute between two individuals which is being fought out in many different jurisdictions and countries.

Withholding notices

n Aedas Architects Ltd v Skanska Construction UK Limited

This dispute arose out of works done on a school renovation project in Midlothian. Aedas sought periodical payments and were met by a refusal since Skanska claimed they had a large and ongoing fund of set-offs which were more than the sums claimed by Aedas. The dispute thus revolved around s111 of the HGCRA. The claim had not been before an adjudicator but had gone straight to the Courts.

The essential point made by Aedas was that although counter notices had been issued, they failed to specify in sufficient detail the grounds of set-off. No issue arose as to the timing of the withholding notices. Skanska said that the notices should not be subject to fine textual analysis as they were not addressed to lawyers but to contract managers and others who were aware of what was happening on site in an ongoing project. The grounds and amounts had been specified and that was enough. Lord McEwan referred to the *Melville Dundas* case and noted that although it was not strictly relevant, it did stress the need for clarity when interim payments are withheld and that section 111 is intended to strike at "set-off abuse" and promote confidence in cashflow.

The Judge observed that the payment applications were couched in general terms and sought payment for what were termed to be professional services. As this was an application for summary judgment, the Judge took the view that the application could not succeed. He could not say that the defence was bound to fail. For example, when looking at the documents, it was plain that issues of fact could arise and evidence may be required to explain letters and events surrounding the notices. The Judge also held that even if he was wrong about that, the documents were effective s111 notices. Upon examination of the notices, sufficient attribution had been made against specified grounds.

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Fenwick Elliott
Solicitors

Aldwych House
71-91 Aldwych
London WC2B 4HN

T +44 (0)20 7421 1986
F +44 (0)20 7421 1987
Editor Jeremy Glover
jglover@fenwickelliott.co.uk
www.fenwickelliott.co.uk