

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

# Dispatch

## Employers, contractors and subcontractors Nobiskrug GmbH v Valla Yachts Ltd [2019] EWHC 1219 (Comm)

The claimant, a German shipyard, Nobiskrug GmbH ("Nobiskrug"), was engaged by Valla Yachts Limited ("Valla"), as a main contractor in the project to build a super yacht. Under the contract, Nobiskrug was to "plan, execute, organise and project manage the Works in order to achieve the Target Delivery Date".

Nobiskrug, under the contract, was responsible for management of the subcontractors. As the works progressed, some of the main subcontractors issued substantial invoices for additional works such as acceleration or overtime. The subcontractors threatened to cease works or commence legal proceedings if the invoices were not settled. One, Ismotec, which was responsible for engineering and cabling, actually issued proceedings. Nobiskrug denied any responsibility for payments and argued that under German law, Ismotec had no right to additional payments. As Ismotec's involvement was critical to the completion of the project and the works were suspended, Valla decided to make the payment in order to avoid further disruption and breakdown of business relations with Ismotec. Similar claims followed from other subcontractors, which were also settled by Valla. These payments were made under various conditions and reservations with Valla expressly reserving their right to recover the payment from Nobiskrug.

Nobiskrug claimed that they were not responsible to repay these sums as the contract between the parties did not contain a direct payment clause. A direct payment clause protects the employer in instances where monies are owed by the main contractor to the subcontractors – it enables the employer to pay the subcontractor directly and then request or deduct the payment from the main contractor. Valla found themselves in a difficult position as the payments they had made were in excess of €3,500,000. Consequently, Valla referred the matter to arbitration in order to recover the sums paid to the subcontractors.

The Arbitration Tribunal noted that under the contractual arrangement between the parties, Nobiskrug was not liable for the repayments as the payments made by Valla were made on a voluntary basis. Further any claim in restitution failed as it was excluded by the contract. However, the Tribunal still found in favour of Valla, putting an emphasis on Valla's reservation of rights and the fact that Nobiskrug had acted negligently in their management duties. Even though Valla had failed to demonstrate how the alleged failures in project management led to delays and subcontractor costs, the Tribunal found that Nobiskrug breached their contractual obligations by insufficient day to day project management.

Nobiskrug appealed to the court, in accordance with section 69 of the 1996 Arbitration Act, on the basis that the Tribunal had made an error in law in its finding, as Valla was unable to prove causation between subcontractor claims and Nobiskrug's poor management. Mr Justice Cranston held that the fact that there existed a reservation of rights by

Valla of sums paid to the subcontractors did not create an automatic right for recovery of sums from Nobiskrug. Valla was not entitled to recover payments made to suppliers on a purely voluntary basis unless it could establish that Nobiskrug was obliged to make them. Such right would only exist if Valla could establish that Nobiskrug was obliged to make the repayment under the contract. Here, the court recognised that Nobiskrug had failed in their management duties and had been unjustly enriched at Valla's expense. Moreover, the court noted that Nobiskrug's poor management and lack of reporting restricted Valla from "forming a proper assessment of whether the payments demanded were due and to manage their resolution effectively so as to minimize any disruption caused to the build".

However, the difficulty was that any analysis in unjust enrichment was not spelt out completely on the face of the Award. There was no finding that Nobiskrug's project management failures caused Ismotec and some of the other suppliers, additional costs. The Tribunal said that Valla would be entitled to damages provided that it could show that the project management failures were an effective cause of any particular item of the costs claimed and that it would return to the issue as necessary. However, the Tribunal did not find it necessary to do so. As a result, because of the complexity and lack of clarity, the matter was referred back to the Tribunal for further consideration and assessment.

## Part 36 offers to settle JLE v Warrington & Halton Hospitals NHS Foundation Trust [2019] EWHC 1582

This was a clinical negligence case. In November 2017 the claimant's solicitors served a Bill of Costs totalling £615k. On 21 June 2018 the claimant made a Part 36 offer in the sum of £425k, inclusive of interest. That offer expired on Friday 13 July 2018, the last working day before the hearing commenced. The Master assessed the bill in the sum of £421k plus £10.7k interest. The claimant therefore beat the offer by just under £7k. The Master ordered the defendant to pay the claimant's costs of the assessment plus indemnity interest of £10.

CPR r.36.17, as modified by rule 47.20(4), applies where a judgment against the paying party is at least as advantageous to the receiving party as the proposals made in the Part 36 offer. By CPR r.36.17(4), the court must, unless it considers it unjust to do so, order that the claimant is entitled to (a) interest on any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate; (b) costs on the indemnity basis from the date on which the relevant period expired; (c) interest on those costs at a rate not exceeding 10% above base rate; and (d) an additional amount, which shall not exceed £75k, calculated by applying 10% of the amount awarded up to £500k, or if the sum awarded is above £500k, 10% of the first £500k and 5% of any amount above that figure.

Here however, the Master noted that having beaten its own offer by £7k on a bill of over £615k, the consequence of allowing the extra 10% on the bill as assessed would

be significant, i.e. over £40k. This was a significant sum compared with the very small percentage margin by which the offer was beaten. The Master accepted that the additional sum provisions were not intended to be compensatory. They are intended to be an incentive to settle. That said, she also thought that the rules did provide a discretion according to the “unjust” test. Adopting that test, the Master concluded that the “bonus” of 10% was clearly a disproportionate sum and it would be unjust to award it.

On appeal, Mr Justice Stewart disagreed. In describing the very small margin by which the offer was beaten relative to the much greater size of the bill as a significant factor, the Master had erred in principle. It was not open to the courts to take into account the amount by which a Part 36 Offer has been beaten. The Master was wrongly influenced by the reduction in the size of the bill. Mr Justice Stewart confirmed that the additional award should not be characterised as a “bonus”. It was not meant to be compensatory. As the Jackson Report had said, there is a penal element when the claimant has made an adequate offer. To consider otherwise would be a serious disincentive to encouraging good practice and incentivising parties to make and accept appropriate offers. The 10% figure should be treated as “all or nothing.” It should be awarded in full unless it is unjust to do so.

Mr Justice Stewart’s judgment provides a clear statement of the court’s approach to the consequences of a paying party failing to beat a valid Part 36 Offer after trial.

**Adjudication  
TeCSA Low Value Disputes (LVD) Adjudication Service**

On 21 June 2019 TeCSA launched a low value disputes (LVD) adjudication service, which is being run on a pilot basis until November 2019. The aim is to give parties who wish to refer disputes for fixed amounts of up to £100,000 (excluding VAT and interest) to adjudication, certainty as to the costs. The LVD Service only limits the fees which the adjudicator can charge, which means that it is not necessary to get the opposing party to agree to the use of the LVD Service. The party seeking the nomination can simply apply to TeCSA for the nomination of an adjudicator using the specified form. The values of the amount being claimed and the adjudicator’s fee caps are:

Up to £10,000	£2,000
£10,001 to £25,000	£2,500
£25,001 to £50,000	£3,500
£50,001 to £75,000	£4,500
£75,001 to £100,000	£5,000

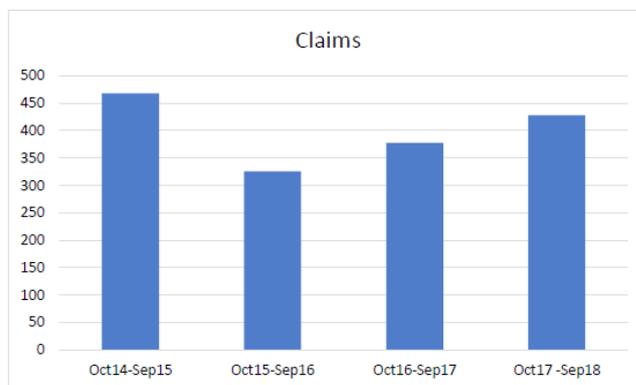
The LVD Service only applies to claims for a specified amount, i.e. a liquidated sum, as between two parties. Whilst there is no restriction on the type of financial claims which could be made (e.g. the claim could be for retention, sums certified under a contract, damages and loss and expense), the LVD Service does not apply to claims where the amount sought has not been quantified, e.g. damages or loss and expense to be assessed.

TeCSA has noted that whilst adjudicators will issue decisions with reasons in accordance with existing TeCSA guidelines, users can expect adjudicators to be quite robust in limiting the number and length of submissions made and to try to deal with the matter within 28 days of it being referred to the adjudicator. That said, TeCSA has made it clear that it expects adjudicators to continue to comply with the TeCSA guidance in terms of the quality of their decisions and they will be expected to follow the rules of natural justice.

Further details can be found on the TeCSA website at <http://www.tecsa.org.uk/>

**TCC Annual Report  
Claims, hearings and trials**

In June 2019, the TCC released its Annual Report for 2017-2018. This showed that in the period from October 2017 to September 2018, there were 428 new claims brought to the London TCC. This was an increase of 13% from the previous year, when only 378 new claims were registered:



The Report notes that there has been an increase in the number of cases brought in the Central London Civil Justice Centre, up by 42% from 139 to 238. These figures do not include the cases heard in the regional TCC centres in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. Here, the overall figures are largely unchanged with 257 cases being issued against 271 for the previous year.

The Report notes that a substantial number of cases continue to be settled shortly, or sometimes very shortly, before trial. During the year there were 241 trials listed at TCC, of which only 65 were eventually contested. This figure of 73% is consistent with the 78% figure reported for the previous year.

The Report also includes an analysis of the type of work carried out in the TCC, although the figures come with the understandable health warning that some cases lie on the borderline between categories and do not always take into account counterclaims. These figures are for the TCC in London and the Central London Civil Justice Centre only. The main categories are as follows:

Construction	127 cases	19%
Adjudication Enforcement	96 cases	14%
Domestic Building Disputes	71 cases	11%
Party Walls - Appeals	71 cases	11%
Procurement	63 cases	9%
Professional Negligence	37 cases	6%
Tree Roots	37 cases	6%

There are a further 13 adjudication cases marked “other”. There are also a small number of IT and computer cases (9) and technology cases (6).

**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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