FENWICK ELLIOTT

The construction & energy law specialists

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

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Dispatch

Without prejudice correspondence in adjudication

Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd and Anr
[2020] CSOH 19.

BB had been carrying out work at a number of schools in North Lanarkshire. A dispute arose about latent defects at one of the schools. The dispute was submitted for adjudication, where the adjudicator found in favour of Transform. During the adjudication, BB had said that the claim had prescribed (i.e. was time barred). The adjudicator disagreed, considering that a series of letters between the parties' solicitors showed that the prescriptive period had been extended.

At an enforcement hearing, BB said that the adjudicator had referred to certain letters which had been marked "without prejudice". Lord Ericht said that he was only considering that "limited issue" of whether the adjudicator's decision should be enforced by the court. He was not therefore to be taken as expressing a binding and final view as to whether the adjudicator was correct in his conclusions on prescription or on admissibility of the "without prejudice" letters. He was looking at the case from the point of view of natural justice. The traditional "without prejudice" rule, in the UK, is that based on public policy and the idea that parties should not be discouraged, when negotiating, by the knowledge that anything they may say may be used to their prejudice in the course of any court proceedings.

It is the content that matters. Just using the words "without prejudice" does not automatically mean that correspondence is protected. Here, the significance of the "without prejudice" letters lay in relation to the question of whether the obligation to make payment had prescribed. Lord Ericht noted that the issue of whether or not he could refer to the letters in question was raised by the adjudicator not the parties.

The adjudicator decided that the use of the words "without prejudice" was intended to convey that by offering to carry out the works proposed, BB were not admitting liability, not that the correspondence was to be regarded as without prejudice in the sense of not being referable to in subsequent proceedings. The adjudicator looked at the correspondence as a whole over a 23-month period. He took the view that it was possible for a court, and thus an adjudicator, to conclude that words in a letter such as "without prejudice to liability" do not, when considered in the wider relevant context, necessarily mean what they appear to say.

Here, the adjudicator had to decide whether or not the claim was time-barred. To do that he had to make a decision as to whether the "without prejudice" letters were admissible; he decided that they were admissible and took the letters into account in making his decision.

The current case was not a situation where the adjudicator was improperly made aware of an irrelevant and collateral "without prejudice" offer to settle which might have an influence on his thinking. The question of the admissibility of the "without prejudice" letters was one which the adjudicator had to decide as one of the central issues in the adjudication. Lord Ericht concluded that the adjudicator in this case may or may not have been right to decide they were admissible. But if he was wrong, then that was an error of law, and errors of law on the part of the adjudicator do not justify this court in refusing to enforce the adjudicator's decision. It could not be said that "the submission of the letters to the adjudicator, or the way in which he dealt with them, was in any way improper or involved any breach of natural justice or apparent bias".

E-disclosure pilot & mediation

McParland & Partners Ltd & Anor v Whitehead
[2020] EWHC 298 (Ch)

This was a disclosure guidance hearing under the Disclosure Pilot where the parties sought "guidance from the court by way of a discussion with the court in advance of ... a case management conference, ["CMC"] concerning the scope of Extended Disclosure". As Sir Geoffrey Vos explained, paragraph 11(1) of PD51U provides that such a hearing can take place where (i) the parties have made real efforts to resolve disputes between them, and (ii) the absence of guidance from the court before a CMC is likely to have a material effect on the court's ability to hold an effective CMC. The Judge took the opportunity to clarify some aspects of the way in which the Disclosure Pilot is intended to work. The Judge said that the watchword for "Extended Disclosure" was that it was in all cases "be reasonable and proportionate having regard to the overriding objective including" certain factors, namely:

> "1) the nature and complexity of the issues in the proceedings;
> 2) the importance of the case, including any non-monetary relief sought;
> 3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
> 4) the number of documents involved;
> 5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
> 6) the financial position of each party; and
> 7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

The Judge explained that the provisions of the Disclosure Pilot are intended to apply across a wide range of cases stretching from the highest value business cases to the lowest value ones, and from the most complex, lengthy and document intensive to the least complex cases with few relevant documents. It was critical that the type of Extended Disclosure was:

> *"fair, proportionate and reasonable. The Disclosure Pilot should not become a disproportionately costly exercise. This latter requirement means that the parties have to think cooperatively and constructively about their dispute and what documents will require to be produced for it to be fairly resolved. In smaller value disputes particularly, but also in higher value ones, unduly granular and complex solutions should be avoided."*

In his judgment, the Judge made a number of helpful comments about the operation of the Disclosure Protocol. He was clear that Issues for Disclosure are very different from Issues for Trial.

> *"The starting point for the identification of the Issues for Disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination. Rather it is the relevance of the categories of documents in the parties' possession to the contested issues before the court that should drive the identification of the Issues for Disclosure."*

For the Judge, the previous test under standard disclosure (whether a document supported or adversely affected a party's "case") was "far too general". Here, under the Disclosure Pilot, the reviewer has defined issues against which documents can be considered. The review should be "a far more clinical exercise".

The Judge also reinforced earlier decisions about the importance of cooperation:

> *"It is clear that some parties to litigation in all areas of the Business and Property Courts have sought to use the Disclosure Pilot as a stick with which to beat their opponents. Such conduct is entirely unacceptable, and parties can expect to be met with immediately payable adverse costs orders if that is what has happened.*
>
> *No advantage can be gained by being difficult about the agreement of Issues for Disclosure or of a DRD, and I would expect judges at all levels to be astute to call out any parties that fail properly to cooperate as the Disclosure Pilot requires."*

In the course of his judgment, the Judge noted that the court had encouraged the parties to proceed to a privately arranged mediation as soon as disclosure had occurred. The reason for this was that both sides had agreed that it was necessary to see from disclosure whether "their suspicions" were justified before a useful mediation could take place. In the dispute here, the claimants suspected more extensive breaches by the defendant, and the defendant suspected an absence of loss of business by the claimants.

Sir Geoffrey Vos noted that during the hearing he had made reference to *Lomax v Lomax* (see Issue 231) where the CA had to consider whether the court had the power to order parties to undertake an early neutral evaluation. He had also raised during the hearing the question of whether the court might also require parties to engage in mediation, something the courts cannot currently do. Nevertheless, the parties took the judicial hint, with Sir Geoffrey Vos commenting that:

> *"In the result, the parties fortunately agreed to a direction that a mediation is to take place in this case after disclosure as I have already indicated."*

Indemnity costs

Lejonvarn v Burgess and Another

[2020] EWCA Civ 114

We have previously discussed this case in Issues 188, 203 and 223. As a final act, the CA considered whether or not the successful defendant was entitled to her costs on an indemnity basis. The claim had failed in its entirety, but at first instance the TCC held that the defendant was entitled to have her costs, in the region of £725k, assessed on the standard basis.

LJ Coulson noted that the position of a defendant who beats their own Part 36 offer, is that they are not automatically entitled to indemnity costs. But they can seek an order for indemnity costs if they can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "out of the norm". Further, if the claimant's refusal to accept the offer "comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made".

In the case here, the CA gave judgment in April 2017 limiting the duty of care owed by the defendant for the free advice given. LJ Coulson said that the claimant, having had time to consider the implications of that CA judgment, should have realised that the remaining claims were so speculative/weak that they were very likely to fail and should not be pursued any further. The CA's judgment emphasised that the duty owed to the claimant related only to the things that the appellant had actually done, not the things which it was suggested she should have done but omitted to do.

Significantly, the critical impact of this change should have been only too obvious to the claimants, because they will have known how little work the respondent had done. The claimants should have called a halt, because their underlying claims were speculative/weak, but they failed to do so. Why was this? LJ Coulson noted that the decision to continue seemed to have been borne out of a desire "to punish the appellant for her alleged negligent mistakes rather than seek fair and reasonable compensation for her alleged mistakes". This was precisely the sort of conduct which the court is likely to conclude is out of the norm and so lead to an indemnity costs order.

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.

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