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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.

Issue 312 – June 2026

Dispatch

Adjudication: natural justice

Premier Modular Ltd v Maidstone and Tunbridge Wells NHS Trust

[2026] EWHC 1404 (TCC)

PML sought summary enforcement of an adjudicator's decision in the sum of £1.6 million. The Trust said that the central findings in that decision were reached in breach of natural justice. In particular, the Trust said that the adjudicator's finding that there had been a Compensation Event was made on a contractual basis that had not been raised by the parties and on which neither party had made submissions. Further, the adjudicator made a finding that the Accepted Programme had been updated, but this was not part of the adjudication and was contrary to the position of both parties.

In other words, the adjudicator had decided the dispute on a basis with which the responding party (i.e. the Trust) did not have an adequate opportunity to deal with. Deputy Judge Wiliamson KC referred to the case of *Roe Brickwork Ltd v Wates Construction Ltd* (see Dispatch 163), where Edwards-Stuart J had said:

> *"If an adjudicator has it in mind to determine a point wholly or partly on the basis of material that has not been put before him by the parties, he must give them an opportunity to make submissions on it."*

The contract here was for the design and construction of a new barn theatre based on the NEC4 Option A (Priced Contract with Activity Schedule). The central issue was that PML said that it needed a permanent mains water supply to be made available no later than 30 October 2023 for testing and commissioning, but the Trust did not make it available until 20 February 2024, which caused delay. The Trust accepted that it was responsible for the mains water supply, but said there was no requirement for it to be made available by any particular date.

It was common ground before the judge that the Accepted Programme was never updated, in the sense that the Project Manager never accepted a later programme, and that the Accepted Programme did not contain an obligation on the Trust to make permanent water available by a particular date, albeit that subsequent programmes put forward by PML did contain such an obligation.

In the adjudication, PML claimed a 14-week extension of time. The Trust said that PML had to show that there was a Compensation Event (within the list at clause 60.1 of the contract) and that it had been properly notified. That had not happened here.

In response to a question from the adjudicator as to whether contract Programme Rev2 was an accepted programme, PML said that the only Accepted Programme was the one in the contract, although PML had submitted later programmes to the Project Manager. The Trust confirmed that Rev2 was not an Accepted Programme in accordance with clause 31.

In the decision, the adjudicator noted that there was an original Accepted Programme but that, in addition, there were a number of later programmes issued by PML, including Contract Programme Rev3 (not Rev2), which PML said set the date by which the water supply was required on site. The adjudicator held that Rev3 had become an Accepted Programme, saying that the default position, where the Project Manager has not taken steps to reject or amend the presented programme must be that the programme becomes the Accepted Programme. As a result, the adjudicator decided that a Compensation Event had arisen under clause 60.1(3) because the Trust had not provided the water main by the date shown in Contract Programme Rev3. This had become an Accepted Programme, even though it had not been accepted in accordance with the procedures set out in clause 31.

The deputy judge found that, in adopting this approach, the adjudicator had decided the central issue–whether the water main was supplied on time, giving rise to a Compensation Event – on a basis that was not argued by either party, was directly contrary to the common position that the only Accepted Programme was that at Appendix 3 to the contract, and had not been put by the adjudicator to the parties.

PML said that the dispute put to the adjudicator was framed in very wide terms, namely whether a Compensation Event arose due to the late provision of the permanent water supply and was not tied to any particular Compensation Event under clause 60.1 of the contract. The deputy judge said that, whilst this might be an answer to a jurisdictional challenge, it was not an answer to a natural justice complaint.

PML said that the adjudicator's attention was drawn to the full list of Compensation Events under clause 60.1. Further, the adjudicator was entitled to consider, rely on and interpret all the provisions of the contract which were put before him, including clause 60.1(3). As the adjudicator had invited the parties to clarify whether Rev 2 was an Accepted Programme for the purposes of clause 60.1(3), that meant that both parties had a reasonable opportunity to consider and address the relevance of clause 60.1(3).

Again, the deputy judge disagreed. The request for clarification did not ask the parties to consider clause 60.1(3). It asked for assistance on the status of Rev 2, which both parties agreed was not an Accepted Programme. The deputy judge accepted that an adjudicator is not obliged to decide a case only by accepting the submissions of one party or the other:

> *"But if he is to depart from the submissions of both parties, he must ensure that the issues have been fairly canvassed. This did not happen here. The first that the Trust knew of the clause 60.1(3) case, based on the proposition that it had not provided the water main by the date shown in Contract Programme Rev 3 30.10.23, was when they received the decision."*

The adjudicator determined that there was a Compensation Event within the meaning of clause 60.1(3) because the Trust had not provided the water main by the dates set out in a revised programme which neither party said was an Accepted Programme. By contrast, the Accepted Programme contained no such dates. This conclusion was clearly material to the decision, and it should have been put to the parties for comment. It was a breach of the rules of natural justice not to do so.

Was there a binding EOT agreement?

Clerkenwell Lifestyle (UK) Ltd v HG Construction Ltd

[2026] EWHC 1406 (TCC)

Clerkenwell sought summary enforcement of an adjudicator's decision. In Part 8 proceedings, HG sought a declaration that there was a binding agreement between the parties as a result of email correspondence on 8 February 2023, the effect of which was to revise the contractual completion dates by extending them generally by 12 weeks. The adjudicator had failed to take account of those revised dates and the decision, therefore, contained an error of law such that it should not be enforced.

The project was for the design and construction of a new 153-room hotel and 9 new-build affordable apartments. The contract was based on an amended JCT Design and Build Contract 2016. During the project, delays occurred. Following discussion, the Employer's Agent ("EA") emailed HG. The email said that it was an update on the "*two Extensions of Time*" ("EOTs"). It concluded:

> *"As previously discussed, a 12 week EOT has been agreed with the client. I understand James is drafting a letter to formalise your request (including the proposed section completion date for the residential), so we will issue the EOT once received."*

On 8 December 2022, in reply, HG requested an EOT of 12 weeks and said: "*Should this request be granted, there would be a revised Practical Completion date for the hotel of 15 September 2023 and for the affordable apartments of 18 August 2023.*" On 1 February 2023, the EA emailed HG stating that, following the email of 7 December 2022 and a subsequent conversation:

> *"I have now spoken to the client and have approval to put forward the following proposal in relation to the on-going Party Walls matters and your two Extension of Time requests."*

That was followed by the email exchange on 8 February 2023, including an email with the following terms:

> *"... the final proposals for the EOTs are as follows ...*
>
> *In consideration of the above [proposals], we will issue the following EOTs:*
>
> - *Hotel Contract – 12 weeks. Revised PC date of 12 September 2023 ...*
> - *Office Contract – 10 weeks. Revised PC date of 28 April. Note: Doesn't currently include any delay as a result of the scaffold / Party Wall addendum, as this will be issued separately once the full extent has been established.*
>
> *We trust the above is acceptable and would appreciate a prompt response in order that we can issue the formal paperwork this week."*

HG replied the same day saying: "*Thanks for issuing and I can confirm agreement.*" On 9 February 2023, the EA wrote to HG, referring to the letter of 8 December 2022 requesting an EOT, and saying:

> *"Having assessed your request, and in accordance with clause 2.25 of the Building Contract, we hereby grant an Extension of Time for a period of 12 weeks."*

The letter stated that the extension was granted having due regard to two Relevant Events and provided that:

> *"This Extension of Time has been issued subject to the terms of our email dated 8 February 2023, which were accepted by HG Construction on the same date."*

Delays continued and, following the issue of the relevant non-completion notices, Clerkenwell ultimately claimed to be entitled to a further £1.1 million as liquidated damages.

In the Part 8 proceedings, HG said that there was a binding agreement between the parties as a result of the email correspondence on 8 February 2023, which the adjudicator failed to take account of. It would be "*unconscionable*" to enforce the decision, which did not reflect the true position.

Jefford J noted that HG was obviously right that the emails in December 2022 and February 2023 referred to agreeing an EOT and used "*the language of agreement.*" However, the judge also considered that the word "*agree*" was being used in the sense of being prepared to, or willing to, do something, rather than indicating an intention to enter into a legally binding agreement.

Following the December discussions, once the period of extension was agreed, the EA asked HG to make an application for an extension of time and said that he would then grant it. In other words, "*the parties were agreeing how they would operate the contractual mechanism and not that they would enter into some free-standing and binding agreement to revise the completion dates.*"

That position did not change, and the contractual mechanism was operated in February 2023 when the EOT was granted. The proposal in the email of 8 February 2023 was far more complex than a simple binding agreement to revise the completion dates by extending them by 12 weeks, which had nothing to do with any particular Relevant Events. The judge considered that it was "*impossible*" to see the apparent offer to issue an EOT of 12 weeks as an offer to enter into a binding agreement to revise the completion dates by 12 weeks outside the confines of the contractual mechanism for extensions of time.

Even if there was supposed to be a binding agreement, it lacked certainty. The application for an EOT made on 7 December 2022 relied on four Relevant Events. The EOT granted, however, was in respect of only two of those Relevant Events. Nothing was said about the other two matters relied on by HG. If HG was correct and the agreed revised completion dates had nothing to do with Relevant Events, then what was being agreed? Did it remain open to HG to claim a further EOT relying on those four (or two) Relevant Events, or was any such claim compromised by the alleged agreement?

And whilst subsequent conduct may be relied upon as evidence of whether there was a contract and what its terms were, here neither party had conducted itself as if there were a binding agreement. Further, HG had not, in the adjudication, argued or drawn the adjudicator's attention to the fact that there was this alleged binding agreement. The judge was therefore satisfied that there was no binding agreement made on 8 February 2023.

In addition, the judge noted that the EA lacked authority to enter into a binding agreement on behalf of Clerkenwell. Article 3 of the contract defined the scope of the EA's authority, which did not extend to entering into further contractual agreements being limited to the exercise of the functions of the employer or the EA under the contract.

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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