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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.

Dispatch

Early Neutral Evaluation: costs

3173 Bidco Ltd & Anor v Roberts & Anor

[2026] EWHC 2312 (Comm)

Section 7.1 of the TCC Guide describes an Early Neutral Evaluation ("ENE") as a form of alternative dispute resolution in which a judge or some other neutral person receives a concise presentation from each party and then provides his or her own evaluation of the case. The decision of Pearce J here related to the question of costs arising from an ENE in an employment dispute.

At the case management conference ("CMC"), the judge had transferred the case to the Shorter Trials Scheme and gave directions through to trial, including provision for an ENE.

This ENE took place earlier than anticipated which meant that witness evidence had not yet been exchanged. The ENE was unsuccessful, being adjourned part heard. The question of costs was reserved. The dispute went on to a full hearing where Bidco obtained judgment on the claim against Roberts for nominal damages in the sum of £100, but otherwise the claim and counterclaim were dismissed.

Pearce J described the case as a relatively typical employment dispute of its kind, in which the employer sought to enforce non-competition covenants and the employee argued that the covenants were unenforceable and that he was not in breach of them in any event. However, during the ENE, counsel for Roberts advanced a previously unheralded argument that Roberts was in fact not operating in competition. Bidco said that this was not an argument that could be advanced without amendment of the defence. Pearce J agreed, noting that: "*it was not realistic to carry out the ENE in circumstances where the Defendants were advancing a previously unheralded and unpleaded case (so that neither the Claimants nor I had had the time to reflect upon its implications)…*".

Bidco argued that Roberts should pay the costs of the fruitless ENE on an indemnity basis; Roberts said that those costs should be costs in the case.

Pearce J noted that where parties agree to engage in ENE, whether before the issue of the claim or after the claim has been issued, it is common for them to agree a provision as to the costs of the ENE: that the costs will be borne by the party incurring the costs themselves in the first instance but ultimately will be treated as part of the costs of the case.

Pearce J also noted that CPR Part 44 gives the court a general discretion as to the basis of costs and when it comes to indemnity costs, the "*well-known test*" to be applied is that established in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston* [2002] EWCA Civ 879: "*before an indemnity order can be made, there must be some conduct or some circumstances which takes the case out of the normal*".

Amongst other points, Roberts said that Bidco's application amounted to satellite litigation and should be discouraged. Roberts further said that the making of any order for costs, in particular an order for costs on the indemnity basis, in respect of the conduct of any ADR, risked undermining the ethos of the whole process.

Pearce J said there were "*powerful arguments*" for the proposition that the court should start from a presumption that costs will be in the case in the absence of compelling alternative factors. There is of course strong judicial support for the use of ADR generally. The ethos of ADR is the encouragement of cooperation and the routine making of costs orders against one or other party to a failed ENE would be liable to discourage parties from engaging in such processes.

Further, whilst there may be cases where the court can confidently predict what would have happened but for the conduct of a particular party during ADR, there are likely to be many more instances where the court cannot do so. In most cases, it will not be possible for the court to reach any secure conclusion on whether wasted costs have flowed from the conduct of the party who is being criticised. In addition, the exploration of why the ENE was unsuccessful may involve the detailed consideration of a variety of factors, both about the merits of the case and the conduct of the litigation. Here, the issues did uniformly point in one direction.

Pearce J also considered the timing of the ENE. The material available for the conduct of an ENE is likely to vary greatly depending on when it takes place in the litigation process. An ENE conducted before the issue of proceedings is likely to involve the parties advancing far less developed cases than should be the case when, as here, the ENE is conducted close to trial. This may reduce the incentive to enter into an ENE late on, when an underprepared party might risk an adverse costs order on the ground that they should have been better prepared.

Pearce J concluded that whilst, the power to make adverse costs orders is a significant tool for encouraging litigation to be conducted efficiently and properly and to avoid that kind of conduct, he would be very cautious in circumstances such as the present to make an adverse costs order, having regard to the risk that dealing with an application for costs will draw the court into satellite litigation in respect of issues which it is not well judged to determine and that discouraging parties from entering into ENE, especially once litigation is commenced. The judge therefore rejected the claim that Roberts should pay Bidco's costs of the abortive ENE.

The judge considered that, though the immediate cause of the unsuccessful ENE was Roberts' inability to fully plead their case, it was possible that Roberts' inability to do so could be attributed to Bidco's own late amendment of its case. In part, Bidco's case was based on its suggestion that the ENE should never have occurred at all. However, the ENE here was ordered by a judge at the CMC. This was not a voluntary ENE; the court had ordered it. Further, this was not a case where Bidco could say that, but for the default of Roberts, the ENE would have been successful and/ or that costs would have been saved.

Adjudication: adjudicator frolics
Entexol Ltd v Sked Construction Ltd
[2026] CSOH 80

The decision here concerned a dispute between a contractor and subcontractor for works to Scottish Power Energy Networks. The subcontractor, Sked, claimed that an adjudicator's decision in the sum £114k should not be enforced because it was made in breach of the requirements of natural justice. Sked said that the adjudicator's conclusion that "*time was at large*" did not reflect the submissions that had been made by the parties. During the adjudication neither party had submitted that time was at large and that in reaching a decision that this was the position, the adjudicator was on a "*frolic of his own*".

Lord Lake disagreed. Although the adjudicator did refer in his decision to time being at large, this was a consequence of his decision on the matters put before him rather than the reason for that decision. The adjudicator had been asked to decide whether Sked had established an entitlement to a contra charge against Entexol's application for payment on the basis that the works were not completed in the time required by the contract. Sked claimed that the contract required that the works were completed by 13 November 2024 and the adjudicator had to consider whether he accepted that this date was the one by which the works were to be completed. The adjudicator did not, which meant that Sked had not established a key element of this part of their case and the contra charge would not be allowed. Whilst it was perhaps open to question whether this would be described as meaning that time was at large rather than that the works would have to be completed within a reasonable time, that did not affect the outcome.

This was not a case in which the adjudicator undertook investigations or inquiries of his own. Instead, the adjudicator rejected the basis of the case put forward Sked, who did not fail in their argument as to contra charges because "*time was at large*"; rather, they failed to establish that the works should have been completed by the date they claimed.

Adjudication: adequate reasons & natural justice
Coventry & Warwickshire Development Partnership LLP v Avison Young (UK) Ltd
[2026] EWHC 2319 (TCC)

Avison resisted an application for summary enforcement of an adjudicator's decision which awarded just under £9 million. Amongst the arguments put forward by Avison were that the adjudicator had failed to give adequate reasons for the decision and that, in a material breach of natural justice, the adjudicator had taken account of documents produced by Gardiner & Theobald (the "G&T Assessment") without giving the parties an opportunity to address them.

Eyre J noted that a failure by an adjudicator to give adequate reasons for his or her decision can indicate that the adjudicator failed to decide the dispute which had been referred to them (and so had made a decision outside the adjudicator's jurisdiction). It can also be an indication that the adjudicator failed to comply with the rules of natural justice.

The judge continued that reasons for an adjudicator's decision can be expressed briefly and are to be seen in the context both of the adjudication procedure generally and of the particular adjudication. It is sufficient if the reasons provided enable the parties to understand what it is the adjudicator has decided and why. The reasons are also addressed to parties who know the issues and whose submissions will have formed the background to the decision:

> "*The question of whether adequate reasons have been given is to be answered by reading the relevant decision as a whole. An adjudicator is not obliged to give reasons for reasons.*"

Further, the reasons in question should relate to the adjudicator's decision on the dispute referred. The adjudicator is not required to address all the arguments advanced on a given issue although a failure to address particular arguments can indicate that the referred dispute has not been addressed or that there has been an unfair failure to consider a party's case properly.

Interestingly, the judge added that a party which can say in detail how an adjudicator erred will find it hard to show that the reasons given did not enable that party to understand what the adjudicator had decided and why. Here, the judge felt that Avison's arguments neither took into account the context of the passages relied on nor considered the decision as a whole.

For example, the suggestion that a conclusion expressed by the adjudicator was a "*bare statement*" which had no reasons behind it was incorrect because that conclusion was: "*avowedly the culmination and summation of the preceding analysis*". In the preceding parts, the adjudicator had set out the parties' cases and identified which contentions he had accepted and which he had rejected, and had given brief reasons for doing so.

The reasons given were sufficient to enable the parties to know what had been decided and why in respect of the dispute referred and this line of defence fails.

As for the use of the G&T Assessment, this, the judge noted that the figures in the G&T Assessment fell between those advanced by the parties' experts. Therefore, by using the G&T Assessment the adjudicator arrived at a higher figure for the over-certification than was accepted by Avison but a lower one than that put forward by C&W. However, it was not the case that in acting in this way the adjudicator was deciding the matter on a basis which had not been put forward by either side and doing so without the parties having been given an adequate opportunity to address the point. In fact, when the exchanges between the adjudicator and the parties' representatives were considered, it is apparent that, although the adjudicator did proceed on a basis which was not advanced by either party (and the judge was one which both parties disavowed), the adjudicator had given a clear forewarning that he was minded to do so and had invited and received submissions from the parties on the issue. The adjudicator also suggested a meeting to consider the issue, which the parties did not take up. The judge noted that an adjudicator:

> "*is not bound by the contentions of the parties and can reach a conclusion for which neither party has contended provided the parties have had a fair opportunity to address the matters which the adjudicator was considering taking into account. That was done here.*"

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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