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Dispatch

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

FIDIC: making claims under sub-clause 20.1

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar

[2014] EWHC 1028 (TCC)

This was a lengthy case relating to a tunnel under a runway at Gibraltar airport, where Mr Justice Akenhead had to consider whether or not the employer, was entitled to terminate the contract. The contract was the FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the contractor, 1st edition, 1999 (better known as the "Yellow Book"). Amongst the many issues the Judge considered was the approach to take to sub-clause 20.1, the clause which says that a contractor, if he wishes to make a claim must give notice in writing to the Engineer:

"as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance."

The Judge decided that the contractor, OHL was entitled to no more than seven days extension of time (rock and weather). However, this was subject to compliance with sub-clause 20. It was accepted by OHL that sub-clause 20.1 imposed a condition precedent on the contractor to give notice of any claim. The Judge held that properly construed and in practice, the "event or circumstance giving rise to the claim" for extension must occur first and there must have been either awareness by the contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. Importantly Mr Justice Akenhead said that he could see:

"no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer".

Sub-clause 20.1 did not call for the notice to be in any particular form and it should be construed as allowing any claim provided that it is made by notice in writing to the engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the contract or in connection with it. It must be recognisable as a "claim". The onus of proof was on the Employer if he should want to establish that the notice was given too late.

In terms of claims for an extension of time, the Judge by reference to clause 8, considered that the entitlement to an extension arises if and to the extent that the completion "is or will be delayed by" the various events, such as variations or "unforeseeable" conditions.

In particular he noted that the wording in sub-clause 8.4 did not impose any restriction such as "is or will be delayed whichever is the earliest". This therefore suggested that the extension of time could be claimed either when it was clear that there will be delay (a prospective delay) or alternatively when the delay has at least started to be incurred (a retrospective delay).

To demonstrate the position, the Judge provided his own hypothetical example:

"(a) A variation instruction is issued on 1 June to widen a part of the dual carriageway well away from the tunnel area in this case.

(b) At the time of the instruction, that part of the carriageway is not on the critical path.

(c) Although it is foreseeable that the variation will extend the period reasonably programmed for constructing the dual carriageway, it is not foreseeable that it will delay the work.

(d) By the time that the dual carriageway is started in October, it is only then clear that the Works overall will be delayed by the variation. It is only however in November that it can be said that the Works are actually delayed.

(e) Notice does not have to be given for the purposes of Clause 20.1 until there actually is delay (November) although the Contractor can give notice with impunity when it reasonably believes that it will be delayed (say, October).

(f) The "event or circumstance" described in the first paragraph of Clause 20.1 in the appropriate context can mean either the incident (variation, exceptional weather or one of the other specified grounds for extension) or the delay which results or will inevitably result from the incident in question."

Finally, the Judge commented that he doubted that this interpretation should in practice necessarily involve "a difficult mental exercise" on construction projects where, as was the case here, an electronic critical path programme was being used. It should therefore be possible to determine fairly easily when delay was actually being suffered.

However, whilst these comments tend to reflect the general approach of most DABs to the FIDIC sub-clause 20.1 and appear to be "contractor-friendly", they did not help OHL here. One of OHL's two EOT claims was rejected because the wording of the documents relied upon, for example "*The adverse weather condition (rain) have [sic] affected the works*" was not recognisable as a notice of a claim about being delayed by the weather. The already small EOT award of seven days was reduced to one.

Mitchell reforms: costs budget one day late

Wain v Gloucester County Council & Others

[2014] EWHC 1274 (TCC)

This case arose out of the first Case Management Conference ("CMC") and costs management hearing. The fourth defendant was one day late in filing her costs budget, so that instead of having been served seven clear days before the hearing, it was in fact served six clear days before the hearing. The claimant took the point that the fourth defendant was late in serving her costs budget. If that was right then the potential consequence as set out in CPR rule 3.14 was that the fourth defendant would be treated as having filed a budget comprising only the applicable court fees.

Until receipt of the note for the CMC prepared and served at 4pm the day before the hearing, no-one on behalf of the fourth defendant had appreciated that the fourth defendant was in breach. Despite this, the issue was argued at the CMC. The claimants relied on the Mitchell case (see Issue 162) and argued that the fourth defendant's breach was not a trivial breach, and that no good reason had been advanced for not serving her costs budget seven clear days before the hearing. In considering the meaning of "trivial" His Honour Judge Grant referred to the case of *Aldington & 133 Others v Els International Lawyers LLP* [2013] EWHC B29, where HHJ Jones QC drew attention to the interrelation between the nature of the non-compliance that was engaged, and the consequences of non-compliance.

The Judge here also referred to a paper delivered by Lord Justice Jackson at a conference held on 21 March 2014 by the Civil Justice Council where Jackson LJ wrote:

"Nevertheless parties should not be allowed to exploit trivial or insignificant breaches by their opponents, as Leggatt J stated in Summit Navigation Ltd & others v Generali Romania Asigurare Reasigurare SA (2014) EWHC 398 (Comm)."

In the circumstances here, His Honour Judge Grant came to the conclusion that the breach complained of was, when properly analysed, and having regard to all the circumstances of the case, a trivial breach. He concluded this for the following reasons:

(i) The delay was of one day in the context of a time period or frame of seven days.

(ii) That seven-day period, namely for filing or serving a costs budget, could usefully be compared with the three-day period for service of an application notice before its hearing: see CPR rule 23.7(1).

(iii) The claimant made it entirely plain that it had not suffered any prejudice by reason of the delay of one day.

(iv) The parties had been able to deal with the topic of costs management at the hearing, notwithstanding the fact that the fourth defendant served her costs budget with only six clear days rather than seven clear days before the hearing.

(v) Unlike the position in Mitchell, in this case no disruption to the court's timetable had been caused by the delay on the part of the fourth defendant in serving her costs budget. The only additional burden placed upon the court was the need to take some time during today's hearing to consider the point, and also for the Judge to spend some time both before the commencement of this hearing and during the short adjournment to prepare this ruling.

(vi) The Judge referred to and relied on the CA's comments at paragraph 40 of the Mitchell judgment where, having stated that it might be useful to provide some guidance as to how to apply the new approach, the Master of the Rolls held:

"It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial the court will usually grant relief provided that an application is made promptly. The principle de minimis non curat lex, namely that the law is not concerned with trivial things, applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms."

This was an instance where the relevant party, here the fourth defendant, had narrowly missed the deadline. Therefore whilst the fourth defendant could not put forward any good reason for the breach, it was in the view of the Judge a trivial one. This meant that the fourth defendant was entitled to rely upon her costs budget as served. It is a matter of some interest that the Judge ended his judgment by noting that:

"Because of the current general interest in these matters, evolving as they are, I will direct that a transcript of this ruling be made available to the parties at public expense."

This decision does not, of course, mean that the courts are going to abandon the new strict approach to deadlines. There have been and continue to be a number of examples of the courts upholding that approach. However, this case is of interest because, on the specific facts outlined above, the TCC took what many will consider to be a proportionate and pragmatic approach to the issue.

That said, the best advice remains, make sure you are able to meet any deadlines, and if you are not, look to make an application for relief before the deadline runs out.

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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