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The construction & energy law specialists

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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.

Entitlement to interim payments

Balfour Beatty Regional Construction Ltd v Grove Developments Ltd

[2016] EWCA Civ 990 (Court of Appeal)

This was an appeal by Balfour Beatty, against an earlier TCC decision which ruled that it had no entitlement to interim payments after the contractual date for practical completion. Grove was a property developer which had employed Balfour Beatty to design and build a hotel and serviced apartments at Greenwich Peninsular in South East London. The contract was the JCT standard form Design and Build Contract, 2011 edition, with a series of amendments.

The parties agreed on periodic payments to be made in accordance with a set of provisions called "alternative B". Subsequently, this was amended by the parties, who agreed on a schedule of 23 valuation and payment dates covering the period from September 2013 to July 2015 ("*Tumber Schedule*"). The completion date was specified as 22 July 2015 in the Contract. As the works were delayed, completion did not take place by that date. On 21 August 2015, Balfour Beatty issued an application for payment number 24. On 15 September 2015, Grove issued a payless notice in respect of that application which deducted £2 million, reflecting an extra-contractual payment of £2 million previously made by Grove. Further, Grove maintained that liquidated and ascertained damages for delay exceeded and extinguished any payments due to Balfour Beatty in respect of work done. Consequently, Grove asserted that Balfour Beatty had no further entitlement to interim payments. Balfour Beatty disagreed.

Mr Justice Stuart-Smith held that Balfour Beatty had no contractual right to make or be paid for an interim application made while the works were ongoing and after an agreed payment schedule had expired. Balfour Beatty appealed, saying that they:

(i) had a contractual right to interim payments after the 23rd valuation;
(ii) were able to recover interim payments after the contractual completion date under section 109 of the HGCRA; and
(iii) the parties had reached a separate fresh agreement for interim payments after valuation 23.

By way of a reminder, section 109 provides that a party is entitled to interim payments for "*any work*" under a construction contract. In the absence of such agreement, a party is entitled to interim payments under the Scheme for Construction Contracts. The CA agreed with Mr Justice Stuart-Smith. Lord Justice Jackson held that the Contract as amended by the Tumber Schedule provided for interim payments to stop at the contractual date for practical completion. The parties had agreed a hybrid arrangement for their timetable which had elements of alternative B and a timetable of their own invention. This timetable ended on the contractual completion date. After valuation 23, the parties had made no agreement as to whether or how they would deal with interim payments after that date. There was no document or agreement that said when valuations should be made, when notices should be served or when payments should be made. Given that these matters were an essential part of any bargain between the parties, it could not be said that the parties had clearly intended payments to continue.

Lord Justice Jackson further held that the Contract as amended by the Tumber Schedule did satisfy the requirements of section 109. Section 109(1) provides general coverage of work under construction contracts which, except in very short projects, is subject to a regime of interim payments. Further, he held that the reference to "*any work*" under section 109 did not mean "*every single piece of work*" under a construction contract. Section 109(2) gave parties considerable latitude as to the system of interim payments they might agree. Here, as the parties had agreed a regime of 23 interim payments stretching right up to the date specified for practical completion, the Contract complied with section 109. The Contract also satisfied section 110 as it included an adequate mechanism for quantifying interim payments. As the HGCRA applied, there was no need to imply the relevant payment provisions from the Scheme.

Finally, Lord Justice Jackson held that there was no "*fresh*" contract for monthly interim payments after the payment schedule expired. The parties had never agreed the terms upon which interim payments would be made. There was no agreement outlining the dates for valuations, notices and payments. Again, as both parties had treated those matters as essential elements of any contract, the Judge found it "*impossible*" to derive any fresh agreement between the parties from their conduct or their correspondence.

Balfour Beatty did suggest that to interpret the contract in this way created a "*commercial nonsense*". The parties could not have intended that, if practical completion were delayed, Balfour Beatty would have to wait for payment until the final payment date. Accordingly, the court should construe the contract as amended by the Tumber Schedule as providing a continuing entitlement to interim payments after July 2015. The CA disagreed, noting that the express words used made it clear that the parties were only agreeing a regime of interim payments up to the contractual date for practical completion. There was no provision for interim payments after July 2015. The CA considered that this was a classic case of one party making a bad bargain and the CA would not (and could not) use the canons of construction to rescue one party from the consequences of what that party had clearly agreed.

Had the parties agreed a contract?

Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd

[2016] EWHC 2509 (TCC)

In the words of the Judge, this was a classic "*contract/no contract*" case. Buchan, who acted as the specialist concrete subcontractor, engaged the Claimant known as "*Hyder*" to carry out certain design works on a car park in anticipation of a wider agreement between the parties that did not materialise. It was alleged that the car park was defective and may need to be demolished and rebuilt at significant cost. Hyder denied liability but also said that if they were liable, there was a simple contract in respect of their design works, pursuant to which their liability was capped in the sum of £610k.

The key legal principles in establishing whether or not there is a binding contract and, if so, in what terms are summarised by Lord Clarke in the case of *RTS Ltd v Molkerei* [2010] UKSC 38 where he noted that what mattered:

"*depends not upon their subjective state of mind, but upon a consideration of what was communicated … by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.*"

This was a case where there were few disputes of fact. Indeed, the relevant events took place over 15 years ago. Buchan argued that there was no contract because the correspondence envisaged a formal Protocol agreement with detailed terms and conditions. The absence of a final Protocol agreement precluded the existence of any contractual relationship between the parties. Usually, the fact that the bargain was performed on both sides will make it unrealistic to argue that there was no intention to enter into legal relations, and difficult to submit that the contract is void for vagueness or uncertainty. And here, Mr Justice Coulson disagreed with Buchan.

This was a case where work was done and paid for on the basis of instructions from Buchan, which were accepted by Hyder. It was not a case in which any of the relevant correspondence was marked "*subject to contract*". Instead, works were performed on the express understanding that, if the anticipated detail contract did not come to pass, the correspondence between the parties would create a legal relationship between them and ensure that, amongst other things, Hyder would be paid for the work they undertook.

There was an instruction, and the fact that Hyder carried out the design work pursuant to that instruction evidenced a contract between the parties. The Judge therefore held that there was a binding, simple contract between the parties. This meant that the court had to go on to consider which documents were incorporated into that instruction or simple contract.

This was not straightforward. There were three competing sets of terms and conditions. The key problem for Hyder was that they had simply not accepted, in plain or any other language, any of the three sets of terms. There must be a final and unqualified expression of agreement and/or acceptance. Hyder were careful to thank Buchan for the instruction, but not to say that they accepted it (and therefore the terms). The Judge noted that Hyder did not use the word "*accept*" at all, even though they could have done so on two occasions. If Hyder were accepting any of the sets of terms, they needed to say so clearly and unequivocally. They wholly failed to do so.

After carefully considering the evidence, Mr Justice Coulson decided that there was too much uncertainty and too much that was not agreed for the court to conclude that the parties intended to be bound by a liability cap in the way Hyder alleged. He noted that:

"Whilst the court should always strive to find a concluded contract in circumstances where work has been performed … the court is not entitled to rewrite history so as to incorporate into that contract express terms which were not the subject of a clear and binding agreement."

The Judge had been asked to consider whether there was an express limitation of liability clause. He recalled the words of Lord Justice Briggs in *Nobahar-Cookson v The Hut Group* [2016] EWCA Civ 128:

"the parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect."

Mr Justice Coulson noted in his conclusions that the result of his analysis was that there was no limitation of Hyder's liability. This was despite the fact that every set of proposed terms and conditions included some sort of provision to that effect. Whilst the Judge acknowledged that this might be regarded as a harsh result, he felt that he was bound to conclude that:

"this was the inevitable consequence of Hyder's dilatory and often unco-operative approach to the proposed Protocol agreement and the negotiation of the terms and conditions. This case starkly demonstrates the commercial truism that it is usually better for a party to reach a full agreement (which in this case would almost certainly have included some sort of cap on their liability) through a process of negotiation and give-and-take, rather than to delay and then fail to reach any detailed agreement at all."

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