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The construction & energy law specialists

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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

## Practical completion: sections of the work

**University of Warwick v Balfour Beatty Group Ltd**
[2018] EWHC 3230 (TCC)

The University engaged BB, under an amended JCT 2011 D&B Form, to design and build the National Automotive Innovation Centre. A dispute arose as to whether the entire Works had to be complete before a single Section could be certified as complete. The Date for Possession for each Section was 20 April 2015 whilst the Date for Completion for Sections 1-3 was 10 April 2017 and for Section 4 was 5 July 2017. Different liquidated damages figures were to apply for each Section. Clause 1.1 set out a lengthy definition of Practical Completion:

*" "Practical Completion": a stage of completeness of the Works or a Section which allows the Property to be occupied or used and in which:*
*(a) there are no apparent deficiencies or defects and no incomplete items of work which would or could:*
*(i) compromise the health and safety of persons entering and/or occupying the Property;*
*(ii) given their cumulative number and/or nature, have more than a trivial impact on the beneficial occupation and use of the Property for the intended purpose, by reason of their rectification or completion; and/or*
*(iii) in relation to the work necessary to remedy them will cause interference or disruption to the beneficial use or occupation of the Property;*
*(b) the Site has been substantially cleared of all temporary buildings, builders' plant and equipment, unused materials and rubbish and cleaned;*
*(c) any other stipulations or requirements which the Contract Documents indicate are to be complied with before Practical Completion have been complied with to the reasonable satisfaction of the Employer.*
*(d) the relevant Statutory Requirements have been complied with and any necessary consents or approvals obtained;*
*(e) all parts of the Works or services in a Section are fully functioning, and safe access to the Section (and associated plant areas required to operate the Section) through or around any other uncompleted sections can be secured on behalf of the Employer or any Tenant (including their contractors, sub-contractors, consultants, sub-consultants, suppliers and agents) in accordance with the access provisions set out in the relevant section of the Employer's Requirements;*
*(f) full testing and commissioning of the services installations has been completed satisfactorily and/or such testing or commissioning..."*

Clause 2.27.1 (as amended) provided as follows:

*"2.27 When Practical Completion of the Works or a Section is achieved and the Contractor has sufficiently complied with clause 2.37 and 3.16.5, then:*
*1. in the case of the Works, the Employer shall forthwith issue a statement to that effect ('the Practical Completion Statement') and the Employer shall from such date be entitled to enter and take possession of the completed Works with effect from such date;*
*2. in the case of a Section, he shall forthwith issue a statement of Practical Completion of that Section (a 'Section Completion Statement');*
*and Practical Completion of the Works of the Section shall be deemed for all the purposes of this Contract to have taken place on the date stated in that statement."*

BB said that on a proper construction of the relevant provisions of the Contract, it was not possible to achieve completion of one Section of the Works prior to completion of the whole of the Works, and as a result, the liquidated damages provisions of the Contract were inoperable. HHJ McKenna noted that the Court was concerned to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the Contract to mean. It does so by focusing on the meaning of the relevant words, that is to say, what the parties are taken to mean by using the words in question. That is, what the parties have agreed and not what the Court thinks that they should have agreed. Where the parties have used unambiguous language the Court must apply it and not ignore the words used or import words not used so as to achieve what the Court considers the parties' real intentions to be.

Here, the Judge noted that the Contract Particulars provided for different Completion Dates for Sections 1-3 and Section 4 respectively and there were different rates of liquidated damages for each one. This suggested that there was a clear intention to permit completion of one or more Sections before completion of the Works as a whole. There would be no purpose in treating the Sections separately if Practical Completion of each could only be achieved when the Works as a whole were complete. The ordinary meaning of the words used in clause 2.27 when considered both in isolation and in the context of the Contract as a whole was that a Section attains Practical Completion if it was sufficiently complete such that it would permit or allow the use and occupation of the Property and sub paragraphs (a) to (f) of the definition were satisfied in so far as they are related to or impact upon the Works connected with the particular Section under consideration, and it was not necessary for the Works as a whole to be complete or the Property as a whole to be ready for occupation. The use of the word "allows" strongly suggested that the relevant stage of completeness to achieve completion of the given Section need not be the complete Works but something less which permitted or enabled a final stage of completion to be achieved in due course. In addition, the use of the words "the Works or a Section" in clause 2.27 and in the definition of Practical Completion suggested that they were alternatives and not intrinsically linked.

Further, business common sense supported this construction since otherwise there would have been no point in providing for the Sectional Completion regime at all.

## Case update: provision of free services

**Burgess & Anor v Lejonvarn (UK) Ltd**
[2018] EWHC 3166 (TCC)

We reported on this case in Issues 188 and 203. The Burgesses had asked Mrs Lejonvarn, a friend and former neighbour, to assist with a landscaping scheme. These decisions established that a duty of care may be found to arise even in circumstances where services are performed gratuitously and in the absence of a contract. However, the decision had not actually considered whether or not Mrs Lejonvarn had breached that duty of care. Judge Bowdery QC noted that the CA had: *"made it clear that a professional providing gratuitous services was liable for what he or she does but not for what they fail to do".*

After hearing the evidence, the Judge was clear that the case against Mrs Lejonvarn should be dismissed. He was critical of the "*scattergun approach*" to the claims and evidence taken by the Burgesses, noting for example that they had been unable to identify any drawings produced by Mrs Lejonvarn which had caused any defective construction or any advice which was given negligently. Further, Mrs Lejonvarn was "*not a design and build main contractor subcontracting the construction work to JL4 and, in turn, London Piling. She was an architect fully entitled to let them get on with their works to produce the necessary retaining walls and finished levels.*" Although the case was dismissed, the Judge went on to consider the loss and damage allegedly caused by the alleged breaches. It is worth noting his comments on what turned out to be a global claim:

*"I consider that the Claimants could and should have attempted to identify what actual, if any, losses were suffered as a result of the breaches alleged. To claim that the Defendant is liable for this global claim offends common sense and I find it wholly unsupported by the evidence which I have heard and read. The agreed budget was a realistic and practical budget. When the Defendant left the project, I have seen no convincing evidence why the Defendant, if allowed to finish the project, could not have completed the garden within budget with any changes and variations priced separately and to the satisfaction of the Claimants. The Defendant had the experience and expertise to comp[l]ete this project if the agreed budget had been respected and had been acknowledged by the Claimants."*

## Case update: adjudication, fraud & enforcement

**Gosvenor London Ltd v Aygun Aluminium UK**
[2018] EWCA Civ 2695

We reported on this case in Issue 215 where Mr Justice Fraser extended the lists of circumstances set out in the *Wimbledon v Vago* case (see Issue 65), where a stay of execution might be granted on an application to enforce an adjudicator's decision to include the following:

*"(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."*

Mr Justice Fraser imposed a stay and Gosvenor appealed. LJ Coulson began by endorsing the principle identified above. He also agreed with Mr Justice Fraser that the number of cases where the new addition will be relevant to the granting of a stay of execution is likely to be small, and the number where there may be an overlap between the evidence that was or could have been deployed in the adjudication, and the evidence justifying a stay on the grounds of risk of dissipation, will be fewer still. The CA then went on to consider if the new principle had been properly applied. It had. Mr Justice Fraser had been entitled to come to the view that he did and, in the exercise of his discretion, to grant a stay of execution of the adjudicator's decision.

## Compliance with court dates: costs budgets

**BMCE Bank International Plc v Phoenix Commodities PVT Ltd & Anor**
[2018] EWHC 3380 (Comm)

Under CPR rule 3.13(1)(b), the parties were required to file and serve costs budgets no later than 21 days before the CMC, which was by 27 September 2018. The claimant complied; the defendant did not, serving the costs budget much later, on 11 October 2018 at 4.32pm. Under CPR 3.14: *"Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees".*

The effect of the late service was that no budget discussion reports were filed and it was not possible to deal with the question of the defendants' costs budget at the CMC hearing. Instead the hearing was taken up with an application for relief from sanctions. The reasons for the failure to serve the budget on time were said to be an "*oversight*" and "*genuine mistake*". The Judge said that that was not a good reason and further the failure was, on any view, a serious breach. This was not a case of a near miss; it was filed two weeks late. In addition, the party in default did not make a prompt application for relief from sanctions. Failing to comply with the cost budgeting provisions hindered case management by the court and caused delays to the court, the other party and other court users. It was contrary to the need for litigation to be conducted efficiently and at proportionate cost. It would therefore have been "*inappropriate*" to give relief from sanctions. The Judge continued:

*"It is important in all divisions of the High Court…that the parties comply with rules, practice directions and orders so that litigation can be conducted efficiently and at proportionate cost. It is also important that parties in commercial litigation before this court cooperate with each other in furtherance of the overriding objective. This means that whilst there may be cases where relief would obviously be granted, and no point is rightly taken, the rules, directions and orders of the court are there to be observed and for good reason. If there is a failure to comply, then an application for relief from sanctions should be made promptly, supported with evidence, after which it will be considered in accordance with CPR 3.9 and the established principles I have identified."*

***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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