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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

Frustration & Brexit

Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency

[2019] EWHC 335 (Ch)

On 21 October 2014, the EMA entered into an underlease with CW dated 21 October 2014 of part of 25-30 Churchill Place, for a term of 25 years. The Parties had committed to the deal in August 2011. On 2 August 2017, the EMA wrote to CW stating that: *"Having considered the position under English law, we have decided to inform you that if and when Brexit occurs, we will be treating that event as a frustration of the Lease."*

CW then sought a declaration from the court that the EMA would continue to be bound by the provisions of the Lease, come what may, after Brexit. The EMA said that as a result of Brexit, given that it was an agency of the EU, it had to relocate away from the UK. Brexit had caused the Lease to be frustrated because it would trigger a number of legal changes relating to the EMA's ability to continue with the Lease. Mr Justice Smith referred to five possible withdrawal options but considered the dispute on the basis of a "no-deal" Brexit, because this was the most likely approach to produce an answer that would be helpful to the parties.

If performance of a contract becomes more difficult or even impossible for the party, then the general rule is that the party who fails to perform is liable in damages. Frustration is an exception. Lord Radcliffe in the House of Lords, in the 1956 case of *Davis Contractors v Fareham UDC*, said:

"Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract … It was not this that I promised to do."

This is a very difficult test to fulfil under English law, with Mr Justice Smith noting that: *"Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine must not be lightly invoked and must be kept within very narrow limits."*

In terms of the parties' expectations as to risk at the time of the conclusion of the Agreement, for frustration what mattered was whether the supervening event and the parties' reasonable and objectively ascertainable calculations rendered the parties' performance something "radically different". Here, the Judge agreed that the EMA's position was materially and adversely affected by Brexit. Further, being an EU agency, it could easily be seen that the EMA might not want to be located in the UK. However, the EMA's capacity to deal with property remained. The EMA still had capacity to continue to use the building and perform its obligations (pay rent) under the Lease.

The EMA was obliged to move its headquarters from London to Amsterdam. However, whilst the move was readily understandable given the desirability of having the EMA located within the territory of a Member State of the European Union, it was not a legal necessity.

The foreseeability of the frustrating event was relevant only insofar as it informed the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk. As at 5 August 2011, the withdrawal of the UK from the EU was foreseeable as a theoretical possibility but was not relevantly foreseeable, but the Judge could draw no inference from the parties' failure to cater for this specific possibility in the Lease. It would have been different if it had been drawn up in the past two years or so.

The lease was 25 years' long. It was foreseeable that over this long period of time, there might be some development that would require the EMA involuntarily to have to leave the premises due to circumstances beyond its control. However, this had been catered for in the alienation provisions, provisions which govern a tenant's ability to sublet or share occupation of the Premises.

Mr Justice Smith accepted that the withdrawal of the UK from the EU was a "seismic event", and was not within contemplation of either party at the time the agreement was concluded. However, the involuntary departure of the EMA, due to circumstances beyond it's (or, indeed, the EU's) control was something which the Lease expressly provided for. The provisions in the Lease drew no distinction between the reasons why the EMA might abandon its headquarters at the Premises. The provisions simply dealt with the fact.

This led the Judge to conclude that not only did the Lease contain provisions catering for the event that occurred – the involuntary departure of the EMA from its headquarters due to Brexit – but also that the operation of these provisions was consistent with the overall intention of the Lease. There was therefore no need to mitigate the rigour of the common law's insistence on literal performance of absolute promises – i.e. the terms of the Lease.

The Judge accepted that the EMA was suffering a financial hardship that was unexpected. The removal of the EMA from London was not a matter it desired but was caused by an event outside its control. If the Lease was not frustrated, the EMA would be obliged to pay rent – if it could not assign or sublet – and would, for the duration of the Lease, be obliged to pay for Premises it did not need. But the EMA chose to enter into a long-term relationship, with long-term obligations. It played a role in framing those obligations: it could have opted for different premises, with a shorter lease; it could have negotiated a break and paid a (far) higher price and foregone the inducements it received. It did none of these things, and so the Lease had not been frustrated.

Adjudication: "smash and grab" vs "true value" claims

M Davenport Builders Ltd v Greer & Anr
[2019] EWHC 318 (TCC)

As we reported in Issue 222, the CA in the case of *S&T (UK) Ltd v Grove Developments Ltd* had confirmed that, where there has been a "smash and grab" adjudication, an employer can bring an adjudication to consider the true value of the works. That is, provided the employer has paid the sums awarded in the first adjudication. This very issue cropped up here, where there was a final account dispute between Davenport and Mr and Mrs Greer. The adjudication and payment provisions of the Scheme applied. Davenport made a payment application for the final account on 22 June 2018 for £106,160.84. The due date for payment was 25 June 2018 and the final date for payment was 12 July 2018. The Greers failed to submit a Payment Notice or a Pay Less Notice within the required time frames. Davenport therefore issued a Payee's Default Notice, which adjusted the final date for payment from 12 July 2018 to 18 July 2018. The Greers failed to pay, and Davenport commenced adjudication proceedings ("Adjudication One").

On 24 October 2018, in Adjudication One, Davenport was awarded the full amount claimed in its final account application plus interest. Again, the Greers did not pay. Instead, on 30 October 2018 they commenced a new adjudication ("Adjudication Two") challenging the valuation of the final account. The Greers were looking to set-off or counterclaim against the amount awarded in Adjudication One. In Adjudication Two, the adjudicator decided that as a result of the revaluation, no sum was due to Davenport. Davenport commenced enforcement proceedings. The Greers sought to rely on the award made in Adjudication Two. The key question in this case was whether they could rely upon the decision in Adjudication Two, considering that they had not paid the amount awarded in Adjudication One.

Here, as well as considering Grove, Mr Justice Stuart-Smith considered the case of *Harding v Paice* [2016] 1 WLR 4068, where, Paice had failed to pay the award ordered from an adjudication following their failure to submit a Payment Notice or a Pay Less Notice. Harding commenced enforcement proceedings. Paice commenced a subsequent "true value" adjudication before the hearing of the enforcement proceedings. Despite the fact Paice did not pay the sum before launching the subsequent adjudication, Paice was not prevented from proceeding with or relying on the result of the later adjudication in the enforcement proceedings. However, before the CA made its decision in the enforcement proceedings and before the adjudicator gave their decision in the "true value" adjudication, Paice had paid the sums ordered by the initial adjudication.

However on the facts here, the Judge concluded that before the Greers could rely on the decision made in Adjudication Two, they were required to discharge their immediate payment obligation from Adjudication One. The Judge held:

"In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication."

In Mr Justice Stuart-Smith's view, it was clear that the immediate payment obligation had not been discharged in this case and as a consequence, the Greers were not entitled to rely upon the decision made in Adjudication Two. As a result, the Greers were ordered to pay £106,160.84 plus interest and the costs of the enforcement proceedings.

Mr Justice Stuart-Smith also considered the difference between final and interim applications and whether the difference was of any importance here. He came to the view that there was nothing in the provisions of the HGCRA or the Scheme which suggested that different policy considerations should apply. Payments at the end of a particular contract may be vital to enable the contractor to continue to operate going forward; quite apart from the need to fund the continuing obligation to make good or complete works under the contract in question. In the view of the Judge, the deprivation of cash flow may have a serious adverse influence on a contractor, whether it occurs during or at the end of the works.

However, the Judge also said this:

"That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation: see the decision of the Court of Appeal in Harding. It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so."

Tantalisingly, the Judge did not provide any examples or circumstances; he did, however, say this of the Harding case earlier in the judgment:

"The decision of the Court of Appeal implies that it is not an essential prerequisite to relying upon a later true value adjudication decision that the earlier immediate obligation should be discharged before launching the later true value adjudication. Paice did not pay its immediate obligation under the third adjudication before launching the fourth, and they were not precluded from proceeding with or relying upon the fourth adjudication for that reason. This suggests that the critical time will be the time when the Court is deciding whether to enforce the immediate obligation."

No payment had been made by the Greers and despite the suggestion made by the Judge that there may be circumstances when payment by an employer is not a prerequisite to relying upon a subsequent true value adjudication, the prudent course in most cases would appear to be that the employer should pay first and argue later.

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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