FENWICK ELLIOTT

The construction & energy law specialists

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

Issue 258 - December 2021

Dispatch

Assessing disputed witness evidence

Mansion Place Ltd v Fox Industrial Services Ltd

[2021] EWHC 2972 (TCC)

MPL was a special purpose vehicle formed to refurbish and extend of student accommodation. Fox was the contractor under an amended JCT Design and Build Contract (2016 edition). Delays occurred, the reasons for which were disputed. Fox issued an interim payment application, duly certified at £367k. MPL served a pay less notice and notices intending to deduct liquidated damages (LADs). Fox referred the dispute to adjudication.

In the interim, there was a telephone conversation between a director of MPL and the managing director of Fox. Fox said that this conversation resulted in a binding agreement whereby MPL agreed to forego any entitlement to LADs and, in return, Fox agreed to forego any right to claim payment for loss and expense as a result of the delay in the works. MPL disagreed. An adjudicator held that this conversation did result in a binding agreement whereby MPL abandoned its right to claim or deduct LADs and that, as a result, £367k was due to Fox.

Fox had sent a series of informal emails from May 2020 complaining that it had not been given possession of a number of bedrooms. On 18 August 2020, MPL raised the possibility of a claim for LADs. The next day, Fox said it was entitled to an extension of time and compensation for that delay. MPL said the delay had been caused by a design failure necessitating a change in the steelwork to be installed.

On 29 September 2020, MPL sent a notice of non-completion in respect of one section. Fox reiterated its claims for an extension of time and said that it would consider the deduction of LADS as a default and would move to termination. Further non-completion notices were sent on 6 October 2020. The Judge noted that it was also relevant to note that all this took place against the background of the Covid-19 pandemic. Fox had indicated to MPL that on all of their other contracts, the client offered the opportunity of a mutual suspension/extension of the works, removing the threat of LADS, on the understanding that Fox did not push for an extension of time and costs. Early in October, Fox sent an email saying: *"in all honesty if they were to knock any threat of LADs on the head I would happily not go for extra prelims I just want to finish the job and walk away"*.

On 14 October, the CA wrote to Fox saying that its requests were being considered but further information was needed before a decision could be made. The disputed conversation took place at 6pm that day. That much was agreed. It was also agreed that both were driving at the time, using hands-free mobile phones to conduct the conversation. The conversation was short, lasting less than ten minutes, and cordial. Neither took a note during the course of the conversation nor sought to make a written record immediately afterwards.

The Judge was satisfied that both were seeking to give their honest recollection of what had been said and that neither was deliberately seeking to mislead. Both had also given witness statements in the adjudication, which were similar to the evidence given here. The Judge gave "some" regard to the demeanour of the witnesses and the impression formed having seen them in the witness box, but took care not to place undue weight on that impression. The Judge looked at the:

"witnesses' evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood."

This meant that the Judge looked at their conduct after the call. For MPL, these objective factors included that no internal documents made reference to the agreement and MPL continued with preparation of its claim for LADs. This would not have been necessary, if there had been an agreement. Further, MPL said that the alleged agreement was commercially unreal. It would have been odd for MPL to abandon a substantial LAD claim in the face of what was said to be a poorly articulated argument likely to involve markedly smaller sums than the LAD amount. MPL was anxious that the works be completed quickly, and the threat of LADs was a powerful weapon to encourage progress. That said, MPL's internal documents showed a concern that Fox would either leave the site or deliberately delay the works and, in those circumstances, the dropping of the LAD claim could be seen as a price worth paying to keep the project moving forward.

The Judge noted the reference by Fox to a "gentleman's agreement". This indicated a belief that they had reached an agreement. The legal effect of that agreement and whether there was an intention to enter legal relations were, according to the Judge, matters to be assessed objectively. The description of the agreement as a "gentleman's agreement" was a reference to it not being in writing. It was not a suggestion that the arrangement was, in some way, not binding or that it was not intended to have legal effect. The use of quotation marks was in the context of explaining that the existence and effect of the agreement were matters for the adjudicator to decide. In terms of the Fox contemporaneous documents, there was an email 5 days later which did not refer to an agreement in unequivocal terms, although it did talk of MPL being "good to their word".

The Judge also referred to an internal Fox email of 9 November 2020 which the Judge was satisfied set out the "genuine understanding" of the position. This internal document gave advice about how to put forward Fox's position as strongly as possible. The author was seeking confirmation that their understanding of the agreement was correct. Whilst it was possible that the author had misunderstood what they had been told or read too much into it, it was far more likely that this was a correct interpretation of what had been passed on.

Fox set out its case that there had been an agreement for mutual abandonment of the claims in a letter of 16 November 2020. MPL replied the same day but did not in that email, or one sent the next day, suggest that Fox's account of what had been said on 14 October 2020 was wrong. This appears to have been a deciding factor. The adjudicator regarded this failure to deny the agreement as "telling". The Judge found the explanation, namely that MPL did not wish to antagonise Fox as "unpersuasive". Positions had become entrenched by this stage; for example, the service of the pay less notices.

The Judge noted that, where there was a short conversation with no contemporaneous or nearly contemporaneous record, a court could rarely, safely, make a finding as to the precise words used. Here, the Judge's task was to consider whether they could make a finding as to the gist of the conversation on the balance of probabilities. Here, the Judge was satisfied that there was an exchange in the context of both parties wishing to move forward to a rapid completion of the project in which MPL agreed to drop its potential claim for LADs in return for Fox agreeing that it would not claim loss and expenses consequent upon an extension of time. This abandonment of the respective claims was on a final and not a provisional basis. Both sides were agreeing to draw a line under their legal claims and to progress the works without regard to those rights. Against the background of the previous dealings and the views which Fox had expressed about the project, such a belief was "*the only realistic explanation not only of ... evidence but, more important, of his actions thereafter ...*"

Sampling: pleading claims

Building Design Partnership Ltd v Standard Life Assurance Ltd

[2021] EWCA Civ 1793

LJ Coulson opened his judgment noting that:

"The use of sampling and extrapolation is not uncommon ... (particularly the TCC) as a way of corralling evidence and keeping trials within proportionate limits. The essential proposition is that, if the sampled allegations are found, on the balance of probabilities, to be properly representative of the pool of allegations as a whole, then a detailed investigation into the sample can be extrapolated into a result in respect of the pool."

Here, SLA's had made a series of specific allegations arising out of a detailed investigation of 167 variations, and then extrapolated the results of that investigation across the remaining 3,437 variations, without investigating or pleading a detailed case in relation to them. BDP said this was an abuse of process and/or disclosed no reasonable grounds for bringing such a claim.

LJ Coulson said that it was not in issue that, in the right case, sampling and extrapolation was an appropriate tool by which the parties and the court can organise the evidence and try the issues in a proportionate way - although, he cautioned that such claims can be particularly difficult to establish. That said, the need to keep costs to a proportionate level would have meant that only some of the variations would themselves be fully explored. The question here was whether a claimant could, in effect, go back a step, and plead a claim at the outset on the basis of sampling and extrapolation. SLA said that it was legitimate to plead the sample in detail, identify the links between the sample and the pool of all the allegations, and explain how and why any findings on the sample would give rise to liability for the whole or part of the pool. Here, LJ Coulson noted that:

"In my view, the Extrapolated Claim is a proportionate way of addressing the 3,437 un-investigated variations. Like any other step taken to save costs, it may make the claim more difficult to establish at trial, but that is an inherent part of the trade-off which any claimant has to negotiate, between saving costs by not doing things which, if money were no object, it might have done, and maintaining a realistic prospect of ultimate success ..."

However, that would count for nothing if BDP did not know or understand the case they had to meet, or if the claim had no real prospect of success. The case here was not an action which raised novel points of law. It was a standard claim for damages for negligence and breach of contract, supported by detailed schedules. LJ Coulson considered that BDP were fully aware of the case they had to meet. They: *"may not like it, and they may consider that it is likely to fail for many of the reasons they advanced ... to this court, but there can be no doubt that they can understand ... how it is advanced."*

For example, the 167 variations ranged across four major elements of the work. On SLA's case, 83.1% of those variations gave rise to a claim of breach of contract and/or negligence against the design team. BDP were said to be responsible for the lion's share of those variations. The allegations were concerned with late, inadequate, inaccurate, incomplete or uncoordinated information or over-certification. They were set out in "interminable detail." LJ Coulson also confirmed that there was nothing special or different about professional negligence actions which would mean that extrapolated claims could never be pleaded as part of such claims. Whilst, the Judge disagreed with SLA that the sheer number of CAIs and CVIs was itself demonstrative of negligence, (there may be reasons why there were so many that did not reflect on the design team at all), but that did not matter:

"There was nothing on their face to distinguish the variations which are the subject of schedules 1-4, with the variations which are not, save that the former have been thoroughly investigated and the latter have not. They were all issued by the same people, on the same project, in the same circumstances, namely an atmosphere of increasing costs and widespread concern about the control of the process. Thus the inference which [SLA] seek to draw about responsibility for the variations as a whole is at least reasonably arguable."

LJ Coulson also disagreed with the suggestion that this decision would "open the floodgates":

"The days of the court requiring parties in detailed commercial and construction cases to plead out everything to the nth degree are over. It is not sensible; it is not cost-effective; it is not proportionate. The parties, with the assistance of the court if they cannot agree, are duty bound to find a way of trying out the principal issues between them in a sensible and proportionate way ... Pleading out every last detail at the outset of the proceedings should not be regarded as the paradigm method of framing such disputes, particularly if there are more proportionate alternatives which still enable the defendant to know the case that it has to meet."

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.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN