Fenwick Elliott
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.

"Reasonable endeavours" and "suspension of services"

Morris Homes (West Midlands) Ltd v Keay & Keay
[2013] EWCH 932 (TCC)

This was an application for leave to appeal against an arbitration award in relation to a dispute arising out of Morris' decision to suspend construction work at a medical centre for about 18 months from July 2008.

On 23 July 2008, Morris wrote to the contractor instructing them to suspend work in a gradual manner which would lead to the site being mothballed. All work had stopped by the end of November 2008. It was anticipated that funding would be available by early January 2010 from the government's Kickstart initiative. Fit-out work started in April 2011 and the centre was handed over in August 2011.

Keay claimed that Morris was in breach of the agreement for lease, in that it failed to progress satisfactorily between 2008 and 2011. As a result, completion of the medical centre and its occupation were delayed, causing losses.

The Arbitrator split Morris' obligations into three distinct parts. First, Morris was obliged to commence the works as soon as was reasonably practicable. Second, once the works had started, Morris was obliged to carry them out diligently. Finally, Morris had to use all reasonable endeavours to ensure that the works were completed as soon as reasonably practicable unless prevented or delayed by a cause or circumstance not within its reasonable control. The Judge thought this point was key. The Arbitrator had said that none of these obligations had been expressed to be subject, or subsidiary, to any of the others, and accordingly that effect had to be given to each one of them disparately.

Morris argued that in the summer of 2008, because of the financial crisis, it was faced with risking commercial suicide if it continued with the project. An obligation to use all reasonable endeavours did not oblige it to risk "commercial suicide". However the Arbitrator noted that there were these three separate obligations. What Morris had done was to stop carrying out any of the works for well over a year. Whilst it may be arguable that by doing so Morris was using reasonable endeavours to secure its financial future and thereby preserve the possibility of the works being completed at some date in the future, in stopping work in 2008 and not starting again until January 2010, Morris was quite clearly in breach of its obligation to carry out the works diligently once they had been started.

The Arbitrator then considered causation. A tribunal has to ask what actual losses were caused by the breach. The types of losses here were diminution in value of the lease, loss of rent, additional cost of development and payments required by the tenants. All were properly claimable.

A court will only give leave to appeal an arbitration decision under s69 of the 1996 Arbitration Act if the question is one of general public importance, the decision is at least open to serious doubt or obviously wrong and it is just and proper in all the circumstances of the court to determine the question.

Whilst it was agreed that the inclusion of both an obligation to carry on works with diligence and an obligation to use reasonable endeavours, in agreements relating to development projects, is widespread, HHJ Grant QC did not consider that this meant that the case was of itself of "general public importance". There were many decisions of many courts, both at first instance and on appeal, on questions of general public importance.

The Judge did consider the question as to whether an obligation to carry out works "diligently" in a development or construction contract relates merely to the manner in which the works are carried out (which usually involves an inquiry in relation to such matters as materials and workmanship), or to the time and/or order within which such works are carried out (which often involves an inquiry into matters such as programming and sequence of works).

The Judge agreed with the Arbitrator that if Morrs was right then it would be able to suspend the project indefinitely by reason of its own financial problems, without being in breach of contract, and there would be nothing that the Keays could do, however long the suspension of works continued. They would remain bound to take a lease of the completed shell and core whenever it was completed, and to fit it out as a medical centre, whether or not there was by then any doctor willing and able to take an under lease of it.

Different considerations arise in connection with a "reasonable endeavours" obligation to complete works as compared with a separate obligation to carry out works with diligence. A party in Morris' position could well comply with a reasonable endeavours obligation to complete works, for instance by taking reasonable endeavours to ensure that it has sufficient capital and other management resources available, but yet be in breach of an obligation to carry out the works diligently in the manner explained above, for instance because it failed to carry out the work by using appropriate materials and/or plant in some respect, or by failing to programme the works appropriately.

Net contribution clauses

West and another v Ian Finlay & Associates

[2013] EWHC 868 (TCC)

In a claim where the main contractor had become insolvent, one question that arose for HHJ Edwards-Stuart QC was whether the architect would be liable for loss or damage caused by that contractor. Whilst the architect had design and inspection responsibilities in relation to that contractor's work, it had also sought to limit its liability under the following net contribution clause:

"Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you."

The homeowners said that this clause did not exclude the liability of the main contractor. The Judge said that this clause had to be construed in its context. At the time when the agreement was signed, everyone understood that several aspects of the work would be procured directly by the Wests and would not form part of the main building contract. The main building contract would not amount to more than about 60%. IFA was aware of this. Whilst one reading of the words "*other consultants, contractors and specialists appointed by you*" meant everyone with whom the Wests entered into a contract in relation to this project apart from IFA, against the background of the project, those words could be read as referring to the various specialists or suppliers with whom the Wests were proposing to enter into direct contracts outside the main building contract. The expression was not one that readily describes any party other than IFA, because IFA was not a contractor. However, it would be appropriate if it was intended to refer to any contractor other than the main contractor whose contract IFA would be expected to administer. This seemed to the Judge to be a natural reading of the words in their context.

Under the Unfair Contract Terms legislation, the Judge noted that where there was, as there was here, doubt about the true meaning of the clause, he was required to give the interpretation most favourable to the consumer (here the homeowners). This meant that IFA would be liable for the loss and damage caused by the main contractor. On the facts, the Judge felt that everyone understood the words of the net contribution clause to be directed to the consultants, contractors and specialists who had been or were to be instructed directly by the Wests outside the scope of the main contract. Each of them had in mind the clear distinction between, on the one hand, the main contract on which IFA was receiving a percentage fee and, on the other hand, the contracts between the Wests and the other suppliers and specialists on which IFA was not receiving a fee. So whilst the Judge did not consider it necessary to decide whether or not on its true construction the net contribution clause was to be given the meaning he considered the parties were attributing to it, if he had to, he would have said that:

"in the context of the factual background to this agreement, the clause means what I consider the parties thought it meant, namely that it does not apply so as to limit IFA's liability to the Wests in a situation where the other party liable is [the main contractor]."

Expert evidence - a reminder

Mengiste & Anr v Endowment Fund For The Rehabilitation of Tigray & Others

[2013] EWHC 599 (Ch)

Extreme examples of when things go wrong can often be dismissed on the grounds of, "well it wouldn't happen to me". That may well be the reaction of all experts, and those who instruct them, when reading the *Mengiste* case, especially when one reads the following words of Mr Justice Peter Smith where he noted the following problems with the Claimant's expert evidence:

(i) He had very little appropriate qualification to give expert evidence on these matters.

(ii) He did not understand his duties as an expert to the court.

(iii) These duties and his potential exposure if his evidence was given recklessly or negligently were not explained to him before he signed his experts report (contrary to the Expert Witness Protocol).

The Judge noted that the expert repeatedly strayed into the argumentative and also made strongly worded criticisms which were simply not sustainable on the thought processes in his report. This led to the "thorough and comprehensive destruction" of the expert during that cross-examination. What was particularly difficult for the expert, and more significantly for those instructing him, was that the Judge noted the following:

"The difficulty was that [the expert] clearly had something of worth to say. He was honest in his evidence, but his answers were coloured by his clear desire to argue the case on behalf of the Claimants and his lack of training as an expert."

Whilst the Judge laid the blame squarely at the door of those instructing the expert, noting that he had been ***"thrown to the wolves without any proper protection or advice as to the nature of his role and his duties and his potential liabilities***", the case does stand as a stark reminder of the importance of ensuring that your expert is truly an expert in the field you need and that your expert remembers above all else to bear in mind their duties to the court and not the party paying them.

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