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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.

Compliance with procedural orders: Mitchell continued

Lincolnshire County Council v Mouchel Business Services Ltd & Anr

[2014] EWHC 352 (TCC)

Mouchel designed a school for LCC. The contract was executed as a deed in April 2000. Practical completion was achieved in March 2002, though in 2003 rising damp was noticed. Certain steps were taken, however on 19 July 2013, LCC issued but did not serve a claim form. Under CPR 7.5, this must be served within four calendar months. LCC also issued a without notice application to extend time for service of the claim form. This was granted until 18 January 2014. LCC made a second without notice application on 23 December 2013. Again, time was extended until 18 April 2014. Mouchel applied to set aside the order. If successful, the claim would be struck out and it would be too late, for limitation reasons, for LCC to re-issue the claim.

In accordance with Part 6 of the TCC Pre-Action Protocol, where it is not possible to follow the requirements of the Protocol because of limitation concerns, a claimant may issue a claim form without complying with the Protocol but then must at the same time apply to the court on notice for directions as to the timetable and form of procedure to be adopted. The TCC will then consider whether to order a stay of the whole or part of the proceedings pending compliance with this Protocol. The first order from the TCC had envisaged that the proceedings had to be served by 18 January 2014 and that the Protocol was to be complied with by then.

Mr Justice Stuart-Smith noted that it was not "entirely" within LCC's hands whether the Protocol would be complied with, since it applied to Mouchel as well. Further, and the Judge said "more importantly", having set the timetable itself, it was imperative that LCC should act promptly if it was to be in a position to serve the proceedings having complied with the Protocol on or before 18 January 2014

What happened was that LCC did not issue its letter of claim until 3 December 2013, four and a half months into the period allowed by the first TCC order. The evidence before the court was that for the first six weeks of that period, the reason for this was the need to provide detailed instructions to a new expert together with both annual leave of the relevant fee earner and the need to cover for others when on their own leave.

Mouchel then inspected the site on 2 September 2013 without experts. There was further correspondence and a joint inspection was arranged for 24 October 2013. It was arranged to take place during half term. However, the Judge noted that there was no reason on the evidence why a joint inspection could not have taken place before term started in early September 2013. LCC's new expert prepared a report after the site visit and this was provided to Mouchel on 8 November 2013. LCC sent out letters of claim on 3 December 2013.

On 19 December 2013, LCC asked Mouchel if they considered there was sufficient time to comply with the Protocol (i.e. letter of response and a meeting) before 18 January 2014. Mouchel's solicitors replied the next day saying that there was and that they would be available to attend a meeting in the week commencing 13 January 2014. However, on 23 December 2013 LCC made a second without notice application to extend time for service of the claim form. That application noted that the second defendants had said they would not be in a position to attend the meeting before 18 January 2014 and in the circumstances, the existing stay did not allow time for the parties to attempt a resolution of the matter by way of mediation should that be considered a way forward.

The Judge said that while an application for an extension of time for serving the claim form may be made without notice pursuant to CPR 7.6, a party issuing proceedings to which Part 6 of the TCC Pre-Action Protocol applies (because his claim may become time barred) is obliged to apply to the court on notice for directions as to the form of procedure to be adopted. An application on notice enables the court to review the position in the light of any relevant submissions made by all the parties. Further, if the order is made without notice, there is the risk that one of those parties will apply to set the order aside as happened here. The requirement for the initial order for directions to be made on notice thus removes the risk of further costly and time-consuming satellite litigation.

The Judge then noted the "*new and more robust approach to case management*" adopted by the courts. He also referred to precedent that neither the fact that the provisions of the Pre-Action Protocol had not yet been complied with nor the prospect that serving proceedings might lead to an increase in costs because of that non-compliance were good reasons for failing to serve the claim form. Mr Justice Stuart-Smith therefore concluded that:

"To my mind, the established principles, the amendments to the CPR that I have identified, and the terms of the Protocol all point in one direction: parties who issue late are obliged to act promptly and effectively and, in the absence of sound reasons (which will seldom if ever include a continuing failure to comply with pre-action protocol requirements) the proceedings should be served within four months or in accordance with any direction from the Court. A claimant who does not do so and (where the Protocol for Construction & Engineering Disputes applies) who does not obtain directions on notice does so at extreme peril."

NEC3: inconsistent contract documents

RWE Npower Renewables Ltd v J N Bentley Ltd

[2014] EWCA Civ 1679

By an agreement dated 22 March 2010 Bentley agreed to carry out civil engineering works on a hydro-electricity generating plant in Scotland. The works were defined in the documents referred to in clause 2 of the contract, all of which were agreed to form part of it and were to be read and construed accordingly. Clause 2 also provided that the documents to which it referred should be read and construed in a prescribed order of precedence. The agreement included the NEC3 Engineering and Construction Contract Conditions June 2005 Edition (with amendments June 2006), Contract Data sheets Parts 1 and 2, Post Tender Clarifications, Works Information and Site Information.

It was agreed that the penstock pipeline was not completed until 25 October 2012. An adjudicator held, however, that section 2 of the works as defined in Options X5 had been completed on 21 February 2012. He held that there was an inconsistency between Part 1 of the Contract Data and clause 6.2 of the Works Information and that the former took precedence. On the true construction of Option X5 the provisions defining the scope of section 2 were in his view to be construed as requiring completion of the penstock pipeline only to the extent necessary to enable the hydro plant to be installed. It was common ground that in order to achieve that limited purpose only a short length of pipeline upstream and downstream of the powerhouse was required.

RWE, dissatisfied with the adjudicator's decision, began Part 8 proceedings seeking a declaration that Bentley's obligation was defined by clause 6.2 of the Works Information, and that all the work described as forming part of section 2 had to be finished before the section as a whole could be regarded as complete. If correct, that meant that the intake, penstock pipeline and tailrace all had to have been completed and tested.

Mr Justice Akenhead had held that the agreement should be read as a whole and construed so far as possible to avoid inconsistencies between different parts on the assumption that the parties had intended to express their intentions in a consistent and coherent way. In his view, there was no significant inconsistency between Option X5 and clause 6.2, which were capable of being read together without undue difficulty.

Bentley submitted that this approach to the documents had been wrong. There was a clear discrepancy between Option X5 and clause 6.2. Bentley argued that the former called only for the installation of the hydro plant as part of section 2, whereas the latter required its testing and commissioning. Bentley submitted that the existence of this discrepancy either meant that the entirety of clause 6.2 should be omitted, or if that were too extreme, at least the whole of the provisions in clause 6.2 defining section 2 in favour of the corresponding provisions of Option X5.

Moore-Bick LJ started from the same position as the judge, that the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. Option X5 was worded in more general terms than clause 6.2, which identified in greater detail the work comprised in each section.

That was reflected in clause 1 of Part 1 of the Contract Data, which expressly recognises that the works "*are more comprehensively set out in Part 2, Works Information*". Despite differences in detail, however, Moore-Bick LJ stated that one would expect the two provisions to complement each other and that only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it.

Both clauses purported to define the content of section 2 and both referred to the completion and testing of the penstock pipeline, which strongly suggested completion of the whole run. Moore-Bick LJ noted that this conclusion was reinforced by the more specific language used in the second bullet point in the part of clause 6.2 which dealt with section 2. Moore-Bick LJ held that these two parts of the contract were capable of being read together sensibly on the basis that section 2 was intended to comprise substantially the whole of Bentley's work, other than the part which fell within section 1. He stated that, approached in this way, it did not matter for the purposes of the agreement whether the reference was to "installing" the hydro plant (X5) or to "testing and commissioning" it (clause 6.2), because none of that formed part of Bentley's work. Moore-Bick LJ continued:

"Moreover, insofar as there is any uncertainty in Option X5 about the scope of section 2, the right way to resolve it, in my view, is by obtaining such assistance as one can from other parts of the contract. For that purpose clause 6.2 with its more detailed provisions is the obvious place at which to start. I agree with the judge, therefore, that the two clauses can and should be read in harmony with each other. The result is that Bentley's obligation was to complete the pipelines by 27th May 2011."

Moore-Bick LJ further remarked that even if it was assumed that there was a genuine discrepancy between the documents, deciding the order of precedence would only become necessary where *"different provisions on their true construction impose different obligations in relation to the same subject matter"*. Option X5 could therefore not be considered in isolation. Moore-Bick LJ therefore held that the judge was correct to hold that section 2 of the works had not been completed until the whole of the penstock pipeline had been completed and tested.

The appeal was dismissed.

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