Fenwick Elliott
The construction & energy law specialists

Issue 180 June 2015

Dispatch

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

Amendments to statement of case

CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd Ors

[2015] EWHC 1345 (TCC)

Coulson J reviewed the Claimant, CIP Properties' ("CIP"), application for permission to amend its particulars of claim which alleged building defects caused by the Defendant building contractor. Subsequent to timetable set in October 2014 for the trial, in April 2015, CIP wished to amend the particulars of claim to raise new complaints regarding smoke ventilation and roof defects eight months before the trial date of January 2016. The original claim was outlined in the Claimant's pre-action protocol letter in 2011 alleging several defects, which included those affecting the car park ventilation system, and the proceedings were issued in 2013. The Claimant argued that the amendments had to be made as they were omitted from the original particulars of claim.

The parties to the dispute agreed to amendments relating to the quantum and the further allegations of breaches already outlined in the pleadings. However, the two new claims were disputed and the Judge dismissed the applications to amend the particulars of claim. Coulson J emphasised that as the timetable had to be revised to allow the agreed amendments, there was little room for the addition of new claims. He also outlined that the Claimant had failed to explain and justify the delay in making the changes. In reaching his judgment, Coulson J assessed the existing case authorities. In particular, he stated that the traditional approach outlined in Cobbold v Greenwich LBC [1999] EWCA Civ 2074 was no longer the starting point. Cobbold generally allowed amendments to statements of case so that the real dispute between the parties can be adjudicated, provided that any prejudice to the other party is compensated in costs to avoid misadministration of justice.

The Judge also outlined that there was a strong prima facie case that the Claimant could not commence new proceedings with the new claims regarding the smoke ventilation defect as this could have been included in the original statement of case and had been deliberately omitted from the pre-action protocol phase. Coulson J referred to Henderson v Henderson [1843] 3 Hare 100, 67 E.R. 313, which established that "the Court requires the parties to [that] litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case".

Guidance in relation to the law of mitigation

Thai Airways International Public Company Ltd v KI Holdings Co Ltd

[2015] EWHC 1250 (Comm)

The Judge, Legatt J, in assessing damages for breach of contract, had to consider whether credit must be given for any monetary benefit received by a claimant as a result of taking reasonable steps to mitigate its loss.

Thai claimed damages for breach of three contracts made with a Japanese seat manufacturer, KI Holdings (or "Koito"), for the delivery of economy class seats for some of its aircraft. Some of the seats were delivered late and other seats were not delivered at all. As a result, Thai had to take delivery of the aircraft from a third party without economy class seats installed. Thai was also prevented from using five new aircraft for around 18 months until alternative seats could be sourced from another supplier. Thai leased three aircraft from a third party in order to fill the gap in its fleet. It also had to source seats from alternative suppliers.

Thai claimed the costs it had incurred in mitigating its loss. Koito's defence was that even where costs were incurred by Thai as a result of Koito's breaches of contract, Thai also gained certain benefits from the mitigating actions taken which must be brought into account in calculating damages. Koito argued that Thai should account for any savings made by using the alternative seats which were more expensive, but lighter, than the seats which Koito was to provide.

Thai submitted that it was entitled to recover these costs without having to account for any benefits received from the third party because entering into the relevant leases was the only reasonable step which it could take to mitigate its loss. Any benefits were incidental and had not been chosen by Thai.

The Judge held that it had been reasonable for Thai to mitigate its loss by leasing the relevant aircraft, but that any monetary benefit received had to be taken into account when assessing damages. Thai had to account for any fuel saving that would arise from the use of lighter seats over their economic life. However, the judge also held that the onus was on Koito to prove that Thai had received any benefit and the amount.

Implied terms of cooperation and non-prevention of performance - a party cannot take advantage of its own wrongdoing

Al Waddan Hotel Ltd v Man Enterprise Sal (Offshore)

[2014] EWHC 4796 (TCC)

The issue before the court was whether the Contractor ("MAN") was entitled to submit a dispute to arbitration before the expiry of the contractual time-period by which the Engineer was first required to issue a decision on the dispute, which was a condition precedent to arbitration, but in circumstances where by the default of the Employer ("AWH") the parties knew that the Engineer would not issue a decision within that period or at all.

The contract in question was the FIDIC Red Book (4th edition, 1987) (the "1987 Red Book"). The relevant clause was sub-clause 67.1 which states that if a dispute arises between the parties, it shall in the first place be referred to the Engineer, who shall issue a decision within 84 days. The court held that it was very well established under the FIDIC form that the procedure under clause 67.1 was a condition precedent to arbitration.

Here, MAN referred a dispute to the Engineer in accordance with sub-clause 67.1. It became evident that no Engineer's decision would be given because AWH had ended the Engineer's retainer and it took no steps to re-engage or replace the Engineer. Subsequently MAN referred the dispute to arbitration. AWH contested this on the basis that even though there would be no Engineer's decision, MAN was still bound to wait until the expiry of the 84-day period which the Engineer had to make a decision.

The court rejected AWH's argument and found that the dispute could be referred directly to arbitration notwithstanding that the condition precedent had not been complied with.

In coming to this conclusion the court reviewed the broad, longstanding legal principles of cooperation and prevention of performance, cited in the 1881 case of Mackay v Dick [1881] 6 AC 25.

Some 17 years earlier in Stirling v Maitland (1864) 5 B & S 840, the court had said:

"... if a party enters into an arrangement which can only take effect by the continuance of a certain existing set of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative",

HHJ Raeside QC held that these principles were so well established that they could be readily implied into common law contracts. Here at least the court looked to the more recent case of Attorney General of Belize v Belize Telecom [2009] 1 WLR 1988, where Lord Hoffman said that:

"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

Applying these principles, the court found that the condition precedent at sub-clause 67.1 could be displaced by either or both of what it labelled the "refusal approach" and the "hindrance avoidance approach".

The refusal approach was based upon a long line of authorities again dating from Victorian times which held that where an independent decision-maker appointed by the parties refuses to carry out his or her delegated function then the parties may come before the court to seek the relief or remedy that would otherwise have been obtained from the appointed decision-maker. Accordingly, upon the Engineer "clearly and absolutely" stating that it would not perform its decision making function, the parties were able to elect either that the contractual requirement no longer bound them or to attempt to obtain another Engineer. As AWH had not taken any steps to obtain another Engineer, the parties were no longer bound by the requirement to obtain the Engineer's decision.

The "hindrance avoidance" approach is based upon the longstanding principle most frequently cited from the speech of Blackburn J in another Victorian case of Roberts v Bury Improvement Commissioners (1870) L.R. 5 C.P.310 where the Judge said that:

"no person can take advantage of non-fulfilment of a condition the performance of which has been hindered by himself".

In respect of this the court noted that AWH was obliged under the contract not only to engage the Engineer but also to ensure that the Engineer's contractual obligations were fulfilled. This meant that AWH were under an obligation to maintain the Engineer's retainer or appoint another Engineer in instances of non-performance.

AWH had breached this obligation because it ended the Engineer's retainer and failed to appoint another Engineer, thereby preventing the performance of this condition. Accordingly, AWH was not entitled to rely upon the condition precedent that made it necessary to obtain an Engineer's decision before the dispute could be referred to arbitration. This meant that MAN was not bound by the condition precedent and was entitled to refer the dispute to arbitration.

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.

Follow us on and

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.com