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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.

Interim payment applications & payless notices

Henia Investments Inc v Beck Interiors Ltd

[2015] EWHC 2433 (TCC)

The parties entered into a fit-out contract based on the JCT Standard Building Contract without Quantities 2011 as amended. Interim payment due dates were 29 November 2013 and thereafter the same date in each month (or the nearest "Business Day" in that month). The Works were delayed by around 11 months. On 5 September 2014, the CA issued a Non-Completion Certificate purportedly pursuant to clause 2.31 of the Contract Conditions to the effect that the Works had not been completed, listing various works said not to have been completed.

On 28 April 2015 under cover of an email, Beck submitted its "Interim Application for Payment No: 18", claiming £2.9 million. The Application included over 100 pages of backup. On 6 May 2015, the CA issued its Interim Certificate No. 18 showing a net sum payable of £226k. Beck did not issue an Interim Application for Payment in May 2015 but on 4 June 2015 at 00.03 the CA issued Interim Certificate No. 19 in the net sum payable of £19k. On 17 June 2015, Henia issued a "Payless Notice" purportedly pursuant to clauses 4.12.5 and 4.13.1 of the Contract, saying that there was "£0" due to the Contractor. This was based on Certificate No. 19 and its entitlement to liquidated damages for 40 weeks' delay at the weekly rate of £15,000. Mr Justice Akenhead had to consider the following:

As a starting point, Mr Justice Akenhead looked to what had been agreed under the Contract. He concluded that it was clear that the parties had not followed the contractual requirements with any precision. Beck's Interim Application No. 18 was late by 6 days and Interim Certificates Nos 18 and 19 were both issued late, No. 18 by one day and No. 19 by 3 minutes in the middle of the night. Mr Justice Akenhead stressed the importance of being able to ascertain whether a document is an Interim Application or not:

"the document relied upon as an Interim Application under Clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

The Judge also considered that a contractor must state what it considers due "at the relevant due date". The relevant due dates are spelt out in the Contract. Here, the material ones in this case were 29 April and 29 May 2015. Whilst it is not absolutely necessary that the specific due date is expressed in the Interim Certificate, it must be clear and unambiguous that an application relating to a specific due date is being made. The Judge then had to consider whether or not the Interim Application of 28 April 2015 was and could be taken to be intended as the relevant Interim Application for the relevant due date of 29 May. If it was then the payless notice was not served in time.

There was a relevant due date on 29 April 2015; that would have been the 18th relevant due date under the Contract. The use of the words "Interim Application for Payment No: 18" pointed to an intention that it was to relate to the 18th application for the 29 April payment due date. If the Interim Application was intended to be taken as relating to the 29 May 2015 due date, the use of the 30 April 2015 date demonstrated if anything that either Beck was anticipating doing absolutely no work of value between 30 April and 29 May 2015 or that it was forgoing any interim entitlement to whatever work it was anticipating doing over those 29 days; both these scenarios were unlikely. The only argument to support the submission that the 28 April 2015 Interim Application was intended to be the Interim Application for the 29 May 2015 due date was that, because it was out of time for the 29 April 2015 due date, it must be taken as relating to the later due date as being the next in time. This was the approach which had been taken by the adjudicator.

The Judge disagreed. Interim Application No. 18 was not in substance, form and intent an Interim Application in relation to the payment due date of 29 May 2015. However, the Judge still had to consider whether Payless Notices can effectively challenge the valuation certified by the CA or where applicable an Interim Payment Notice as opposed to merely setting up arguable cross-claims or other deductions expressly envisaged by the Contract.

Here the Judge noted that the parties had agreed that the CA was required to certify what it "*considers to be or have been due at the due date to the Contractor in respect of the interim payment*" (clause 4.10.1). This meant that "as a matter of commercial common sense", an Employer might wish to disagree with the Interim Application or Interim Payment Notices submitted by the Contractor and that both parties might disagree with what the CA has certified. There was nothing in the Contract wording to suggest that the Employer could not legitimately challenge either the amount certified by the CA or the amount claimed within the Interim Payment Notice. There was nothing commercially illogical in the Employer being permitted to do so. It was clear that the Payless Notice can include and allow deductions and other set-offs which the Employer is entitled to make or claim. Therefore a Payless Notice "generally and in this case" could properly challenge either the CA's certification or any Interim Payment Notice.

The Payless Notice can not only raise deductions specifically permitted by the Contract and legitimate set-offs but also deploy the Employer's own valuation of the Works. In this case, all the Employer did was to challenge the Contractor's most recent application for payment (Interim Application No. 18) by way of putting forward the CA's most recent evaluation (albeit that the Certificate in question, Certificate No. 19, was issued late). There was no suggestion that the Employer was acting in anything other than a bona fide way. The Payless Notice of 17 June 2015 (clearly served within time for the 29 May payment due date and the final payment date 28 days later) would have provided an adequate agenda for an adjudication as to the true value of the Works and the validity of the alleged entitlement to liquidated damages for delay.

Liquidated Damages

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Mr Justice Akenhead also had to consider whether Henia (or any employer) could rely on the Certificate of Non-Completion even though the CA had failed to make a decision on a contractor's claim for an extension of time. Here the Judge looked at the wording of the principal liquidated damages provision, clause 2.32, which was not cast in a way that suggested that the obligation on the part of the CA to operate the extension of time provisions was a condition precedent to an entitlement to deduct liquidated damages. In contrast, it did expressly seek to impose two other conditions precedent, namely the need for the CA to have issued a Non-Completion Certificate for the Works and for the employer to have notified the contractor before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated damages. It therefore seemed "odd" to the Judge, if there was to be a condition precedent, that no liquidated damages should be payable or allowable unless the extension of time clauses had been operated properly, when it was not spelt out as such.

Mr Justice Akenhead also noted that a contractor is not left without a remedy both in the short term through adjudication and in the long-term final dispute resolution processes; it can challenge the refusal to grant an extension and/or the deduction of liquidated damages and, in the case of adjudication, secure relief if it can convince the adjudicator that it is right and that the employer and the CA are wrong in whole or in part. The Judge noted that it may seem unfair on a contractor to have liquidated damages deducted at a time when the CA has failed to deliver the process of considering extension of time claims. There were two answers to this: the ready availability of short- and long-term remedies and the fact that there are numerous potential defaults on the part of both employer and contractor which can give rise to serious financial consequences for the other, and merely because unfairness can happen in the short term it does not necessarily or obviously lead to the need to construe clauses as conditions precedent to the ability of one party to secure such financial advantage in that short term.

Therefore, a failure on the part of the CA to operate the extension of time provisions did not debar Henia from deducting liquidated damages where the other expressed conditions precedent in the relevant JCT clauses had been complied with.

FIDIC: making employer claims "as soon as practicable"

NH International (Caribbean) v National Insurance Property Development Company

[2015] UKPC 37

Under sub-clause 2.5 of the standard FIDIC form, an Employer who "*considers itself to be entitled to any payment under any*" clause of this contract should, subject to certain specified exceptions (such as cost of electricity), "*give notice and particulars to the Contractor ... as practicable after the Employer became aware of the event or circumstances giving rise to the claim*". The sub-clause ends by noting that the Employer should only be entitled "*to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this sub-clause*". Here the Privy Council had to consider an arbitrator's decision where the arbitrator had allowed certain counterclaims which were put forward as "*common law rights of set-off and/or abatement of legitimate cross-claims*". NHIC had said that they were barred by virtue of not having been made in accordance with sub-clause 2.5.

The Privy Council said that the purpose of sub-clause 2.5:

"is to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given 'as soon as practicable'. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served 'as soon as practicable'.

Whilst no definition of "as soon as practicable" was given, the Privy Council stressed that the structure of sub-clause 2.5 was such that it applied to any claims which the Employer wished to raise. The clause made it clear that, if the Employer wished to raise such a claim, it must do so promptly and in a particularised form. Where the Employer has failed to raise a claim as required by the earlier part of the clause: "*the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim*".

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.

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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