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

Dispatch

Pay Less Notices

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd

[2017] EWHC 17 (TCC)

Here the Trust sought a declaration about the validity or otherwise of an alleged Interim Payment and Pay Less Notice. An adjudicator had decided that, as the Interim Payment Notice was valid but the Pay Less Notice was not, the Trust was liable to pay Logan just over £1.1 million.

Practical completion was certified on 25 August 2015. Although Logan made no applications for interim payment, Interim Certificates were issued every two months as required by the Contract. The Certificate of Making Good Defects was issued on 24 August 2016 triggering the 28-day period for the issue of the Final Certificate, which had to be issued by 21 September 2016. A final account meeting was arranged to take place on 21 September 2016. Shortly before midnight on 20 September 2016 Logan sent an email attaching a Payment Notice. The Trust treated the document as being Logan's position on the final account valuation for the forthcoming meeting. During the meeting, the final account valuation was discussed at high level. At no time was there any discussion about the issuing of an Interim Certificate or that the document issued the night before was intended to be an Interim Payment Notice. No agreement was reached.

The Final Certificate was issued. The covering email noted that the Payment Notice was "out of date and void", but that "in any event, the details stated in the Final Certificate are the same as would have been stated in any final Interim Certificate which may have been issued". A proposal was made that there should be a standstill agreement whilst the parties attempted to settle their differences through mediation.

If Logan's Interim Payment Notice was validly issued on 20 September 2016, it was common ground that the expiry date for service of a Pay Less Notice was 24 September 2016. On 28 September 2016, Logan noted that no Pay Less Notice had been issued. On 19 October 2016, Logan issued a Notice of Adjudication claiming payment of the sum set out in the Interim Payment Notice.

The Trust said that the court should construe the purported Interim Payment Notice against the factual background. The parties were trying to resolve the final account and, save for what was apparent on the face of the document itself, there was no reference to or prior discussion about Logan seeking an interim payment. The email was sent by Logan without drawing attention to the interim payment regime. Instead Logan diverted the Trust's attention towards the final account meeting. Logan waited until expiry of the time for service of a Pay Less Notice before making its position clear. A contractor had to be open and transparent about its intentions. The notice must be unambiguous. Here the true intention had been buried away.

Logan said that the Interim Payment Notice was clear on its face. It identified itself as an Interim Payment Notice and made particular reference to clause 4.10. The Notice made reference to Valuation No. 24 because it was the 24th payment cycle. Whilst the covering email which enclosed the Notice was not as clear as it might have been, there was sufficient clarity from the Interim Payment Notice itself.

All that had happened here was that the Contract Administrator had taken his eye off the ball, and not having read the Contract properly was not aware that Logan was entitled to issue an Interim Payment Notice when it did. The factual background relied on by the Trust was wholly irrelevant to the question of the validity of the notice. All that mattered was whether Logan had issued a notice which was in substance, form and intent an Interim Payment Notice. If so, then it qualified as such.

Deputy Judge Nissen QC said that there was a "high threshold" to be met by any contractor who seeks to take advantage of the provisions whereby a sum automatically becomes payable if a timely employer's notice is not served. Therefore, it was relevant to consider the background matters. Here a relevant consideration was that the present dispute would never have arisen had a timely Interim Certificate been issued. It was no answer to say by way of mitigation that the parties were operating the final account process and that this overtook the interim payment regime. The Contract provided for and permitted the continued receipt of interim payments until the issue of the Final Certificate.

The attachment to the email was an Interim Payment Notice in substance, form and intent. Viewed on its face, the Interim Payment Notice was both clear and free from ambiguity. The document said, in terms, that it was an Interim Payment Notice. The Trust was therefore provided with reasonable notice as to its content.

The Judge then considered whether the Trust's email attaching the Final Certificate could be considered to be a valid Pay Less Notice. Here the valuation of Logan's work was set out in some detail in the Final Certificate and accompanying breakdown. This was the only sum to which Logan was entitled, whether by way of final account or interim payment. Thus on a broad level, one purpose of the email and attachments was that it was responsive to the Interim Payment Notice. Looked at another way, the documents provided an adequate agenda for an adjudication about the true value of the Works on an interim basis for the purposes of Valuation No. 24. There was a detailed breakdown of the Trust's position. There was nothing more that Logan needed to know.

The Judge saw no difficulty with the notion of serving a contingent Pay Less Notice. Here the Contract Administrator was simply saying that, if he was wrong about the invalidity of the Interim Payment Notice, the Final Certificate reflected everything he wanted to say in response to it. The Trust had therefore, on 21 September 2016, provided a valid Pay Less Notice.

Limiting liability

McGee Group Ltd v Galliford Try Building Ltd

[2017] EWHC 87 (TCC)

This was a Part 8 claim, where McGee sought a declaration that the amount of their liability for any financial claims brought by GT for delay and disruption was capped at 10% of the subcontract sum. GT engaged McGee as a subcontractor to undertake the design and construction of earthworks and related substructure works. The subcontract was based on the JCT Design and Build Sub-Contract together with a large number of bespoke amendments. Mr Justice Coulson commented that one potential cause of the problem here was a potential mismatch between the JCT standard terms and the amendments.

Clause 2.21B, which dealt with late completion, provided the cap:

> *"Provided always that the Subcontractor's liability for direct loss and/or expense and/or damages shall not exceed 10% (ten percent) of the value of this Subcontract order."*

The amended clause 4.22 dealt with claims by the main contractor for loss and expense arising out of the subcontractor's default affecting the regular progress of the main contract works. GT made claims against McGee for delay and disruption, and sought to differentiate between a claim under clause 2.21 and one under clause 4.21. GT accepted that their claims arising out of what GT called McGee's "delayed and disruptive delivery of the sub-contract works", where the alleged default caused GT to remain on site beyond the access target dates set out in the main contract, were capped by clause 2.21B. However, GT went on to say that their claims for the financial consequences of delay and disruption, which were said to arise directly out of a critical delay of 52 days to the main contract caused by McGee, were claims under clause 4.21 and so not caught by the cap.

The Judge set out the applicable principles for clauses that seek to limit liability as opposed to exclude liability altogether.

> *"In summary, a clause which seeks to limit the liability of one party to a commercial contract, for some or all of the claims which may be made by the other party, should generally be treated as an element of the parties' wider allocation of benefit, risk and responsibility. No special rules apply to the construction or interpretation of such a clause although, in order to have the effect contended for by the party relying upon it, a clause limiting liability must be clear and unambiguous."*

The Judge considered that clause 2.21B was a straightforward provision seeking to cap McGee's liability. The cap was not said to be referable to claims which may be made under particular clauses of the subcontract or for breach of any express or any implied terms. It is specifically a cap on McGee's liability for a particular type of claim, namely one for "direct loss and/or expense and/or damages". This meant the financial loss which flowed directly from delay and disruption caused here to the main contractor was recoverable, being "synonymous with the financial consequences of delay and disruption".

The Judge considered whether the fact that the term here which capped McGee's liability, not only for direct loss and/or expense, but also "and/or damages", extended beyond McGee's liability for the financial consequences of delay and disruption. He said that it did not, noting that precisely the same claims for loss and expense due to delay and disruption under the express terms of the subcontract will be routinely put in the alternative as a claim for damages for breach of (often implied terms of the) contract, especially if the subcontractor is concerned that he may not have complied with all of the notice provisions required for the same claims under the contract.

The Judge did not accept that the reference to the words "and/or damages" meant that clause 2.21B was seeking to limit the entirety of GT's claims against McGee (including, for example, any claims for damages for defective work) to the 10% cap. The natural reading of the words "loss and/or expense and/or damages" was that it was identifying McGee's liability for loss and/or expense and/or damages arising out of delay and disruption caused to GT. It was an agreement whereby GT's financial claims (whether described as loss, expense or damages) as a result of delay and disruption caused by McGee would be capped at 10% of the subcontract sum.

> *"Anyone who has ever put together, argued or been obliged to decide a claim for loss and expense under a building contract, knows that no sensible distinction can be drawn between delay and disruption. One man's delay is another man's disruption. A sub-contractor's failure to complete a particular part of his work may have an adverse effect on the main contractor, but whether the consequential claim is one for delay or disruption, or a mixture of the two, will depend on a raft of factors: whether or not the delay was on the critical path of the main contract programme, what other sub-contractors were affected and how, if others were also in default etc. It is impossible to divide up such claims between delay, on the one hand, and disruption, on the other."*

Accordingly, the cap in the subcontract caught all GT's claims for loss and/or expense and/or damages for delay and disruption.

Mediation: admissibility of evidence

Savings Advice Ltd and Anor v EDF Energy Customers Plc

[2017] EWHC B1 (Costs)

During a costs assessment a question arose over the admissibility of information provided during a mediation. It was suggested that evidence in arriving at an approximation of the Defendant's costs made use of various information including that provided to the Claimants for the purpose of mediation between the parties. The use of this information was contrary to the clear terms of the mediation agreement. Clause 15 of the Mediation Agreement made it clear that:

> *"all documents or other material produced for or brought into existence for the mediation will be subject to without prejudice or negotiation privilege ... [and] not be disclosable in any litigation or arbitration connected with the dispute so long as and to the extent that such privilege applies".*

Master Haworth found as a fact that the information relied on consisted of documents produced for or brought into existence in relation to the proposed mediation. Crucially he also found that the statements referred to were purely factual. The Master continued that it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim they do so in the full knowledge of their opponent's costs. Whilst the "without prejudice privilege" exists in a mediation to protect the disclosure of admissions or concessions made in negotiations, it does not protect statements of pure fact:

> *"The whole purpose of the mediation was to achieve a settlement. In those circumstances any costs information given in mediation is and must be admissible in order to work out the consequence of any subsequent settlement."*

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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