



Dispatch

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Dispatch highlights a selection of the important legal developments during the last month.

Extensions of time - causation - concurrency

■ City Inn Ltd v Shepherd Construction Ltd

This long running Scottish dispute, see for example issue 14, came to a final judgment at the end of last year. The disputes related to the construction of a hotel under a contract incorporating the JCT Standard Form (Private Edition with Quantities) 1980 as amended. The core element of the dispute was whether or not the contractor was entitled to an extension of time of 11 weeks and consequently whether or not the employer was entitled to deduct LAD's. In the course of his lengthy decision, Lord Drummond Young had to consider the approach to take when delay is caused by concurrent causes, one of which is the fault of the contractor, the other of which is not. The Judge said that:

"Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable."

As to what was fair and reasonable, the Judge said this would turn on the exact circumstances of a particular case. He noted that, in the application of clause 25 of the JCT contract, the architect has the power to take a relevant event into account even though it operates concurrently with another matter that is not a relevant event. Under this JCT form, the Judge felt the architect was given a "reasonably wide discretion" in order to achieve fairness as between the contractor and the employer. In other words, what was required by clause 25 was that the architect should exercise his judgment in determining the extent to which completion has been delayed by relevant events. This determination must be on a fair and reasonable basis. The Judge also considered the dominant cause principle. Where it is possible to show that a relevant event or a contractor risk event is the dominant cause of delay, then that event should be treated as the cause of delay. However if it is not possible to establish the dominant cause of delay, then all concurrent causes of delay must be considered. This stress on the need to act fairly and reasonably lead the Judge to conclude that the correct approach would be to carry out an exercise to apportion the delay periods. In doing so, he went a step further than any of the English authorities, such as *Henry Boot v Malmaison*.

On the facts here, the Judge concluded that the delay in completion was the result of concurrent causes. The majority were the result of late instructions or variations issued by the architect. However, two of the causes were the fault of the contractor. In the Judge's opinion none of the causes of delay could be regarded as a dominant cause. They each had a significant effect on the failure to complete on time. Therefore, the correct approach was that the architect should use his judgment to determine the extent to which completion had been delayed beyond the completion date by all these events. This involved a determination of the period in which the works should have been completed having regard to the various delay events. Of course, this determination must be made on a fair and reasonable basis.

The Judge said that the exercise of apportionment is broadly similar to apportionment of liability on account of contributory negligence or contribution amongst joint wrongdoers. What matters is the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing that delay. That said, culpability is likely to be less important than the actual causative significance of each of the relevant factors. Two matters are potentially of some importance: the length of the delay caused by each of the causative events and the significance of each of the causative events for the works as a whole. An event that only affects a small part of the building might be of less importance than an event whose impact runs throughout the building. Ultimately this would be a question of judgment and accordingly, the Judge carried out his own fair and reasonable apportionment exercise. This led to the contractor's claim for an 11-week extension of time being reduced by two weeks.

Finally, the Judge considered prolongation. He agreed that a claim for prolongation costs need not automatically follow success in a claim for an extension of time. Different considerations may apply. However, here on the circumstances of this case, he felt that the claim for prolongation should follow the result of the extension of time claim. This was a case where delay had been caused by a number of different causes, most of which were the responsibility of the employer, but two of which were the responsibility of the contractor. Therefore, the correct approach here, in the view of the Judge, was to apportion the prolongation costs between the two categories on the same basis as the delay apportionment.

Adjudication - set-off against an adjudicator's decision

■ Ledwood Mechanical Engineering Ltd v Whessoe Oil & Gas Ltd & Anr

A dispute arose in respect of the defendant Joint Venture's assessment of interim application 19. The contract incorporated adjudication provisions, even though the project related to the fabrication and erection of pipeworks at a natural gas terminal. An adjudicator held that the JV had wrongly withheld some £1.2m. The JV did not challenge the decision. However, it claimed that it was entitled to set off against the adjudication decision. The contract provided for a risk/reward (often known as "pain and gain") regime to be applied. The JV said that the elements of risk/reward should be dealt with on applications for interim payments. This was because the contract expressly stated that payment must be made on the basis of the sub contract price "as determined in accordance with the sub contract based on the target cost, subject to adjustments."

Ledwood had made their application 19 in July 2007. Before the adjudicator made his decision, there were three further interim payment applications, 20-22. The JV issued a revised payment notice against application 22 on 11 October 2007. However, when they received the adjudicator's decision, the JV issued a revision to that payment notice giving effect to the decision but also assessing their own deduction for risk/reward. This led to a negative sum being due. Mr Justice Ramsey said that to permit the JV to use an adjustment to the payment notice for application 22 to give effect to the adjudicator's decision would ignore the wrongful deduction from application 19 and permit the JV to take account of subsequent events and other rights of set off which it was not entitled to do. However, the JV also argued that a risk/reward adjustment should be made in respect of application 19. They said that this was based on the logical corollary of the adjudicator's decision. In particular, they referred to the decision of Mr Justice Jackson on the *Balfour Beatty v Serco* case (see issue 59) where the Judge had said:

"Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required)."

The question for Mr Justice Ramsey was whether it followed logically that the JV was entitled to recover a specific sum by way of adjustment of the risk/reward element. First he had to consider whether a set off could be made. There was a dispute between the parties about the expended and revised target man hours which formed the basis of the risk/reward calculation. The Judge held that while the natural corollary of the decision was that it increased the number of expended hours in the pain/gain calculation, the calculation of the effect was not undisputed or indisputable. Thus, the position differed from the calculation of LAD's which can be made using a number of weeks decided by an adjudicator and applying the contractual rate. Therefore, Ledwood was entitled to the summary judgment.

Time bars - waiver

■ City Inn Ltd v Shepherd Construction Ltd

Another issue which arose in the *City Inn* case related to clause 13.8 which contained a time bar clause, requiring the contractor to provide details of the estimated effect of an instruction within ten days. The Judge characterised the clause thus:

"I am of opinion that the pursuers' right to invoke clause 13.8 is properly characterized as an immunity; the small defenders have a power to use that clause to claim an extension of time, and the pursuers have an immunity against that power if the defendants do not fulfil the requirements of the clause."

However, the Judge also felt that an immunity can be the subject of waiver. The architect and employer have the power, at least under the JCT Standard Forms, to waive or otherwise dispense with any procedural requirements. This was what happened here. Whilst, the employer (in discussions with the contractor) and the architect (by issuing delay notices) both made it clear that the contractor was not getting an extension of time, neither gave the failure to operate clause 13.8 as a reason. The purpose of clause 13.8 is to ensure that any potential delay or cost consequences arising from an instruction, are dealt with immediately. Thus, the architect can assess the consequences of the instruction. The point made by the Judge is that whilst clause 13.8 provides immunity, that immunity must be invoked or referred to. At a meeting between contractor and employer, the EOT claim was discussed at length. Given the importance of clause 13.8, in the view of the Judge, it would be surprising if no mention was made of the clause unless the employer, or architect, had decided not to invoke it. Significantly, the Judge held that both employer and architect should be aware of all of the terms of the contract. Therefore, it is important that all certifiers are aware of the potential consequences, if by their actions, they could be deemed to have waived time bar clauses or other condition precedents.

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