Fenwick Elliott
The construction law specialists

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Dispatch

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

The condition precedent

WW Gear Construction Ltd v McGee Group Ltd
[2010] EWHC 1460 TCC

Gear engaged McGee as ground works contractor at the Westminster Park Plaza Hotel development. The contract incorporated the JCT Trade Contract Terms (TC/C) 2002 edition with Amendment No.1:2003 together with further bespoke amendments. The contract contained a number of conditions precedent. These included clause 4.21 which, as amended, stated:

"If the Trade Contractor makes written application to the Construction Manager that he has incurred or is likely to incur direct loss and/or expense…then the Construction Manager…shall ascertain the amount of such loss and/or expense…provided always that:

.1 the Trade Contractor's application shall be made as soon as and in any event not later than two months after it had become, or should reasonably have become apparent to him that the regular progress of the Works or any part thereof has been or was likely to be affected as aforesaid, and such application shall be formally made in writing and fully documented and costed in detail, and it shall be a condition precedent under this clause 4.21.1…that the Trade Contractor has complied fully with all requirements of this clauses [sic] including, for the accordance [sic] of doubt, the said time period of two months."

McGee made applications for payment, broadly on a monthly basis. The applications included requests for payment of extended preliminary costs associated with delay. More specifically, Application no.18 referred in its summary to a "loss and expense claim" which was "as attached". Disputes arose between the parties in relation to payments including McGee's claims for delay and disruption and related loss and expense. Gear referred the issues in dispute to adjudication. These included the proper interpretation and application of the extension for time and delay related loss and expense clauses in the contract. The adjudicator issued a decision broadly in Gear's favour but found that the condition precedent in clause 4.21 was "*devoid of meaning*" and of no effect.

Using Part 8, Gear issued proceedings for a declaration that McGee was required to comply with the provisions of clause 4.21 as a condition precedent to its entitlement to make an application for payment of loss and/or expense and/or to have such application ascertained by the Construction Manager. McGee's position included that conditions precedent should be construed strictly. Therefore, as the words were superficially meaningless, they should not be construed as barring McGee from a legitimate claim, if the application was made outside of the time limits specified.

Mr Justice Akenhead considered that there was a condition precedent. The trigger for the operation of clause 4.21 was the making of the application by the contractor. That application should state that the regular progress is or is likely to be affected by the various matters. Then, whilst there was a need for the construction manager to form an opinion about the claim, the Judge did not see how the forming of that opinion could be part of any precondition. The refusal on the part of the Construction Manager to carry out the ascertainment exercise where there was a justified claim could not in practice be a bar to the Contractor's entitlement.

The use of the words "*provided always that*" was important. The Judge held that this type of wording was often the strongest sign that the parties intend there to be a condition precedent. Here as usually, what follows is a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise. Further, there was nothing particularly difficult or onerous for the contractor in making its application within either the general or specific timetables.

Since the application must state that direct loss and/or expense has been or will be incurred, because the progress of the Works has been or will probably be delayed, the long stop period within which the application must be made is two months after it has become or alternatively should reasonably have become, apparent that the regular progress of the Works or any part was, or was likely to be, affected. This meant the Contractor has the option of making its application at the later of the two alternative stages. Of course, the date when the regular progress of the Works was actually affected may well be later than the date when it became reasonably apparent that the regular progress of the Works was likely to be affected.

The words of the clause were sufficient to establish that the submission of a timely application was a condition precedent to the allowance to the contractor of loss or expense. In other words, the requirement to make a timely application in writing was a precondition to the recovery of loss and/or expense under clause 4.21. The contractor simply had no entitlement to recover such loss or expense unless and until it had made such an application. This was because it was the application which triggers the ascertainment process which leads to the adjustment of the contract sum. That is what the parties had agreed, and the fact that, as had happened here, there was an obvious mistake in the sub-sub-clause drafting did not change that. The key point was that it was clear what the parties had intended.

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NEC Form - service of notices

Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd

[2010] EWHC 1529 (TCC)

The parties entered into a contract under the NEC2 form. LOR alleged that AWS had failed to serve a valid notice of dissatisfaction under clause 93.1 within four weeks of a decision of an adjudicator. The failure did not consist of a failure to send the document to LOR within the four week period, but a failure to send it to what LOR said was the correct address for service.

AWS argued that a contract which requires a mandatory adjudication prior to the chosen means of final determination is non-compliant with the HGCRA. The HGCRA is silent on this issue. However, Mr Justice Edwards-Stuart noted that a contract that obliges a party to refer a dispute to adjudication before he can pursue it by either litigation or arbitration did not impose any fetter on the right to refer a dispute to adjudication at any time. However, it did prevent a party from starting proceedings in the courts or by way of arbitration at any time, because he cannot do so without having first referred the dispute to adjudication.

In terms of the service point, clause 13.2 of the NEC core conditions states that a communication has effect when it is received at the *"last address notified by the recipient for receiving communications or, if none is notified, at the address ...stated in the Contract Data".* The Judge noted that the probable commercial purpose of the clause was to enable the parties to work on the basis that all communications in relation to the contract will be channeled through one particular office. This had the obvious advantage of enabling every incoming document to be properly filed and its arrival properly recorded. It was then up to a designated member of staff to ensure that incoming documents are then copied to all those individuals who have an interest in seeing them.

Here, the notice of dissatisfaction had found its way to the relevant individuals in LOR within the prescribed time. However, that was not the answer to the problem here. The Judge concluded that compliance with the mode of delivery specified in clause 13.2 is the only means of achieving or securing effective delivery because that communication only takes effect when it is received at the prescribed address. Therefore, Mr Justice Edwards-Stuart rejected the submission that the fact that notification was received within time by the relevant personnel at LOR would trump the failure to give notice in accordance with the contract. That said, on the facts here, an agreement between the parties during the adjudication to serve documents on a particular address meant that that office became the notified or prescribed address.

In addition, the Judge also found that the conduct of those acting for LOR was a material contributing cause to the fact that the notice was not sent to correct contract address before the deadline expired. Further, given that the notice was in fact received in time by the people at LOR who needed to see it, the Judge considered that it would be unjust to hold AWS to the strict provisions in relation to service. Therefore the Judge was prepared to exercise the discretion afforded by s12 of the 1996 Arbitration Act and grant an extension of time for service of the notice.

Finally the Judge made an interesting comment on the NEC Form which is bound to be much repeated:

"I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents ... but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance."

Arbitration - CIMA Rules

Price & Anr v Carter (t/a Ian Carter Building Contractors)

[2010] EWHC 1451 (TCC)

The CIMA arbitration rules are the default rules under the JCT Standard Forms. In the case here, Mr Justice Edwards-Stuart faced a challenge to an arbitrator's award under sections 67 (lack of jurisdiction), 68 (serious irregularity) and 69 (error of law) of the 1996 Arbitration Act. It was suggested that the Notice of Arbitration did not comply with rule 2.1 of the CIMA Rules because it did not require Price to agree to the appointment of an arbitrator. The Judge disagreed. What the Rules require is for the party serving the Notice to name anyone they propose as arbitrator (either in the Notice or separately). In the Notice they may also, although not required by the Rules, invite the other party to respond and propose any other names.

The arbitrator notified the parties that he intended to appoint a surveyor as an assessor to address the conflicting evidence on valuation. The Judge said that this fell within the power given to him by s 37 of the 1996 Act to appoint an assessor. That said, the clause does require that where this is done, the parties shall be given a reasonable opportunity to comment on any advice offered by the surveyor. Rule 4.2 of the CIMA Rules, whilst giving the arbitrator the power to appoint an assessor, does not make specific provision for the parties to comment on any report that might be produced. The Judge noted that the overriding duty on an arbitrator to act fairly as between the parties, imposed by section 33 of the Act, *"probably"* required an arbitrator appointed under the CIMA Rules to give the parties some opportunity to comment.

Here, as it happened, there had not been a serious irregularity. For example, Price put forward no evidence to show what they would have done if they had been permitted to comment on the report.

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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