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The construction 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.

Adjudication, final accounts and conclusivity

Jerram Falkus Construction Ltd v Fenice Investments
[2011] EWHC 1935 (TCC)

JFC was engaged by Fenice to carry out the development of a site in Camden, London. The contract incorporated the JCT Design and Build Form 2005, as amended. The contract completion date was 25 May 2009. That was extended by Fenice's agent to 15 June 2009 but the works were not practically complete until 9 September 2009, a delay of 86 days, for which Fenice levied liquidated damages. JFC argued that Fenice had prevented completion and that, by reason of the deletions to the extension of time provisions, which meant that no extension of time could be granted in relation to such acts of prevention, time was set at large. One result of this would be that Fenice could not levy any liquidated damages. Delay was the subject of the third adjudication as Fenice sought declarations that JFC were not entitled to any further extension of time for, amongst other things, alleged delays by utilities providers and alleged late instructions. The adjudicator found in favour of Fenice noting that there was no act of prevention by the Employer.

JFC tried to bring its prevention arguments before Mr Justice Coulson. However, Fenice said that the issues which JFC sought to raise in court were precisely the same as those decided by an adjudicator, and that, pursuant to the terms of the contract, JFC's failure to challenge that decision in the stated time meant that that decision is conclusive. Clause 1.9 of the Contract, entitled 'Effect of Final Account and Final Statement' said:

"1.9.1 The Final Statement, when it becomes conclusive as to the balance due between the Parties in accordance with clause 4.12.4, or the Employer's Final Statement, when it becomes conclusive as to the balance due...shall, except as provided in clauses 1.9.2, 1.9.3 and 1.9.4 (and save in respect of fraud), have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration or legal proceedings) as:
1.9.4 In the case of a dispute or difference on which an Adjudicator gives his decision on a date which is after the date of submission of the Final Account and Final Statement or the Employer's Final Account and Employer's Final Statement, as the case may be, if either Party wishes to have that dispute or difference determined by arbitration or legal proceedings, that Party may commence arbitration or legal proceedings within 28 days of the date on which the Adjudicator gives his decision."

The adjudicator's decision was dated 28 October 2010. It was common ground that no proceedings had been issued within 28 days of that date. It was also common ground that the rectification period under the contract ended on 13 January 2011 and that, as a result, unless Fenice challenged the Final Account, this would render the Final Statement conclusive as at 13 February 2011 (as per clause 4.12.4). However, Fenice' on 24 January 2011 wrote a letter which included the comments that:

"I have considered and reviewed your Final Account submission in full ... Having completed this review, please find enclosed ...response to your final account identifying those adjustments to the Contract Sum identified in your Final Account submission which are agreed and those which were incorrect in your original submission and so for the purpose of the Contract are identified as disputed. Where an item is disputed, there is included in the enclosed response the correct valuation for that item...A balance of £122,102.36 is therefore due and payable to Fenice, ...and is required to be paid in accordance with ...Clause 4.12.9."

JFC's principal response to the conclusivity argument was to suggest that the dispute in the third adjudication was different to the dispute raised before the court. This was summarily rejected by the Judge. The dispute which JFC wished to raise – namely delays caused by alleged acts of prevention in respect of EDF, British Gas and the instructions as to the levels – was exactly that which was decided in the third adjudication. Further, since that third adjudication had taken place after the Final Account had been submitted, there was equally no doubt that clause 1.9.4 had been triggered. The Judge accepted that nowhere in clause 1.9.4 did it say in terms that the adjudicator's decision, if not challenged within 28 day, was conclusive. Further he noted that the requirement to challenge that decision within 28 days was not said to be mandatory but merely permissive (i.e. "may" not "must").

However, the Judge also considered that these narrow points on the wording of the clause ignored two fundamental issues. The first was the purpose of clause 1.9 itself. The clause was designed to provide for various circumstances in which, following the provision of the Final Account, the position between the parties can become conclusive, thereby precluding any further dispute. It must therefore be read the clause in that context, namely it is providing a deadline beyond which something becomes conclusive. It was providing a "last chance". Second, if clause 1.9.4 was not providing some form of deadline, beyond which the result in a post-Final Account adjudication could not be challenged, then the provision was entirely redundant. Unless there was a consequence for failing to challenge the decision within 28 days, the provision would be meaningless. Clause 1.9.4 was plainly intended to ensure that, if there was an adjudication after the Final Account had been provided, the losing party had 28 days to bring a challenge. JFC had failed to do that, and as a result they could not now raise any argument to the effect that time is at large. That contention had been expressly considered and rejected by the adjudicator.

Then there was the question of the Final Account. Here the Judge noted that the whole point of conclusivity provisions is to provide the employer with an opportunity to challenge the Final Account, but to ensure that the time in which such a challenge may be made is restricted, so as to provide a measure of finality. Here, within the relevant period, there was a clear and detailed challenge, namely the January letter., which served to prevent that Final Account from becoming conclusive.

Prevention, delay claims and notice provisions

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

Here, AAD, had agreed to build two ships for SD. AAD did not deliver the ships on time, SMS sought to rescind the contract. AAD claimed that because of the extra work entailed by variations and because of SD's failure to obtain agreement as to the consequences of the variations, the prevention principle applied which would mean that SD could not insist on strict adherence to the original time limits. Hamblen J held that the extension of time provision in the contract did cover the delay caused by the alleged variations, which meant that AAD could not rely on prevention. However, the Judge still took the opportunity to comment on what AAD would have had to have done to make out their case. The judgment is interesting for a number of reasons not least because his conclusions were followed by Mr Justice Coulson in the *Fenice* case. Hamblen J noted that:

"The conduct therefore has to render it "impossible or impracticable for the other party to do the work within the stipulated time" The act relied on must actually prevent the contractor from carrying out the works within the contract period or, ..., must cause some actual delay".

Hamblen J also noted that if there were two concurrent causes of delay, one which was the contractor's responsibility, and one which was said to trigger the prevention principle, the principle would not in fact be triggered because the contractor could not show that the employer's conduct made it impossible for him to complete within the stipulated time. The existence of a delay for which the contractor is responsible, covering the same period of delay which was caused by an act of prevention, would mean that the employer had not prevented actual completion. Throughout his analysis, Hamblen J stressed the importance of the contractor proving delay to the actual progress of the work as a result of the alleged act of prevention. For the prevention principle to apply, a contractor must be able to demonstrate that the employer's acts or omissions have prevented him from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply. The Judge took a similar approach to AAD's alternative claim for an extension of time. AAD had relied on the comments of Lord Carloway in the *City inn* case (see Issue 122), who said that:

"… delay caused by the contractor … is irrelevant so far as the contractual exercise is concerned. That exercise does not involve an analysis of competing causes. It involves a prediction of a Completion Date, taking into account that originally stated in the contract and adding the extra time which a Relevant Event would have instructed, all things being equal"

Therefore AAD said that here the effect of SD's risk event had to be measured against the contractual completion date and that this did not require any analysis of competing causes of delay for which it might be responsible. The Judge disagreed noting that the English authorities in relation to extensions of time claims were clear that it must be established that the relevant event is at least a concurrent cause of actual delay to progress. Further, the majority in the *City Inn* case accepted that the issue of whether a relevant event causes delay is to be assessed by reference to the progress of the works as a whole, thus clearly recognising the need to consider and establish causation. In fact Lord Osbourne had said:

"…before any claim for an extension of time can succeed, it must plainly be shown that a relevant event is a cause of delay and that the completion of the works is likely to be ...or has in fact been delayed ... the decision ...is an issue of fact ...to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of common-sense.

To succeed here, AAD had to show that the variations caused actual delay to the progress of the works. They could not. Finally, the Judge noted that even if AAD's had been able to prove delay, the claim would have failed because they had failed to comply with the notice provisions of the contract.

International Arbitration - case update

Jivraj v Hashwani [2011] UKSC 40

We reported on the CA decision in Issue 123. The CA had decided a requirement that an arbitrator be a member of the Ismaili community was discriminatory and unenforceable. The reason given for this was that arbitrators were employees of the parties pursuant to UK employment legislation. It is fair to say that the decision was a controversial one, with many fearing that it might mean that the requirements in arbitral rules that a sole arbitrator not be the same nationality as any of the parties would also be unenforceable. However the Supreme Court has now overturned the decision. UK anti-discrimination law does not apply because arbitrators are not employees. Lord Clarke stated:

"The question is whether, in all the circumstances, the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified. In my opinion it was. The approach of the Court of Appeal seems to me to be too legalistic and technical."

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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