



Dispatch

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

Partnering & insolvency

Lovell Partnerships Ltd & Anr v Merton Priory Homes

[2014] EWHC 1615 (TCC)

The claim here related to the ACA Standard Form of Contract for Term Partnering, which as Mr Justice Edwards-Stuart said was specifically devised for situations where one party requires the other to carry out a series of relatively minor but repetitive or cyclical tasks over a substantial period or "Term": here building, repair and related services for a local authority. The employer or client would place orders for particular "Tasks" during the Term and the contractor (or Connaught), referred to as the "Service Provider", would carry them out and submit monthly valuations for payment. However, the contract provided that it would terminate automatically if either party became insolvent.

The question for the Judge was whether, and if so to what extent, the Service Provider was entitled to any further payment for work carried out where, as here, it had been put into administration, when in such circumstances, clause 13.9 provided that the client "shall not be bound to make any further payment" to the Service Provider. Merton said that Connaught was not entitled to any further payment and that, following a termination caused by insolvency, absent bad faith, any loss lay where it fell. However, Merton did suggest that it would be entitled to make a claim after termination against the Service Provider for defective work. Connaught said that clause 13.9 served to suspend the operation of the contractual machinery for payment and instead left the parties to pursue their rights under the contract either by adjudication or litigation.

Clause 13.10 said that termination of the appointment of any Partnering Team Member "shall not affect the mutual rights and obligations of the Partnering Team Members accrued at the date of termination". Clause 7 dealt with payment. The Service Provider was to submit an application for payment at the end of each month. Within five days of receipt of the application, the Client's Representative issued a valuation specifying the proposed payment. The final date for payment was 15 days later.

Connaught said that the effect of clause 13.9 was to deprive the Service Provider of any right to insist on any further payment under clause 7 following an automatic termination on insolvency. The effect of clause 13.10 was that clause 13.9 did not deprive either party of its accrued rights up to the date of termination, which could be enforced subsequently by way of adjudication or litigation. Merton submitted that the words of clause 13.9 meant exactly what they said and that the Client did not have to make any further payment following an automatic termination for insolvency.

The "mutual rights and obligations" referred to in clause 13.10 did not extend to rights confined solely to the payment of money, but rather claims for defective work, confidentiality, TUPE rights etc.

The Judge gave an example: say that a valuation was submitted for £100k. Then, as per clause 7, the Client Representative (acting in good faith) issued a valuation within five days for £70k. In the absence of insolvency, Connaught would become entitled to payment of £70k 15 days later. However, Connaught was placed into administration on 8 September 2010. Connaught submitted that the effect of clause 13.9 was that Merton did not have to make any further payment under clause 7. However, this did not prevent Connaught from seeking to recover the payment by way of adjudication or litigation, albeit that, in such a claim, Merton would be entitled to set off against Connaught's claim any cross-claim for, say, damages for defective work.

By contrast, Merton said that the effect of clause 13.9 was that Connaught simply had to forego its claim for £70k. However, it also submitted that nothing in clause 13.9 prevented Merton from taking separate proceedings to recover damages for defective work carried out prior to termination (although it would not recover the additional cost of completing unfinished work or the additional cost of employing a fresh contractor to carry out other Tasks that would have been carried out and completed if the contract had not been terminated).

The Judge preferred the reasoning of Connaught. Clause 13.10 was a freestanding clause. It is not made subject to clause 13.9 by the introduction of words such as "Subject to clause 13.9 ...". The effect of depriving clause 13.10 of any application to an accrued payment entitlement under clause 7 would have the effect of preferring other creditors of the Service Provider over the Client, thereby undermining the general principles of insolvency. Instead of the Client being able to retain the amount of the valuation against any loss it may have suffered by reason of, say, defective work, it would have to pay it straight out so that it would become part of the assets available for general distribution to the Service Provider's creditors.

This was a simple and straightforward outcome more consistent with the overall purpose of the contract. The reference to "any further payment" in clause 13.9 referred to any further payment to which the Service Provider would or might otherwise be entitled pursuant to the contractual payment provisions. The clause did not prevent the Service Provider from pursuing separately, by way of adjudication or other claim, any rights or obligations that had accrued by the date of termination.



Public procurement: how detailed must the Claim be? Travis Perkins Trading Company Ltd v Caerphilly County Borough Council

[2014] EWHC 1498 (TCC)

In public procurement claims, because parties have to move promptly there are often issues over whether or not claims have been properly and/or sufficiently pleaded. Under the Procurement Regulations, the limitation period is 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. Here, the issue was whether the Brief Details of Claim which form part of the Claim Form issued by TPT covered all the claim that emerged in the Particulars of Claim served later, and if not, whether the eventual claim pleaded was therefore time barred.

The Council initiated a competitive tender process for building materials supply. TPT were excluded for being unable to provide a bond in the required form. On 16 May 2013 TPT's solicitors requested from the Council under the Freedom of Information Act 2000 various information about what had happened in relation to the other tenderers' submissions. The Council replied on 14 and 28 June 2013. The second letter enclosed actual documents sent to and received from other tenderers. This suggested that there had been a fair amount of "coming and going" between at least three other tenderers and the Council about the bonds.

On 11 July 2013, TPT's solicitors wrote to the Council's solicitors raising the arguably different complaint that three other tenderers should have been excluded or, given that they were allowed to remain in the tendering process albeit with arguable deficiencies in their proposals for bonds, TPT should have been allowed to remain in. TPT sought information and clarifications as to whether these other tenderers had been excluded and on various other matters. There being no effective response despite reminders, on 26 July 2013 TPT issued its Claim Form. The Particulars of Claim were by agreement served about four months later.

Amongst other issues, Mr Justice Akenhead had to decide whether TPT had raised in its Claim Form the issue that there had been a failure to treat economic operators equally and in a non-discriminatory way (i.e the Council had treated the other tenderers in relation to the bond in a different way) for the first time in its Particulars of Claim. TPT's main complaint related to the way the Council treated its own tender and the way it deal with the bond issue. There was little doubt that this was covered by the Claim Form.

The Judge therefore considered rules and practice relating to the contents of the Brief Details of Claim, which must accompany the Claim Form as required by CPR Part 16.2:

"(a) Only "brief" details are required to describe "the nature of the claim", although the remedy sought needs to be spelt out; a statement of value (not more than or more than £X) needs to be provided.

(b) Whilst it is open to a claimant to be specific and restrictive in what it, he or she seeks to claim by way of the "Brief Details of Claim", it is not necessary.

(c) The Court should have regard to the wording overall to determine what is covered by the wording of the Brief Details to see whether and to what extent the rule has been fulfilled. The Court should not be prescriptive about what is required in terms of the words used by the claimant; all that is prescriptive is in the wording of the rule.

(d) In construing or understanding what was intended by the wording used, the Court can and where necessary should have regard to the context or "factual matrix" ... in which the Claim has been prepared. It is legitimate to have regard to the Particulars of Claim, particularly if served promptly at or about the time of the issue and/or service of the Claim. It is legitimate to have regard to correspondence and applications sent or served at or about the same time as the Claim. Indeed, it may be legitimate to look further back in time for exchanged communications between the parties, albeit that caution may need to be exercised to limit this exercise only to such communications which clearly demonstrate what was intended to be the subject matter of the proceedings which followed.

Here, the real issue was whether the wording of the Claim was wide enough to cover the complaints about the allegedly unfair treatment of other bidders compared with the treatment of TPT. Although there was no separate sentence setting out the nature of the claim, the relief sought was for a declaration that the Council "was and is in breach of the Regulations, general EU and/or Treaty obligations and principles and/or an implied tendering contract between the Claimant and the Defendant" and for damages for such breaches.

That, in the view of the Judge, could not leave anyone, let alone the Council, in any doubt that the nature of the claim was for breach of the Regulations and other specified requirements. A declaration to that effect was expressly sought. The Judge then said that if one coupled that with the letters dated 11 July and 26 July 2013 from TPT's solicitors to the Council, there could be no doubt that properly interpreted in that context the Brief Details of Claim were intended to cover TPT's complaint that it had not been treated lawfully in that it was dealt with differently and unequally from other tenderers in relation to their respective treatment for the bonds and parent company guarantee.

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