Fenwick Elliott
The construction & energy law specialists

Issue 184 October 2015

# Dispatch

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

## Conditions precedent and force majeure

### Scottish Power UK plc v BP Exploration Operating Co Ltd & Others

[2015] EWHC 2658 (Comm)

A dispute arose over the shutdown of the production of natural gas from the Andrew Field in the North Sea. One of the preliminary issues that Mr Justice Leggatt had to decide was whether or not, following the notification of a claim for *force majeure,* the subsequent reporting requirements were a condition precedent to a successful claim for relief. Article 15.4 of the contract imposed a number of requirements on a party claiming relief for *force majeure*. These included that:

*"A Party, when claiming relief under Clause 15.2 shall: -*
*(1) within ten (10) Days of the failure … for which relief is sought, notify the other Party thereof and shall within five (5) Working Days of such notification provide an interim report which shall furnish such relevant information as is available … including the place thereof, the reasons for the failure and the reasons why obligations under this Agreement were affected, and give an estimate of the period of time required to remedy the failure;*
*(2) within twenty (20) Working Days of such notification, if requested, provide a detailed report which shall amplify the information contained in the interim report..."*

The BP Defendants maintained that they had complied with Article 15.4(1) by notifying Scottish Power by a letter and by providing them with an interim report. But the Defendants admitted that they did not provide a further detailed report pursuant to Article 15.4(2). Scottish Power said that compliance with Article 15.4(2) was a condition precedent to a successful claim for relief under Article 15.2. If that was right, the defence of *force majeure* would fail. The Judge reviewed the relevant authorities in relation to force majeure clauses in the Commercial Court. For example, in *Great Elephant Corporation v Trafigura Beheer BV* [2012] EWHC 1745 (Comm), Teare J held that a provision was not to be construed as a condition precedent to reliance upon the *force majeure* clause for three reasons:

*"i) The clause is not framed as a condition precedent.*
*ii) The requirement is not for notice within a clear and specified number of days but notice which is immediate and prompt. What is immediate and prompt will depend upon factual context... This is not the context in which the parties are likely to have intended that failure to provide immediate or prompt notice would debar a party from relying upon a force majeure event.*
*iii) Where a specific sanction is intended the parties tend to say so expressly. ..."*

Here the Judge came to what he termed the "clear view" that compliance with Article 15.4(2) was not a condition precedent to a successful claim for relief. There were no words in the contract stating that the consequence of failure to comply with any of the requirements of Article 15.4 was to preclude a claim for relief. Article 15.4 required a party to do various things when claiming relief. It did not say that the right to claim relief from liability under Article 15.2 was conditional on doing the things set out in Article 15.4. The Judge noted that:

*"The absence of any such language seems to me to be all the more significant in the context of what is a very detailed and elaborate contract that has obviously been professionally drafted."*

The Judge did not consider that it could be said that reasonable people entering into the contract would have thought it appropriate to make compliance with this requirement a condition of the right to claim relief for *force majeure*. Further, there were no words such as "without delay" or which set out a precise time within which the Defendants had to do something. Here the Judge queried quite what the clause meant. It was not clear. For example, when did the 20 day period start? There was also potentially significant scope for argument about what degree of detail and amplification of the interim report was necessary in order to satisfy the clause.

The Judge recognised that it was possible to envisage cases in which failure to comply with Article 15.4 could cause serious prejudice. Scottish Power gave the example of a claim for *force majeure* relief first made years after the events in question. Here the Judge noted that this example illustrated that failure to comply with the notification requirements of Article 15.4 could cause financial loss which was capable of being compensated by the Defendants by an award of damages.

The Judge also noted that delay may have some evidential significance. A party that failed to comply with the requirements of Article 15.4 when claiming relief will need to explain its failure to do so. Unless there was some good alternative explanation, the inference may be drawn that the reason why it did not comply was that its claim for relief was not justified. Here, the failure to comply with the request for a detailed report as required by Article 15.4(2) laid the Defendants open to the suggestion that they could not have substantiated their claim.

In short, the Judge concluded that no reasonable party would have intended the requirements of Article 15.4 to constitute conditions precedent to a claim for relief without thinking it necessary to say so expressly.

## Adjudication enforcement

### Wycombe Demolition Ltd v Topevent Ltd

[2015] EWHC 2692 (TCC)

This was an adjudication enforcement dispute. An adjudicator decided that the employer Topevent should pay £114k plus interest and his fees to Wycombe.

Mr Justice Coulson commented that the Referral Notice, which ran to 56 closely typed pages, was much too long and managed to complicate a simple claim. Topevent's Response raised two key issues. First, the ascertainment of a fair and reasonable valuation of Wycombe's claim for varied and extra work and the sums due under the contract, and second, the circumstances in which Wycombe left the site. Topevent said Wycombe were in breach of contract and they set out a counterclaim of some £180k, being the costs of completion.

Topevent also wanted the adjudicator to visit the site in order to complete his assessment of any revaluation. The adjudicator felt that such a visit would be neither necessary nor cost-effective and he made his decision on the basis of the documents only.

The adjudicator decided that on the evidence before him the Parties probably ended the Contract by mutual consent: Topevent, because of the escalating costs, and WDL because it was not being paid. As to the valuation of Wycombe's work:

*"Much of Topevent's Response is comprised of bare allegations without supporting evidence. WDL's case is, in contrast, well supported with documentary and witness evidence and also appears to be reasonably complete …"*

Topevent raised three challenges. The first, an alleged reference to the adjudicator of two entirely separate disputes, was rejected. Here there was a claim for payment of all outstanding sums, including the sum of £4k, which Wycombe said was due in respect of what they claimed was the wrongful termination of their contract. Wycombe wanted one final payment so as to be able to close their books on this contract. That could only be achieved if the adjudicator addressed all their outstanding financial claims. In that context, there was therefore a clear and obvious link between their modest claim for the cost consequences of the allegedly wrongful termination and the overall claim for all sums outstanding. They were not separate disputes. In any event, paragraph 11.1 of the TeCSA Rules makes clear that the adjudicator can deal with "*any further matters which all Parties agree should be within the scope of the Adjudication*".

The Judge considered that the suggestion that the failure to visit the site was a material breach of natural justice was "hopeless". The Judge noted that:

*"the organisation of an adjudication, the procedure and process to be adopted and the steps required before the decision is issued to the parties, are all matters uniquely for the adjudicator. It is up to him or her to decide what he or she needs in order to reach their decision. In this case, the adjudicator did that, and he carefully explained why a site visit/meeting was not a proportionate use of his time and therefore the costs of the adjudication. It is not and cannot be for this court to second-guess that decision."*

Further, the Judge agreed that a site visit or meeting would have been of no assistance in valuing the variations and the works carried out on site. The valuation exercise was a paper exercise and, if necessary, photographs of the site could be – and were – provided.

The final challenge was that the adjudicator failed to decide the valuation dispute on the basis of the parties' respective submissions, and instead decided it on a basis on which the parties had not had an opportunity to address him. Here the Judge noted that the adjudicator was faced with "*a myriad of different approaches to valuation*". The adjudicator then concluded that *"the invoices generally properly reflect the sums due"*, although he too made a number of adjustments.

The Judge thought that the adjudicator had therefore carefully considered both parties' submissions and then, as he was entitled to do, provided his own valuation based on those submissions. The Judge suggested that the following analysis was appropriate:

*"An adjudicator has to do his best with the material with which he is provided. He has considerable latitude to reach his own conclusions based on that material, and he is certainly not bound to accept either one or other of the figures advanced by the parties. In my view, this latitude will inevitably be even wider now that the original constraint provided by the 1996 Act, that there had to be a written contract between the parties, has been removed by amendment. As happened here, an adjudicator's conclusion about the nature and terms of the contract could affect his approach to valuation issues."*

What an adjudicator cannot do, without warning to the parties in advance of his decision, is to make good deficiencies in the claiming parties' case. That had not happened here.

Topevent had also at one point sought to avoid summary judgment by suggesting that they had a counterclaim in respect of the costs of completion. However, the counterclaim was raised by Topevent during the adjudication and was rejected by the adjudicator. A defending party cannot seek to prevent enforcement of an adjudicator's decision by reference to a counterclaim that the adjudicator has himself considered and rejected.

*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.

*Dispatch* is a newsletter and does not provide legal advice.

Follow us on and

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

**www.fenwickelliott.com**