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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: natural justice

Stellite Construction Ltd v Vascroft Contractors Ltd

[2016] EWHC 792 (TCC)

Stellite engaged Vascroft to carry out shell and core works at a substantial house in Hampstead. The contract was based on the JCT SBC Without Quantities 2011 form. Completion of the works was delayed. Stellite claimed liquidated damages and when Vascroft did not pay, referred its claims to adjudication. The Adjudicator decided that time for completion had been set at large and that no liquidated damages were due. Stellite maintained that the Decision was unenforceable as a result of a breach of the rules of natural justice. Stellite said that Vascroft had not argued that time for completion of the Works was at large and the Adjudicator had not given the parties a fair opportunity to comment on this proposition. The breach was of fundamental importance to the outcome of the Decision. Having decided that time was at large, the Adjudicator went on to decide that a reasonable date for completion was 5 March 2016. Stellite said that neither party had asked for a decision on the reasonable date for completion, nor had the parties' submissions addressed the issue. Therefore the Decision as to a reasonable date for completion was also outside the Adjudicator's jurisdiction and/or in breach of the rules of natural justice.

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Therefore, Mrs Justice Carr found herself in the unusual position of having to deal with a claim by the Referring Party for declaratory relief that the Adjudicator's decision had been made in breach of natural justice. The first issue was whether or not the parties had had a fair opportunity to set out their respective positions in relation to the question of whether or not time was at large. As the Judge said, what is and is not fair will depend upon all the circumstances: circumstances that need to recognise the compressed and limited context in which the decision was delivered. In deciding that there was no breach of natural justice, Mrs Justice Carr analysed the submissions made during the adjudication and came to the conclusion that the issue of whether time was at large was obviously "*in play between the parties*". The parties were each aware of the relevant material and the issues had been canvassed fairly before the Adjudicator. The Judge said that:

"When one traces the Adjudicator's reasoning ... it can be seen that there has been no breach of natural justice. This is not a case where the Adjudicator was relying on a new authority or line of authorities, let alone some external information, fact or expertise, or some expertise peculiar to himself, which he did not share with the parties. Rather he was applying ventilated law to the material before him in circumstances where, as he put it, the parties had, to their common knowledge and understanding, approached the issues on the facts from 'slightly different angles'."

The Adjudicator had decided the case, not by accepting the precise submissions of one party or another, but rather by reaching a decision on a point of importance on the material before him. The Judge concluded by reminding the parties that it would be "*a rare case where there has been a breach of the rules of natural justice*".

The second issue arose out of the first. The Adjudicator, having found that time was at large, went on to consider what the reasonable completion date was. Whilst to all intents and purposes, this may have seemed like the next logical step, the problem was that in proceeding to consider the issue, the Adjudicator had exceeded his jurisdiction. As the Judge noted:

"It is important not to confuse the fact that the Adjudicator may have had material with which to decide an issue with having the jurisdiction to resolve it. The two are not the same."

Here, the Notice of Intention to Refer did not confer jurisdiction on the Adjudicator to consider alternative claims that did not affect the sums that might be due to Stellite in liquidated damages. The Judge did not consider that even allowing for some latitude, the words "*or such other amount that the Adjudicator deems appropriate*" could be stretched to encompass a claim for unliquidated damages (or any other amount brought in any claim for money under the contract). As far as Mrs Justice Carr was concerned, those words simply allowed for the awarding of a lesser sum than Stellite had claimed if, for example, Vascroft had established an entitlement to an extension of time under the contract. What those words did not do was confer jurisdiction on the Adjudicator to determine a reasonable time for completion, which could only be relevant to a claim for unliquidated damages. To reinforce the point, the Judge noted that the parties had not actually made reference to any claim for unliquidated damages (or a reasonable time for completion outside the context of a claim for liquidated damages).

Whilst Vascroft had raised a claim for extensions of time by way of defence to Stellite's claim for liquidated damages, the question of whether or not Vascroft was entitled to an extension of time under the contractual provisions was quite separate and distinct from the question of what would be a reasonable date for completion in the event that time was at large.

What was the result of the Judge finding that the Adjudicator did not have jurisdiction to determine the reasonable time for completion? It was not that the whole Decision could not be enforced. Instead, as the two parts of the Decision were separate, the Judge was able (and this was common ground between the parties) to sever that part of the Decision, which had been made in excess of jurisdiction, from the balance of the Decision, which the Adjudicator did have proper jurisdiction to make.

Payment applications and statutory demands

COD Hyde Ltd v Space Change Management Ltd

[2016] EWHC 820 (Ch)

COD had entered into a contract with Space Change using an amended JCT D&B form. Space Change served a statutory demand (for a figure in excess of £600k) based on three applications for payment, Nos 6, 7 and 8. Although a Payment Notice was served proposing a reduced payment amount for Application No. 6, it was late and no Pay Less Notice was served at all. The same happened with Application No. 7. With Application No. 8 no notices were served but COD said that the application was not served.

On 29 January 2016, Space Change gave notice, pursuant to clause 4.11.1, of the intention to suspend the performance if payment was not made within seven days. Mr Justice Warren noted that he had not been shown a reply to that letter. Then on 9 February 2016, Space Change wrote saying that the suspension was "*now in effect and we have no further obligations under or arising from the contract until payment of the outstanding balance is made*".

That letter also enclosed a statutory demand. The situation was not entirely straightforward as the judgment suggests that Space Change had walked off site just before Christmas 2015 and that after that date, COD had engaged others to carry out the work. This led Space Change to suggest that the employment of others was a repudiatory breach of contract.

On 15 February 2016, COD rejected the demand for payment, noting amongst other issues that Space Change had been notified that payment would be withheld until such time as a performance bond was put in place (although this was not something COD maintained at the hearing). Correspondence continued and on 29 February 2016, COD put Space Change on notice of default under clause 8.4, something Space Change rejected. COD further challenged the threat to present a winding-up petition, saying that the alleged debt was disputed; there was a dispute about whether the contract had been terminated and if so by whom.

Mr Justice Warren noted that the payment provisions of the JCT contract were balanced. Whilst a contractor can seek an interim payment, if the amount is not accepted, the employer can serve its own Payment Notice or, failing that, a Pay Less Notice. If it does so, it only has to pay the lesser amount which it considers is due, with the contractor being left to other remedies, such as adjudication, if it considers that it is entitled to more on an interim basis. In particular the Judge noted that:

"If an employer fails to observe the clear contractual procedure laid down, the contractual consequences follow and it cannot be heard to say that the interim sum is not due and is excessive. Any necessary adjustments can be effected at a later stage of the contract."

If an employer fails to make an interim payment that is due, the contractor can invoke a procedure for suspension, and ultimately termination, if the default continues. However, a contractor does not have to follow that route. As the Judge remarked, a contractor may consider that it is in its commercial interests simply to continue with the contract and attempt to recover payment in some other way at the end of the contract.

If the employer has failed to challenge an application for interim payment by a Payment Notice or Pay Less Notice, the amount due may be more than the employer considers reasonable, but that, the Judge made clear, provides no ground on which to object to the contractor's notice of suspension or, ultimately, termination when the contractual provisions in respect of the unchallenged amount are relied on.

Here, whilst the Judge considered that Space Change had followed the contract procedures correctly, COD had failed to respond to the payment applications within the contractual time limits. Space Change said that it therefore had an unanswerable claim for the amounts set out in the payment applications. Accordingly, it was entitled to implement the default provisions; and it was entitled to suspend work and, ultimately, to terminate the Contract.

The Judge went on to consider whether or not there was a dispute sufficient to justify an injunction restraining presentation of a petition. He felt that COD had made only "*the most general of assertions*". However, even if those assertions could have been substantiated, which they were not, then the fact was that no default notices were ever served in respect of them and they afforded no answer to the claims under the interim applications which had not been met by valid Payment Notices or Pay Less Notices.

There was, in the view of the Judge, nothing to prevent Space Change from relying on the provisions of the contract concerning interim payment, suspension and ultimately termination. Further, although COD asserted that there was a counterclaim which would exceed the amount of the Statutory Demand, there was no evidence before the court to show this, not even "*a shadowy case to suggest that that is so*".

Accordingly, on the information before the court, the Judge refused to grant the injunctions sought. This is an interesting decision which highlights again in clear terms how the courts understand the payment provisions of the JCT contract. However, before considering taking a similar route, parties should exercise caution. The bar for showing that there is a genuine dispute before an insolvency court is not a high one, albeit it was one that COD could not reach. Accordingly, the specific facts of this case may make it somewhat unusual.

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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