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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.

Lump sum contract or measure and value?

Mascareignes Sterling Co Ltd v Chang Cheng Esquares Co Ltd

[2016] UKPC 21

This was an appeal from the Supreme Court of Mauritius. MSC was the employer and CCE the contractor on a project for the design and construction of a 13-storey office building. The contract was the JCT Standard Form of Contract 1980 edn with Contractor's Designed Portion Supplement, as amended. Work commenced on 2 May 1994 and practical completion was achieved on 31 March 1996. Following completion, MSC refused to pay the sum which was stated to be due in the final valuation. A dispute arose which went through arbitration, the Mauritius courts and finally ended up before the Privy Council ("PC") in London.

One of the key issues was the nature of the contract itself. The arbitrator decided that the contract was a measure and value contract but as a fallback, if the parties' contract was initially a lump sum contract, it was varied by the parties so that payment became due on the basis of measurement and valuation. Before the PC, CCE conceded that the contract had been a lump sum contract but submitted that the parties had altered it by their conduct into a measure and value contract. This meant that the arbitrator, in the words of Lord Hodge, had "erred" in so far as he relied on the subsequent actions of the parties to construe the contract as being a measure and value contract. However, this left the second point, namely that the parties had agreed to depart from the original contract and that variation was evidenced by their behaviour in carrying out the contract.

The arbitrator had said that MSC was aware during the contract that interim valuations had been issued based on measure and value. Further the arbitrator accepted CCE's evidence that MSC had radically redesigned the building compared with that which it had proposed when the parties entered into the contract. The changes included the alteration of the height of each basement, a change to the grade of concrete, an increase in the number of lift shafts from two to three and changes in their size, thickness and height, and changes to the floor area and height of the building.

The evidence of the QS was that (a) the parties had agreed priced bills of quantities, (b) rates had been agreed for works not defined in the bills of quantities, (c) when preparing interim valuations, his staff measured the works carried out by CCE, and (d) when preparing the final account he was required to measure items of work because of the extent of the changes to the scope of the works.

What the QS did in preparing the interim valuations resulted in part from the absence of an architect to operate the process of interim certification under the contract and in part from the changes that MSC was making at the time to both the design of the building and the allocation of work. Lord Hodge commented that there was, in the view of the Board:

"*more scope for flexibility in valuing additional or substituted work in a lump sum contract than the parties have submitted. Work which is not expressly or impliedly included in the work for which the contracted lump sum is payable is extra work.*"

Lord Hodge also noted that under clause 13.5 of the JCT standard form contract which applied here (but also under clause 5.6 of the JCT 2011) additional or substituted work carried out within a lump sum contract may be measured and valued by use of the rates and prices set out in the contract bills if three conditions are met:

"First, the work must be of a similar character to the work set out in the bills; secondly, the work must be executed in similar conditions to those of the work in the bills; and, thirdly, the work must not significantly change the quantity of the work set out in the bills. If either or both of the second and third conditions are not fulfilled, the valuation can be based on the rates and prices on the bills but a fair allowance must be made for differences in conditions or quantity."

In other words, here the use of measurement and value to ascertain the value of additional or substituted work was not inconsistent with a lump sum contract. So the QS treated the contract as a lump sum contract by preserving the preliminaries unchanged, but the sums attributed to each of the other components of the contract were significantly altered. Most of the significant works were measured and valued although some items (site works, professional fees and attendance and profit) were valued at figures which the parties had agreed as appropriate in view of the changes to the building and the allocation of work.

So whilst it was not correct to say, as the arbitrator did, that the contract was varied to become a measure and value contract, the bulk of the components of the contract were properly valued by measurement and value in the final account statement as a consequence of the changes which MSC made to the building and the allocation of work since the signing of the written contract. Hence there was no error in law in the arbitrator accepting the QS's approach to the valuation of CCE's work, which involved extensive use of measurement and value.

Adjudication: what makes up the dispute?

Lulu Construction Ltd v Mulalley & Co Ltd

[2016] EWHC 1852 (TCC)

The question for Deputy Judge Acton-Davies QC was whether or not the adjudicator had jurisdiction to make an award in favour of Lulu of what were described as "*debt recovery costs*" of £48k. The reason this was an issue was because the claim was not specifically referred to in the Notice of Adjudication, or in the Referral Notice, or in the Response. It was only pleaded, for the first time, in the Rejoinder. The reason for this somewhat unusual state of affairs was that the adjudication was brought by Mulalley, effectively the paying party, who wanted to resolve the value of Lulu's claim under the subcontract. As the Judge noted, it was therefore "*hardly surprising*" that the claim for debt recovery costs was not referred to in the Notice of Adjudication. Mulalley's position was that the head of claim was not within the scope of the Referral and the claim was not something which could be run as what might be called a defence.

The Judge accepted that the issue was not within the wording of the dispute referred. Mulalley's concern was to try to sort out the payments due under the subcontract, although the Notice did also refer to such other sums as the Adjudicator may decide. Lulu relied upon the decision of Mr Justice Akenhead in *Allied P&L Ltd v Paradigm Housing Group Ltd* where the Judge said this:

"The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration … In my view, one should look at the essential claim which has been made and the fact it has been challenged as opposed to the precise grounds upon which it had been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it's referred to adjudication…

"It follows from the above that if the basic claim, assertion or position has been put forward by one party and the other disputes it, the dispute referred to adjudication will or may include claims for relief which are consequential upon an incidental to it and which enable the dispute, effectively, to be resolved. The key question is: is it so connected with and ancillary to the referred dispute as properly to be considered as part of it? There must be limits to this which can be determined by analysing what the essential dispute referred is."

The Judge considered that the costs claimed were clearly connected with and ancillary to the referred dispute and therefore must properly be considered part of it. This meant that the Adjudicator was correct to say that he had jurisdiction to decide this element of the dispute; although it was not within the scope of the referral, it was something which was connected with and ancillary to that Referred dispute. To be clear, the Judge did not say that the Adjudicator was correct, simply that he had jurisdiction to consider the claim and make a decision on it. Given the unusual nature of this adjudication, it was possible for a claim which was not part of the Adjudication Notice to fall within the issues which the adjudicator had jurisdiction to decide.

Concurrent delay

Saga Cruises BDF Ltd & Others v Fincantieri SPA

[2016] EWHC 1875 (Comm)

This was a shipping case, where the Owners (Saga) sought to levy liquidated damages. There were a number of delays to the scheduled completion date, some of which were the responsibility of the Yard (Fincantieri), and others of the Owners. These included delays to the creation of new cabins and a new decking system, which were the responsibility of the Yard, and delays caused by the Owner due to issues over the weight of the lifeboats and a request for additional insulation.

The Owner said that if completion of the works was already delayed by the issues for which the Yard was responsible, then delays to completion that were the responsibility of the Owners would not entitle the Yard to an extension of time.

The Yard said that where the completion was delayed by two events concurrently, one for which the Yard was responsible and one for which the Owners were responsible, no liability for liquidated damages arose. When there are two concurrent causes of delay, one of which would be a relevant event and the other would not, the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event.

Having considered the authorities and textbooks, Judge Cockerill QC concluded that unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Care must be taken to avoid adopting an over-broad approach. Causation in fact must be proved based on the situation at the time as regards delay. When the Owners' delays occurred, there were already outstanding issues which were the responsibility of the Yard. The point here is that the Yard was not able to demonstrate true concurrency. Unless there is a concurrency actually affecting the completion date as then scheduled a contractor cannot claim the benefit of it. The works had already been delayed by the Yard-risk events to the extent that the Owner delay had no impact on the completion date. In other words, you must always first consider the issue of causation as there may be situations where concurrent delay will not automatically entitle the contractor to an extension of time.

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