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

Dispatch

Rectification: common or unilateral mistake

Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd (No 2)

[2017] EWHC 239 (TCC)

The Borough of Milton Keynes ("MK") engaged Viridor to carry out waste recycling in Milton Keynes for a period of 15 years. The contract required Viridor to make both fixed and variable payments to MK. The fixed payment was sometimes referred to as rent; the variable payment was the product of a profit-sharing arrangement between the parties. Two final tenders were received by MK. The tenders were the subject of a detailed Evaluation Report prepared by management consultants. That report noted that the proposed fixed payment was to be indexed for inflation. Viridor's final tender bid of May 2009 included an Income Generating Payment Mechanism ("IGPM") which identified a fixed payment of £500,000 per annum "indexed for inflation". When the final contract documents were put together by MK''s consultants, an earlier and incomplete version of the IGPM, which contained gaps and made no reference to indexation, was included in the contract documents.

The putting together of the contract documents themselves was the responsibility of lawyers employed by MK. They emailed the consultants asking them for the final version of the IGPM. The version sent to the lawyers was in fact an earlier incomplete version, which did not contain details of the indexation. The final contract was dated 1 October 2009. It was common ground that the version of the IGPM included in the contract was not the version that was sent out by Viridor as part of its final tender but the earlier version that had been sent out with the invitation to tender. It was said that in its final (incomplete) version, the IGPM incorporated into the contract was "inoperable", because "there are so many vital parts that are missing".

MK brought a claim submitting that it was either a common or a unilateral mistake, and sought rectification of the contract by the replacement of the earlier, incorrect version of the IGPM with the later, correct version, including its reference to indexation. Viridor resisted. The necessary requirements for rectification of a written contract on the grounds of common mistake were set out in the case of *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560. The party seeking rectification must show that:

"(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

(2) there was an outward expression of accord;

(3) the intention continued at the time of the execution of the instrument sought to be rectified;

(4) by mistake the instrument did not reflect that common intention."

Mr Justice Coulson had no hesitation in saying that there was a common intention between the parties, at the time the tender was accepted, that the fixed payment would be "indexed for inflation". There was also clearly an outward expression of accord. The fixed payment indexed for inflation was part of Viridor's tender which was expressly accepted by MK.

Viridor tried to claim, that there was no continuing intention in respect of indexation because, by the time that the contract was concluded, it had changed. The Judge thought this was "hopeless". There was no attempt to renegotiate the indexation question. The mistake was an obvious and major one, made by and common to both parties, neither of whom spotted it prior to execution of the contract. In other words, the relevant ingredients for rectification had been made out.

However, the Judge still had to consider what happened between 2009 and the current claim. The parties used the figures in the correct version of the IGPM, but from April 2010, MK invoiced Viridor for the fixed payment but did not include any claim for indexation. One invoice did, but it was reissued most likely because those administering the contract checked the contract and did not see any reference to indexation. The Judge considered whether there were any discussions or subsequent agreement that indexation would not be charged on the fixed payment. He found none.

In early 2012, MK was the subject of a detailed audit and it became apparent that MK had not previously sought indexation on the fixed payment. The issue was raised with Viridor. As the Judge noted, matters then proceeded slowly and delays occurred on both sides. However these delays were a shared responsibility and so delay could not be raised as a defence. The Judge noted that merit was on MK's side. Viridor had offered that the fixed payment would be index-linked. He also considered the commercial reality of the position. The fixed payment was the equivalent of rent on the facility owned by MK. If indexation did not apply to the fixed payment then it meant that MK was allowing a lease of that facility for 15 years, with no break clause, and no opportunity to increase the rent. Finally, it is worth noting Mr Justice Coulson's comments on the original error:

"There is no doubt that it was sloppy work by ... the management consultants and, to a lesser extent, by ... the solicitor ... [the] error is perhaps a sad reflection of the fact that modern day contracts of this kind are so complicated that nobody (not even the consultants) bothers to check the actual documentation being signed."

Payment Notices

Trilogy Services Scotland v Windsor Residential

[2017] SAC (Civ) 2

This is a Scottish payment case that was heard through the courts. In November 2014, Windsor entered into a fixed price "construction contract" (as defined by the HGCRA), the terms of which were set out on one sheet of A4 paper. The Scheme therefore applied. The contract provided for payment by four separate instalments. There was no dispute that Trilogy completed the works required of them in relation to the first three instalments and that they were paid for those works. A dispute arose over whether Trilogy had completed the fourth. Trilogy said they had and in July 2015 made an application for payment.

No s. 110A(3) notice was given by Windsor specifying the sum that they considered to be due; the work to which the payment related; or the basis upon which that sum was calculated. This failure meant that it was open to Trilogy, to give Windsor such a notice. That notice could be given at any time after the date on which the payer ought to have given notice.

On 9 October 2015, demands were sent by Trilogy's solicitors to Windsor. The letter was accompanied by a copy of the outstanding invoice dated 16 July 2015. It was asserted that payment was due and that previous demands for payment had been ignored. The letter ended with a threat to raise proceedings for recovery in the absence of payment. No payment was made and proceedings were commenced. The issue for the court was whether the solicitor's letter could constitute a notice under s. 110A(3) of the HGCRA. A notice complies with s. 110A(3) if it specifies the sum that the payee considers to be, or to have been, due at the payment due date in respect of the payment; and the basis upon which that sum is calculated. The solicitor's letter complied with all this.

However, Windsor argued that a party serving such a notice had to make it clear that it was applying for payment. A considerable degree of clarity was needed that an application was a notice under HGCRA before it could legally be one. In short, it could not have been the intention of the author of the letters that they be notices under the HGCRA.

Here the Sheriff Appeal Court considered that Trilogy were not required to demonstrate that it was their intention to give notice under the HGCRA. The court was referred to the English decision of *Henia Investments Inc v Beck Interiors Ltd* (Issue 183) where Mr Justice Akenhead said that it must be clear that, in substance, form and intent, that what was being given was a complaint notice. The Scottish court noted that it was not surprising that the claims in the *Henia* case failed. Henia had sought to take advantage of "what could be described as a lack of clarity in their own documentation." That was not the position here.

Trilogy's position was that they had completed the works necessary to entitle them to the fourth instalment and accordingly they had made an application for payment of that amount under the contract. No notice was given and the solicitor's letter complied in form and substance with the requirements of the HGCRA. It probably assisted Trilogy's case that the letter had appended to it a copy of the original application. There could be no doubt about their intentions. They wanted to be paid.

Put another way, what would Windsor have thought on receiving the letter? That Trilogy wanted to be paid the sums requested in its application for payment sent some three months previously. The Sheriff Appeal Court, looking more at the substance of the documents than their form, duly held that the solicitor's letter was not a letter written as a notice which was said to be in accordance with s. 110A(3) of the HGCRA, but its content meant that it was a valid notice under s. 110A(3) of the HGCRA.

The sting in the tail for Trilogy was that this dispute, over payment of £14,000, had taken some 18 months to reach a conclusion, not least because the apparent lack of clarity in Trilogy's notices, had given Windsor something to argue about.

Extension of time awards

Carillion Construction Ltd v Emcor Engineering Services Ltd & Anr

[2017] EWCA Civ 65

During the construction of the new court buildings where the TCC is based, delays occurred. Carillion blamed Emcor for part of the 182-day delay. During the hearing of preliminary issues, the court was asked whether, assuming that Emcor was entitled to an extension of time, that extension should:

(i) Run contiguously from the end of the current period for completion to provide an aggregate period within which Emcor's works should be completed; or

(ii) Fix further periods in which Emcor could undertake their works, which were not necessarily contiguous but reflected the period for which it had been delayed.

The contract in question was based on the DOM/2 form, 1981 edition. Clause 11.3 provides as follows:

"11.3 If on receipt of any notice, particulars and estimate under clause 11.2 the Contractor properly considers that:

.1 any of the causes of the delay is an act, omission or default of the Contractor, his servants or agents or his sub-contractors, their servants or agents (other than the Sub-Contractor, his servants or agents) or is the occurrence of a Relevant Event; and

.2 the completion of the Sub-Contract Works is likely to be delayed thereby beyond the period or periods stated in the Appendix, part 4, or any revised such period or periods,

then the Contractor shall, in writing, give an extension of time to the Sub-Contractor by fixing such revised or further revised period or periods for the completion of the Sub-Contract Works as the Contractor then estimates to be reasonable."

Recorder Jefford (as she then was) had held that the natural meaning of the words used of the sub-contract conditions, when read in context, was that any period of extension granted will be added contiguously to the end of the current period within which the sub-contractor is required to complete its works. The CA agreed. The CA accepted that there may be situations in which clause 11.3 may lead to an unsatisfactory result. For example it could exempt a sub-contractor from liability during a period when it was in culpable delay or render the sub-contractor liable to the contractor for a period when it was not in culpable delay. However, clause 11.3 as interpreted by the CA (and probably as most practitioners had assumed it worked in any event) was practicable, workable and accorded with commercial common sense.

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