FENWICK ELLIOTT

The construction & energy law specialists

Issue 204 - June 2017

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

Dispatch

Interpreting contracts: commercial common sense

Sutton Housing Partnership Ltd v Rydon Maintenance Ltd
[2017] EWCA Civ

Sutton engaged Rydon to carry out maintenance and repairs to housing stock based on the National Housing Federation's standard form contract 2011. During 2014, difficulties arose and on 12 November 2014, Sutton served a notice asserting that Rydon had failed to achieve certain contractual MAPs (or minimum acceptable performance standards). They followed this with a termination notice. Following an adjudication and a TCC hearing, both of which were in favour of Rydon, the CA had to consider whether the MAPs were contractually binding or merely illustrative. If they were illustrative, Rydon could argue that the termination was invalid.

LJ Jackson agreed with the TCC Judge that a court should proceed with care when determining whether contractual provisions are sufficiently clear to permit the termination of a relatively long-term contract. The contract here had a term of five years. Rydon said that the parties must have intended to specify MAPs and that their omission to do so was inadvertent. However, LJ Jackson noted the comments of Lord Neuberger in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 that:

> *"Further, I do not think it is normally convincing to argue that, if the parties had meant a phrase to have a particular effect, they would have made the point in different or clearer terms."*

LJ Jackson also noted that if the MAPs were not contractually binding then the termination provisions were not effective. The Judge considered it to be unlikely that parties could have intended to neutralise the principal contractual provision enabling the employer to terminate for poor service, even if there were other routes.

The Judge also considered that the KPI framework was a "poorly drafted document". It was common ground that the parties must have intended to provide MAPs. Not only was it the case that if there were no MAPs, Sutton would lose a valuable mechanism for termination, but at the same time Rydon would also lose their entitlement to bonuses. It was not possible to calculate what bonuses (if any) were due without having a set of MAPs. The situation was that the contract was:

> *"a commercial one, made between a local authority and a building contractor. Self-evidently, Rydon intended to receive all the bonuses which were due to it under the incentivisation scheme. That was only possible if the contract specified MAPs. Also self-evidently, Sutton intended to retain their valuable power to terminate for poor service ... That was only feasible if the contract contained MAPs."*

Therefore both parties must have intended (and "any reasonable or indeed unreasonable person standing in the shoes of either party would have intended") the contract to specify MAPs. The only place where MAPs appeared was in the three so-called "examples" in the framework. Therefore they must have been actual MAPs not hypothetical MAPs by way of illustration. This, LJ Jackson concluded, was "the only rational interpretation of the curious contractual provisions" into which the parties had entered.

Adjudication, payment and when not to issue a winding-up petition

B v R
[2017] EWHC 1206 (Ch)

Deputy Judge Alexander QC had to consider an application for an order that R be restrained from proceeding further with a creditor's petition to wind up B. The Judge was in no doubt that the application was misconceived. First B was not unable to pay its debts. B on the evidence provided to the court was solvent with cash in hand and a substantial unused credit facility. Further, the reason B had not paid the substantial sums claimed was that it had arguable defences as well as substantial cross-claims of its own. The Judge was clear that:

> *"The proper place for the dispute between the parties is either Adjudication under the scheme established under the Scheme for Construction Contracts or ordinary proceedings. The dispute could be readily resolved in either forum."*

This was not a case of "can't pay" but of "won't pay". However, a petition will not be struck out merely because the company alleges that the debt is disputed. The Companies Court will not allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds. This is because the effect of presenting a winding-up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is something quite different from an ordinary court case. Here, the Judge noted that the continuation of the winding-up proceedings was likely to have an adverse impact on the business of B, both as a result of creating an adverse credit reference and because of the impact of such a petition (and knowledge of it) on other contracts as well as banking relationships.

The Judge accepted that the petition debt was disputed on bona fide and substantial grounds and that there was a potential substantial cross-claim. R was in the position of a conventional claimant on an invoice where the liability to pay the bill was disputed and where the dispute was "wholly unsuited to resolution in insolvency proceedings". The Judge continued that winding-up proceedings are not:

> *"the place for resolving genuinely disputed debt claims which the court cannot properly determine, either as to merits or as to quantum ... such proceedings can operate as a form of commercial oppression, where the very existence of proceedings can be the source of disproportionate injustice. While the court must be astute to avoid having the wool pulled over its eyes by a debtor trying to escape its obligations, it must be equally astute to avoiding injustice being caused by a potential creditor using insolvency proceedings to make it less likely that a justified defence or counterclaim will be pursued because the alleged debtor will be pressurized into paying the claim in full before that can be done."*

Cost budgeting: what not to do

Findcharm Ltd v Churchill Group Ltd

[2017] EWHC 1108 (TCC)

Cost budgeting has become an important part of litigation. Essentially parties put forward their estimate of the likely costs of the proceedings and these estimates are considered and approved (or not) by the court. The approved figures stand as a yardstick for the parties' ultimate cost recovery if they are successful at trial. Following a hearing, the court will not depart from a costs budget during detailed assessment unless there is good reason to do so.

Parties are expected to put forward a cost budget discussion report (known as Precedent R) which in theory is intended to identify real areas of dispute and so narrow the focus of any issues that need to be raised before the court. In this case, Mr Justice Coulson expressly cautioned against those who:

> *"treat cost budgeting as a form of game, in which they can seek to exploit the cost budgeting rules in the hope of obtaining a tactical advantage over the other side".*

The claim here was for £820,000 plus interest. The bulk of the claim was for loss of profits following the closure of a hotel as a result of a gas explosion. The Judge described Churchill's defence as basic, being a combination of bare denials and non-admissions. It was "*an insurer's defence straight out of the 1970's*".

Findcharm's budget was £244,676.30 (not including costs already incurred). Findcharm's budget, in the usual way, made a number of assumptions to explain how the budget had been prepared. For example, Findcharm had assumed that no expert evidence was necessary on one key issue, namely the cause of the explosion, because no positive defence had been pleaded, and that when it came to quantum, there would be a single joint accountancy expert. When it came to witness evidence, the Judge noted the need to explain the background to and circumstances of the explosion, together with detailed factual evidence of how the claim for loss of profits was made up. Churchill's cost budget was for £79,371.23, a sum described by the Judge as:

> *"completely unrealistic. It is designed to put as low a figure as possible on every stage of the process, without justification, in the hope that the court's subsequent assessment will also be low. In my view, therefore, it is an abuse of the cost budgeting process."*

The Judge approved Findcharm's budget figures as being reasonable but also noted that Findcharm had not unreasonably accepted the Churchill estimate. As a consequence Churchill were bound by the figure (which of course was significantly less than that of Findcharm) that they themselves had put forward.

Adjudication: preserving the right to make a jurisdiction challenge

Dawnus Construction Holdings Ltd v Marsh Life Ltd [2017]

EWHC 1066 (TCC)

Marsh had engaged Dawnus to design and build a hotel plus retail and restaurant units in Poole. The project fell into delay and the contract was terminated. A number of disputes arose and there had been four adjudications. This adjudication enforcement case concerned the fourth, a referral by Marsh seeking a valuation of the account upon termination. Although it was Marsh who had made the adjudication referral, the Adjudicator held in favour of Dawnus. The total amount said by the Adjudicator to be due to Dawnus came to just under £1.5 million (inclusive of VAT and interest).

Marsh said there had been a breach of natural justice in that the Adjudicator had failed to consider and deal with various defences that they had put forward. However, as a starting point, HHJ McKenna had to consider whether Marsh, by inviting the Adjudicator to correct errors in the Decision under the slip rule, was accepting the validity of the Decision. By doing this without a general reservation of rights, Dawnus said that Marsh was electing to forego any opportunity it might otherwise have had to challenge the Decision.

Following the issue of the Decision, both parties had written to the Adjudicator raising a number of slips, Dawnus raising mathematical errors but Marsh raised more substantive issues, namely alleged breaches of natural justice going to whether or not the Adjudicator had considered the arguments raised by Marsh during the adjudication. Marsh said that the failure by the Adjudicator to have considered the arguments, must have been a slip. The Adjudicator revised the quantum of his Decision but rejected the more substantial points raised.

HHJ McKenna explained that the doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold" in relation to an adjudicator's award. Here Marsh could have, but did not, expressly reserved its right to pursue a claim of breach of the rules of natural justice when inviting the Adjudicator to make corrections under the slip rule. By not doing this, when inviting the Adjudicator to exercise his powers under the slip rule, Marsh had waived or elected to abandon its right to challenge enforcement of the Decision since it had thereby elected to treat the Decision as valid:

> *"Assuming that good grounds exist on which a decision may be subject to objection, in the absence of an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested."*

Marsh was therefore precluded from challenging the Decision in the enforcement proceedings. However, in case he was wrong, the Judge did go on to review the natural justice challenge. Before doing so, HHJ McKenna reminded the parties that for a breach of natural justice to be a bar to enforcement, the breach must be plain, significant and causative of prejudice.

Here, the Judge accepted that the Adjudicator may have misunderstood the nature of certain of Marsh's arguments. However, the Judge then reviewed in general terms what it was the Adjudicator had been asked to do. Here, the Adjudicator was specifically asked to determine the issue of loss and expense and that was what he did. Marsh had argued that contractually there was no entitlement to loss and expense and the Adjudicator had rejected that argument. In doing so, the Adjudicator accepted Dawnus' contractual arguments about which were the relevant events that should be taken into account. He had therefore addressed the question that had been put to him. The Judge concluded that Marsh:

> *"may not like that conclusion but to my mind it is stuck with it."*

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.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986

Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

www.fenwickelliott.com