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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.

Specific performance

Blue Manchester Ltd v North West Ground Rents Ltd
[2020] EWHC 2777 (TCC)

In 2014, some eight years after completion of the Beetham Tower in Manchester, the sealant bond failed in some of the shadow box units ("SBUs") forming part of the glass curtain walling system in the external façade, leading to a risk that the glass might blow off which would pose a serious safety risk to pedestrians and traffic below.

Carillion had built the tower. It provided a temporary fix but had not designed a permanent remedial scheme before going into liquidation. BML was dissatisfied with what it perceived to be the failure of the defendant ("NWGR") as its landlord to resolve the problem. Accordingly, it brought proceedings seeking an order for specific performance of the landlord's repairing covenant.

HHJ Davies held that BML was entitled to specific performance to compel NWGR to undertake a permanent remedial scheme which would restore the external façade to its condition immediately before the discovery of the defects in the SBUs. That was unless it was revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost.

NWGR said that its investigations had revealed that the remedial scheme as ordered was not reasonably practicable other than at disproportionate cost, whereas there was an alternative remedial scheme which was reasonably practicable and could be undertaken at proportionate cost and more quickly.

The Judge said that when it came to a question of disproportionate cost, that required an attempt to make some comparison between the benefit to be obtained from the remedial scheme and the cost of achieving that benefit. The Judge also commented that he would have to have regard to the contribution made by the particular design of the SBUs to the visual appearance of the tower, i.e. to aesthetic considerations, and give considerable weight to the design intent of the building as realised in the construction.

The Judge agreed that the proposed remedial scheme was reasonably practicable. In their joint statement, the experts had said that "while challenging, these concerns are not without solution if a competent contractor were engaged". There was a "real difference" between works not being reasonably practicable and works being extremely challenging, but those challenges being capable of being solved by a competent contractor.

There were three very different tenders for the court scheme, ranging between £6 million and £16.3 million. There was also a very significant disparity in anticipated duration, between 57 weeks and 96 weeks. The tender analysis noted that both contractors demonstrated a good understanding and suitable method statement for the removal and procedure process.

Therefore it could not be shown that the court ordered remedial scheme was not reasonably practicable in itself.

What about the cost? Was that disproportionate? The Judge did not think so, in the context of a remedial scheme to put the tower back into its condition as at the date of the grant of the long (999- year) lease to BML's predecessor in title and the premium paid by BML's predecessor in title for its long leasehold interest of £60 million. The cost was not obviously disproportionate to the benefit to be obtained, both to secure a proper structural repair and to return to the original design intent.

There was little evidence about cost at the original hearing. There was a suggestion that the option closest to the option that was tendered would have cost in the region of £3.7 million, although a full replacement scheme would have cost £5.1 million.

What about the new remedial scheme? It was accepted that the alternative scheme was much faster and more economical and would carry fewer health and safety risks. The cost was likely to be around £3 million, with a contract programme of 30 weeks, reducing the contract programme by between 9 and 12 months.

However, there were aesthetic considerations. It was said that the proposal was akin to "putting tape on a top-end luxury car" which would "ruin the entire look of the car". Whilst the Judge thought that was going too far, he agreed that the proposal would result in a patchwork effect, whereas the initial unitised appearance gave the Beetham Tower an undoubted visual impact which was more impressive than the more typical glass facades which have more visually obvious connecting structures.

Therefore to require BML to accept the new option would involve requiring it to accept a visual appearance which was materially different from and significantly less visually impressive than the original one.

The Judge accepted that the alternative scheme had real advantages in terms of the relative practicability, timescale, cost and risk of unforeseen difficulties. He was also conscious of the increased health and safety risk involved, given the challenges of removing and replacing the SBUs whilst working at height. However, the decisive point was that everyone also considered that the originally ordered scheme was practicable, the challenges could be overcome and the differences in timescale and cost were not inordinate.

The Judge had originally held at trial that BML was entitled to insist on a remedial scheme to restore the tower to its appearance as designed and constructed unless it could be shown that it was not reasonably practicable at disproportionate cost. That had not been done. The alternative scheme had a significantly different visual appearance and, further, BML's genuine wish to have the tower brought back to its original appearance was neither idiosyncratic nor perverse.

What about the position of the leaseholders? NWGR intended to seek recovery of a proportion of the remedial costs under the service charge. The Judge did not consider that this was something he could take into account. The court was in no position to investigate whether the leaseholders would be obliged to pay the difference in cost between the two schemes. For example, they may be able to argue that they should not have to do so because NWGR ought to have put this alternative scheme forward at the original trial.

Bresco continued

Styles Wood Ltd v GE CIF Trustees

[2020] EWHC 2694 (TCC)

In Issue 244 we looked at the first case in the TCC following the Supreme Court decision in Bresco (see Issue 241). There the court held that the claimant John Doyle, who had been in liquidation for over six years, could not enforce an adjudicator's decision in its favour.

Here the facts were very different from Bresco and John Doyle. S&W commenced a final account adjudication on 14 February 2020, but went into administration on 28 February 2020. The adjudicator awarded S&W some £700,000. Here, the administrators offered to ring-fence the adjudicator's award, and also offered an ATE policy as security for the potential arbitration costs. There was also no third-party funder.

As a result, the Judge granted summary enforcement and did not impose a stay. This was on the condition that the ATE policy was provided, and sums to be paid over were ring-fenced as offered, with such ring-fencing to continue until the conclusion of any appeal process from the arbitrator's award.

Retentions

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd

[2020] EWHC 2308 (TCC)

Stepping Stone, a property developer, engaged Yeovil, under three contracts (based on amended JCT Design & Build and Minor Works forms), to build assisted living units. After practical completion of the works, half the retention was released. Yeovil agreed to a deduction from the remaining retention but a final settlement figure was not agreed. Yeovil therefore began court proceedings for the remaining amount which was met by a counterclaim for defects.

Clause 4.8 stipulated that the Retention was to be deducted from any interim payments due to DRJ. Under clause 4.18.3 half of the Retention Percentage (i.e. 2.5%) could be deducted by Stepping Stone when the Works had reached practical completion but no Making Good Certificate had been issued.

Stepping Stone said that the balance of the retention only became payable as part of the sums due under the Final Statement under the contracts. DRJ had no entitlement to payment if there was no Final Statement or if there was one but no Making Good Certificate had been issued (so that the Final Statement had not become conclusive). Second, they suggested that even if there was a Final Statement and it had become conclusive then they were entitled to deduct from the Final Statement figure sums due in respect of losses caused by the alleged breaches of contract by DRJ. Stepping Stone said the retention provided "both security and leverage".

Stepping Stone said that the retention of the monies was the way for them to force DRJ to put things right or pay compensation for not doing so.

DRJ said that the trigger for the release of the retention was not the issue of the Final Statement but the issue (or what should have been the issue) of the Making Good Certificate. Clause 4.18.3 provided as follows:

"half the Retention Percentage may be deducted from so much of the total amount as relates to work where the Work or relevant Section(s) have reached practical completion but in respect of which a Notice of Completion of Making Good under clause 2.36 or a notice under clause 2.32 has not been issued."

The Judge said that it was clear from the language of the contract that the sum representing the 2.5% (or any part of it) could not be withheld ("deducted") where the Certificate of Making Good had been issued. The entitlement to do so ended with the issue of one. As to the period for which the second half of the retention may be deducted and treated as not yet payable, DRJ should be able to say that that which ought to have been done in relation to the issue of the Making Good Certificate should be treated as having been done.

For the purposes of this case, the only basis for Stepping Stone disputing the hypothetically served Final Statement would be that one or more of the defects identified in its schedule of defects had not been rectified and that they intended to make an appropriate deduction from the Contract Sum in respect of them. Yet the premise behind the issue of a Making Good Certificate by Stepping Stone was that any defects had been made good.

The parties were some eight years on from the expiry of the Rectification Period, and Stepping Stone should not otherwise be able to treat its counterclaim as secured by the retention figure and the contractual interest accruing on that sum. The retention here could not be used to provide Stepping Stone with unjustified leverage simply because it was the party in possession. Stepping Stone had to put forward any counterclaim independently of any right to hold the retention monies. HHJ Russen QC said that:

"It is in the very nature of a 'retention' out of the contractual price that the parties anticipate it being released to the payee at some point during the performance of the contract (even if that be at its very end and subject to whatever deductions may properly be made by the payor under the terms of the contract)."

Here the contracts fixed DRJ's entitlement to be paid by reference to the timing of the Making Good Certificate (or what should have been that certificate). The Judge said that Stepping Stone could not ignore the point that the retention represents monies earned and otherwise payable to DRJ:

"It is one thing for the retention to be used properly as leverage to ensure that outstanding breaches are rectified, or as pro tanto security for the loss incurred if they are not. It is quite another for leverage to be exerted by the de facto withholding of the whole of the retention, regardless of the true extent of SS's set-off against the debt it owes to DRJ, when the initial contractual expectation is that it will be released."

DRJ was entitled to the retention subject to any loss and damage found to be recoverable on any counterclaim. In other words, Stepping Stone needed to make good its counterclaim independently of any right to retain monies. This they failed to do.

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