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The construction & energy law specialists

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

Issue 285 – March 2024

Dispatch

Expert Evidence

Aston Risk Management Ltd v Jones & Ors

[2024] EWHC 252 (Ch)

The defendants suggested that ARM's expert should not be regarded as an independent expert wit-ness, and that HHJ Cawson KC should disregard that evidence as being inadmissible. The basis for this was a contention that the expert was engaged at an early stage by ARM to provide advice which, it was suggested, ARM and its legal representatives had been less than frank about. The result was to compromise the expert's independence.

During the course of the hearing, ARM voluntarily disclosed a "Preliminary Quantum Appraisal" dated 6 March 2020 prepared by the expert – a document that would, but for such waiver, probably have been privileged. The expert included as part of the introduction:

> *"My instructions are to undertake a preliminary appraisal of the loss of claim, as presented, and to provide a preliminary assessment of the quantum aspects of the constituent heads of loss as set out in the draft claim.*
>
> *I am instructed in this matter as an accountant. My comments within this appraisal limited to my expertise as an accountant. I am not qualified to comment on matters of law nor am I qualified to comment on the legal merits of the claim.*
>
> *This appraisal is prepared solely for the purpose of assisting my instructing solicitors in the furtherance of litigation and in assisting those instructing me to better understand the potential risk elements solely from a quantum viewpoint in advance of a proposed litigation funding application."*

HHJ Cawson KC said that the purpose of the document was: *"merely to provide a preliminary indication from the point of view of an expert forensic accountant as to the quantum aspects of the claim as it was being formulated."*

The document did deal with other heads of claim than those in respect of which the expert was ultimately asked to provide evidence for the quantum trial; the judge did not consider that the advice given somehow impinged upon the expert's ability to give independent expert forensic accounting evidence. The judge also noted that it would not be unusual for an expert identified as a potential expert to provide an expert report for trial to be asked, at an earlier stage of the proceedings, to give a preliminary indication, or appraisal, of the issues that arise regarding quantum.

Further, the judge did not detect in the way that the expert gave evidence any partiality on their part. To the contrary, when asked a number of questions that were potentially inconsistent with, or disadvantageous to, ARM's case, the expert gave what the judge considered to be frank answers that did not necessarily assist ARM's case. Accordingly, there was no proper basis for ruling the expert's evidence to be inadmissible as not being independent expert evidence. The expert was a good witness, who had clearly grasped the quantum issues that arose. The expert gave considered answers to the questions that were posed and the judge was of the view that he was entitled to place very considerable weight and reliance on that expert evidence.

Notices & conditions precedent

FES Ltd v HFD Construction Group Ltd

[2024] ScotCS CSOH_20

The parties entered into a contract for fit-out works based on the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 edition), as amended. A dispute subsequently arose as to FES's entitlement to an extension of time and an associated claim for loss and expense under contract. One of the issues identified by the adjudicator was the question: is the giving of a notice in terms of clause 4.21 a condition precedent for recovering loss and expense? The adjudicator said that it was, and decided that FES had not given the required notice and so had no entitlement to direct loss and expense in terms of clause 4.20 of the contract.

FES sought a declaration from the court that the notice provisions in clause 4.21 were not conditions precedent to any entitlement of the pursuer to reimbursement for direct loss and expense. Clause 4.21.1 stated that:

> *"The Contractor shall notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him."*

The judge noted that when it came to drafting: *"[…] that the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to parties an improbable and unbusinesslike intention […]"* (*Mitsui Construction Co Ltd v AG of Hong Kong* [1986] 33 BLR 14, per Lord Bridge). It was the opposite here. The clause was one which had been negotiated and drafted by skilled professionals. It came *"directly and unaltered"* from the Standard Building Contract. It is the same wording as used in clause 4.20.1 of the JCT Standard Form of Building Contract 2016 Edition.

Lord Richardson commented that: *"On its face, the language used in clause 4.20.1 is clear and straight-forward. It indicates that that the contractor's entitlement to reimbursement is 'subject to … compliance with clause 4.21'."* It is difficult to construe this language other than that it creates a condition precedent. To construe the clause as FES argued would involve having to delete or ignore this critical phrase.

FES had said that as clause 4.20.1 does not spell out the consequences of non-compliance with the provisions of clause 4.21, the parties cannot have intended that the clause create a condition precedent. Lord Richardson held that this argument failed to take account of the fact that, as a result of the way in which clause is structured, a contractor's entitlement was dependent on compliance:

> *"Accordingly, far from not spelling out the consequences of non-compliance, the wording of the clause makes it clear that, without such compliance, the contractor is not entitled to reimbursement."*

Clause 4.21.1 imposed an objective starting point for notification by the contractor being the point at which the likely effect of the Relevant Matter or the likely nature and extent of any loss and expense became or should have become reasonably apparent to him. Clause 4.21, as a whole, set out a practical and workable set of steps for notification and provision of information by the contractor with the obligations on the contractor to provide information being qualified by what is reasonably necessary or what may be reasonably required. Further, the wording tied entitlement to relief with compliance with the procedure for a claim.

The judge concluded that the obligation to comply with clause 4.21 was not:

> *"an unduly onerous one. Benefits, in the form of timely and well administered contract administration, can reasonably have been anticipated as accruing to both parties from that compliance. The difficulty for the pursuer is that, on the basis upon which I am to proceed, those obligations were not complied with by it. As a result, if compliance is a condition precedent, the pursuer has lost its entitlement."*

Letters of intent

CLS Civil Engineering Ltd v WJG Evans and Sons

[2024] EWHC 194 (TCC)

In 2021, CLS engaged WJGE to carry out construction works on a development at Narbeth, Pembrokeshire. CLS said that WJGE was engaged subject to a letter of intent ("LOI"), which governed the relationship between the parties, and that this limited CLS's liability to £1.1 million. WJGE said that the construction contract was governed by JCT terms and that, in any event, CLS's liability was not capped at £1.1 million.

Deputy Judge Moody KC noted that it became clear during the hearing that the real dispute between the parties was whether CLS's liability to WJGE was limited to £1,100,000 in circumstances where WJGE had lodged a final valuation for £1,413,669.24.

CLS said that that the position was clear; the parties had never agreed JCT terms. The LOI and its revisions were clearly accepted by WJGE and governed the parties' relationship. WJGE said that a contract had come into existence but that there were four possible bases for it: (a) a contract based on correspondence and communications between the parties before works commenced; (b) a contract based on the LOI; (c) a contract based on the LOI "*as purportedly varied*"; and (d) a contract based on the formal contract that the parties presupposed would be executed as of the week of 4 October 2021. As at 4 October 2021, all essential terms were agreed between the parties such that a contract was formed on the basis of the JCT Intermediate Contract 2016 conditions; and (b) the parties agreed that the cap should be removed. This was on the basis that they agreed that WJGE would continue to be paid in excess of the cap as that was commercially sensible.

The judge considered that WJGE was bound by the cap of £1,100,000. One reason was that this appeared to have been admitted by WJGE in evidence. Further, the judge said that he would reach the same conclusion based upon an objective construction of the communications between the parties. The original LOI made clear that CLS's intention was to enter into a contract with WJGE but on terms to be agreed. In the meantime, WJGE was instructed to proceed but CLS would not be liable to pay WJGE more than £150,000 plus VAT. The judge considered that WJGE accepted that offer by starting work.

The fact that WJGE accepted the offer was further demonstrated by an email which referred to WJGE coming "*ever closer to the £150k cap.*" In the meantime, the parties were negotiating about the other terms including JCT terms. A revised letter of intent increased the cap to £300,000. There was no evidence of an express acceptance of that revision, but CLS offered an increase in the cap to £500,000. It was clear that this was accepted because of a WJGE email which said they were happy "*to accept the increased value of work*" and a second email referred to the "*current LOI limit of £500k.*" WGJE also then threatened that all works would stop unless the limit was further increased. CLS offered an increase to £800,000, which was accepted.

WJGE also drew attention to the cap of £800,000 being exceeded. The judge said that WJGE thereby expressly accepted that WJGE was working subject to that cap. The final increase to £1,100,000 was made and WJGE noted the existence of the limit in a further email.

Accordingly, the correspondence between the parties, "*objectively construed,*" showed that the cap was accepted at the time as the works progressed. There were at least six occasions on which WJGE expressly or impliedly agreed that WJGE was working subject to the cap.

The chronology showed that the parties were in discussion about JCT terms whilst the works were being undertaken but it is also clear that there was no agreement as to which JCT terms would apply. In the opinion of the judge, the parties' discussions in relation to a formal contract and JCT terms never achieved a meeting of minds.

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