



Dispatch

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

What claims can be heard at High Court level at the TCC?

West Country Renovations Ltd v McDowell & Anr [2012] EWHC 307 (TCC)

The dispute here related to the final account. The sum in dispute was just over £100k and a claim was issued in the TCC in London. There was nothing wrong with the approach taken by West Country. However, at the first Case Management Conference ("CMC"), Mr Justice Akenhead raised with the parties, whether the claim should be transferred to the TCC judges at the Central London County Court. This was not something that either of the parties had requested be considered at the CMC. As the Judge noted, both had "politely but forcefully" indicated that they would both prefer to stay in the High Court giving the following reasons:

- "(a) The TCC in the High Court was a victim of its own success, in that its case management practices and ability to secure reasonably early trial dates for a 3 day trial for a case such as this was well known and established. There was uncertainty as to whether the County Court could as readily accommodate a trial for a 3 day case...and early appointments for procedural applications as the TCC could.*
- (b) The Claimant was a small builder to whom this case and its outcome was very important. The Defendants were also anxious to have this dispute resolved efficiently.*
- (c) There was a good chance that the case would settle and any transfer...would not particularly assist that process."*

The Judge, having carefully considered what the parties had to say, disagreed. He noted that the work of the TCC in London had since 2004 increased by a factor of about 75% with just under 550 new claims issued last year. The Judge acknowledged that active case management did mean that there was a high level of settlement, but he felt that there remained a very real risk that there would not be sufficient judges to deal with the cases. As the TCC judges had other responsibilities, this meant that there were currently, the equivalent of less than four judges to handle in numerical terms not far short of twice what eight TCC judges handled seven years ago. There is thus a real risk that the progress made and efficiency established by the TCC over the last seven years could be impacted by having to handle an excessive number of low value claims. The Judge said that:

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Having consulted with his fellow Judges, Mr. Justice Akenhead then proceeded to set out the following approach that they would adopt at the High Court in London for future claims:

"(1) Generally, claims which are for less than £250,000 should be commenced in County Courts or other High Court centres outside London which have TCC designated judges.

(2) However, a non-exclusive list of exceptions is as follows:

(a) Cases involving adjudications, including enforcements and arbitrations may be started in the High Court, irrespective of the financial amount involved; this is justified by the need to build up a body of case law which is consistent in these important areas of construction law business.

b) International cases of any value will ordinarily be accepted. These will involve cases between non-resident (in the UK) parties or cases involving foreign projects or developments. This is explicable on the basis that for such cases, London is, commonly if not invariably, the first port of call in such cases, overseas parties will expect a TCC High Court judge to hear the case and the judges here are experienced in international work.

(c) Cases involving new or difficult points of law in TCC business or which have issues of technical complexity suitable for a High Court judge.

(d) Any test case or case which will be joined with others which will be treated as test cases. Examples could be a fire supposedly caused by a washing machine, car or lorry where the value of the claim is a five- or six-figure sum but it may be joined with others in which similar points are being taken.

(e) Public procurement cases. As the TCC in London has built up an expertise and experience over the last 4 years, it is sensible if the judges in the TCC deal with this interesting, important and developing area of law and practice.

(f) Part 8 and other claims for declarations.

(g) Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge.

(h) Complex nuisance claims brought by a number of parties, even where the sums claimed are small.

(i) Claims for injunctions.

If there is any other good reason (even if not mentioned above) why any proceedings instituted in the TCC in London should remain in the High Court, the Court will retain the case"

This is an important case for anyone involved in issuing claims at the TCC. What this means is that whilst a claimant can still issue a claim in any court, if he, she or it selects an inappropriate court they run the risk that the court on its own motion may transfer it elsewhere. The Judge noted that the court did not intend to transfer cases which are already well under way here but, the Judges did reserve the right primarily at the first CMC (and possibly before) to review the question of transfer. Whilst this judgment was not a formal Practice Direction, it is clearly intended that it is to be treated as one. The impact both in the TCC in the High Court and the TCC at the London County Court and elsewhere remains to be seen.



Liquidated and ascertained (or delay) damages LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd

[2011] SGHC 163, B.L.R. Vol 1. [2012] 14

In this Singapore case, the sub-contractor, LCS, failed to complete the works by the agreed date. Some six months after the completion date had passed, LW, the main contractor terminated the contract. One issue that arose was whether LW, was entitled to rely upon the liquidated damages ("LADs") clause. Judge Prakesh made it clear that LADs which have accrued before termination of a contract may still be deducted after termination. The question which then arose was whether or not the right to LADs had accrued as of the date of termination. LCS argued that LW had failed to provide a valid notice. The contract had said that:

"24.1. If the contractor fails to complete the construction of the works by the completion date the employer shall issue a notice in writing to the contractor to that effect.

24.2.1. Subject to the issue of a notice under clause 24.1 the contractor shall ... pay or allow to the employer the whole or part of a sum calculated ... as liquidated and ascertained damages ..."

The notice did not specifically refer to the right to deduct LADs. The Judge held that what mattered was the content of the notice. Clause 24 merely required that the notice should state that the contractor failed to complete the works by the completion date. This it did. LCS also argued that clause 24 provided that the right to LADs only arose upon actual completion of the works. Could LADs be claimed for the period beyond the extended completion date up to the time of termination? The Judge said that the date that mattered was the agreed completion date (whether the original or extended) and not the date on which the works were actually completed. The Judge also agreed with LW that if it was the parties' intention that the right to LADs would only accrue once the actual date of practical completion had passed, they could have easily provided for this. They could have agreed that LADs could be deducted in respect of a shorter period if practical completion was not yet achieved when the contract was terminated. They did not. As the Judge noted, it is well established that the function of a LADs clause was to allow the employer to deduct LADs immediately after the agreed completion date had passed.

LCS then said that there was uncertainty as to the exact date of completion. Relying on the Singapore case of *Engineering Construction PTE Ltd v Attorney General*, LCS said that as long as the contract remained in force, events for which an extension of time may be granted may occur. Therefore, the total extension of time could not be determined until the works are actually completed. That period could not be finally determined until the works are in fact completed. That period also could not be determined if the works can no longer be completed by the contractor by reason of the contract having come to an end. It was possible that that period of delay may be shorter upon completion (if the contract had not been terminated) than at the time of termination. Any extension of time awarded could not be final until the works are actually completed, and as further performance had been taken out of the contractor's hands, the extension of time clause could no longer operate. This meant according to LCS that LADs could only be calculated after the works are completed and after

the project consultants have taken into account all events that happened prior to completion. This is because the completion date in a construction contract is liable to change and there may be events which occur after termination which in fact reduce the effective delay before termination for which a contractor is liable. Whilst the Judge did not necessarily disagree with some of the principles raised, they did not address the issue of whether a right to LADs had already arisen. The Judge said that the right to LADs on LW's part arose as soon as actual completion of the works was not achieved by the agreed completion date. What was uncertain was the final total amount of LADs to which LW was entitled. It was right that the total period of delay may turn out to be shorter than the expected period of delay viewed at the agreed completion date. However the Judge then characterised the right to LADs as:

"a right to liquidated damages arises the moment the works have not been completed by the agreed completion date, and the total quantum of a claim to liquidated damages consequent on this right will increase with every day (or week, etc, as the case may be) that actual completion is not achieved. However, the total quantum of liquidated damages that may be claimed is subject to alteration by subsequent events such as extensions of time which will, by extending the agreed completion date, reduce the effective period of delay for which the contractor is liable. In other words, the maximum quantum of liquidated damages that can be claimed increases as time passes, but the actual quantum of liquidated damages which are eventually claimed or deducted, over the entire period, may be less than that."

The subcontract here, required that the parties should deal with issues of extension of time as and when the relevant events occurred. There was no requirement to do so only after practical completion is achieved, and such an approach was prohibited. The sub-contract provisions also said that LADs accrued upon the occurrence of a delay in the completion of the sub-contract works. LW was therefore entitled to deduct any LADs from payments other than the balance stated as due to LCS in the final account and final statement. Also, LW had to repay to LCS any LADs previously deducted upon the fixing of a later completion date.

Finally the Judge referred to an English case, *JF Finnegan Ltd v Community Housing Association Ltd* where the CA held that LADs accrued once there is delay to the completion of the construction works, regardless of the fact that the agreed completion date may be subsequently revised.

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.

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Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.com