Fenwick Elliott
The construction & energy law specialists

Issue 186 December 2015

Dispatch

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

Housing Grants Act: payment provisions

Severfield (UK) Ltd v Duro Felguera UK Ltd

[2015] EWHC 3352 (TCC)

This was a claim for summary judgment which, although it was not an adjudication enforcement case, included discussion of the payment principles under the Housing Grants Act ("HGCRA"). Mr Justice Coulson provided a useful summary of the recent case law:

"Over the course of the last year there has been a flurry of cases in which Edwards-Stuart J has considered the situation in which a contractor has notified the sum due in a payment notice, and the employer has failed to serve either its own payment notice or a payless notice. Those cases … are authority for the proposition that, if there is a valid payment notice from the contractor, and no employer's payment notice and/or payless notice, then the employer is liable to the contractor for the amount notified and the employer is not entitled to start a second adjudication to deal with the interim valuation itself.

All of these cases concern the situation where the contractor is seeking to take advantage of the absence of any notices from the employer to claim, as of right, the sum originally notified. That approach is in accordance with the amended provisions of the 1996 Act. But because of the potentially draconian consequences, the TCC has made it plain that the contractor's original payment notice, from which its entitlement springs, must be clear and unambiguous."

The Judge then reminded the parties of the words of Mr Justice Akenhead in the Henia v Beck case (Issue 183):

"If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

Here the contract between the parties was for the design, supply and erection of steel structures on a site in Manchester. The project involved the construction of two power generation plants, each comprising several different structures. In the terms of the HGCRA, it was a "hybrid" contract. Some parts fell under the provisions of the HGCRA, other parts did not. The court had to decide how to treat payment applications made under the contract. Mr Justice Ramsey had said this in the case of *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC):

"It also follows that the right to refer disputes to adjudication under section 108, the entitlement to stage payments under section 109, the provisions as to dates of payment under section 110, the provisions as to notice of intention to withhold payment under section 111, the right to suspend performance for non-payment under section 112 and the prohibition of conditional payment provisions under section 113 will only apply to the Subcontract in this case, insofar as the Subcontract relates to construction operations."

Mr Justice Coulson rejected the suggestion that the provisions of the HGCRA ought to be incorporated wholesale, even in a hybrid contract, to apply to all the works. In the Judge's view, the court must uphold that different regime in respect of all claims to payment with regard to the works which were excluded by the 1996 Act. Although it was "*uncommercial, unsatisfactory and a recipe for confusion*", the result of Parliament excluding certain construction operations from the HGCRA was that in situations as the one here there would be two very different payment regimes.

The Payment Notice relied upon here was for some £3.7 million, of which £1.4 million related to works under the HGCRA element of the contract. However, the notice of December 2014 identified the sum due as £3,782,591.12. The £1.4 million now claimed was not said to be the sum due, and was not the notified sum. There was no reference in the payment notice to the sum of £1.4 million. It was not therefore a payment notice in respect of that claim. You cannot "*convert the sum notified by refining it later on*".

It was not sufficient to say that because the application was supported by a spreadsheet with a number of line items, the "notified sum" consisted of each of the sums in each line item. In the view of the Judge, this was not the purpose or intention of the payment provisions of the HGCRA. It would make for unnecessary complexity to say that the notified sum was not the net total claimed, but each (or just some) of its individual components. In order to be a payment notice, the notice has to set out the basis on which the sum claimed has been calculated. The December 2014 Notice and the accompanying spreadsheet did not begin to address the complexities of what were and were not construction operations. It was not at all clear or unambiguous from either the notice or the accompanying spreadsheet that £1.4 million was the minimum due in respect of construction operations within the HGCRA. All of which led the Judge to conclude that:

"Adjudication, both as proposed in the Bill and as something that has now been in operation for almost 20 years, is an effective and efficient dispute resolution process. Far from being a 'punishment', it has been generally regarded as a blessing by the construction industry. Furthermore, it is a blessing which needed then - and certainly needs now - to be conferred on all those industries (such as power generation) which are currently exempt. As this case demonstrates only too clearly, they too would benefit from the clarity and certainty brought by the 1996 Act."

Unforeseen ground conditions and notices

Van Oord UK Ltd & Anr v Allseas UK Ltd

[2015] EWHC 3074 (TCC)

In this case, the Claimants (a JV known as "OSR") made a number of disruption and prolongation claims against AUK arising out of the onshore laying of a thirty-inch gas export pipeline in the Shetland Islands in Scotland.

Article 2.2.3 of the Contract provided that should OSR encounter subsurface conditions different from those described in the Contract Documents which an experienced Contractor could not reasonably have been expected to foresee following an examination of those documents and data which substantially modified the scope of work, contract price or completion date then notice should be given. Mr Justice Coulson referred to the 2014 judgment of Mr Justice Akenhead in *Obrascon Huarte Laine SA v Her Majesty's Attorney General for Gibraltar* which was upheld by the CA this year ([2015] EWCA Civ. 712). Here the Judge refused a claim based on allegedly unforeseen ground conditions. One of the disputes there centred on the contractor's case that, if the ground conditions were not expressly identified in the geotechnical information provided pre-contract, then they had a claim for unforeseen ground conditions. Mr Justice Akenhead rejected that approach saying:

"I am wholly satisfied that an experienced contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise. In so doing not only do I accept the approach adumbrated by Mr Hall [the defendant's geotechnical expert] in evidence but also I adopt what seems to me to be simple common sense by any contractor in this field."

The problem for OSR here was that their pleaded case was almost entirely based on the results of a probe survey, which was irrelevant to the Article 12 claim because it was not a Contract document. Accordingly, the subsurface conditions were not different from those described in the Contract documents. The Judge noted that contractors are provided with all available information as to ground conditions, but ultimately it is a matter for their judgment as to the extent to which they rely upon that information. It is wrong in principle for a contractor to argue that, merely because, in some particular locations, the conditions were different from those set out in the pre-contract information, those different conditions must somehow have been unforeseeable. That is a matter of common sense:

"Every experienced contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall."

OSR's claim had in fact already failed at the first hurdle. They had failed to give proper notice. Article 22 provided a maximum of five days for the claim request to be issued following the occurrence of the relevant event. There was an additional seven days (making twelve days in all) for the production of full substantiation. The article made it plain that a failure to comply with these provisions would disentitle OSR to any claim. There was no challenge to the Article itself and OSR maintained that they did comply with these provisions.

OSR said that they discovered unforeseeable ground conditions on 11/12 October 2011. Therefore a notice should have been provided by OSR no later than 17 October. It was not. The Judge rejected the suggestion that on 11/12 October OSR thought that the deep peat excavated at the start of the Southern section was merely an isolated pocket and as such it was not thought to be a claim event until a few days later when a notice was given, namely on 19 October 2015. The problem for OSR was that there was no evidence to support this. The notice of 19 October was therefore not within five days of the relevant event, and so was out of time.

In fact the Judge did not accept that the letter of 19 October was a notice under Article 22 in any event. The last paragraph of the letter made it plain that it was "*notification in accordance with Article 15.4 … where we are to notify you of events affecting progress of the work*". It made no reference to Articles 12 or 22. Article 15 dealt with the possibility of an extension of time. In other words, this was not a notification of unforeseen ground conditions under Article 12 or a request for a Change Order under Article 22. There was a further notice submitted on 22 November 2011. This was where OSR provided full substantiation of the claim. As the Judge again noted, this was also far outside the seven days for the provision of all relevant financial information.

Finally, the claim was put on an alternative basis, by way of a claim for damages for breach of implied terms as to cooperation, hindrance and prevention. This follows the 1985 case of *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51. Whilst the Judge was prepared to accept that, in some instances, particularly where there are straightforward claims for failure and default on the part of an employer, there may be room for implied terms like these, he made it clear that he did not understand how such terms could be of any relevance to a claim for unforeseen ground conditions. The claim fell to be analysed under the express terms of the contract. It could not be rescued by alleged breaches of these implied terms. This was a claim triggered by ground conditions and has nothing whatsoever to do with hindrance, prevention or lack of cooperation on the part of AUK.

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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