

Is Your Dispute Resolution Process Fit For Purpose?

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23 September 2021

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Payment dispute

CC Construction Limited v Raffaele Mincione [2021] EWHC 2502 (TCC)

The Contractor was Engaged by the employer to design and build the core of a new house for the sum of £2,587,250. The Contract was dated 21 April 2016 and used the JCT D&B 2011 with amendments.

In September 2017 the Contract was varied, and as such, the Contract Sum was increased to £3,130,602 and completion date postponed.

On 5th October 2020 the Contractor sent the Employer a letter attaching a Final Statement, containing the remaining balance of £479,957.80. The Employer claims not to have received this letter and on 1 December 2020, the Contractor sent a further letter containing the original letter of 5th October 2020.

On 18th December 2020, the employer disputed the contents of the Final Statement, arguing that as a result of the delay, liquidated damages were due and the final payment was owed by the contractor to the employer.

On 13th January 2021, the employer issued a Notice of Completion of Making Good.

On 19th January 2021 the Contractor sent an invoice for the £479,957.80 sum detailing the final date for payment being 14th January 2021. The due date was disputed by the Employer, on the basis that as the Notice of Completion of Making Good was 13 January 2021, final payment was due 28 days after this date.

The employer then served a payment notice on 10 February 2021, and argued that as this was served before the due date this prevented the Final Statement sum being conclusive.

The matter was taken to adjudication, which found in favour of the Contractor that the Final Statement was conclusive and no Payment Notice had been served before the due date.

The Employer argued that this decision was not enforceable and that there was a breach of natural justice as the adjudicator failed to address the issue of liquidated damages.

Decision

The court found that the Employer's letter of 18th December effectively prevented the Final Statement becoming conclusive however the impact of this declaration was limited as the due date was found to be 5th January 2021, meaning that Employer's Payment Notice was served 5 days too late.

The adjudicator's decision was found to be enforceable, however there was a material breach of the rules of natural justice with the failure to consider the Employer's entitlement to liquidated damages, therefore the decision is only enforceable to the extent of the balance over the amount of that claim.

Privileged documentation

Axnoller Events Ltd v Brake & Anor (cross-examination on a draft witness statement) [2021] EWHC 2539 (Ch)

Facts

The dispute related to the disclosure of one of the Defendant's draft witness statements. The Claimant claimed that the Defendant's counsel (Ms Brown) had voluntarily disclosed the draft witness statement and as such, the Claimant could cross-examine the Defendant on the contents of the document.

The witness statement was not signed by the Defendant and the Ms Brown denied having disclosed this document to the Claimant.

The Claimant's Counsel, Mr Modha, alleged that Ms Brown had informed him that she intended to hand the draft witness statement to the judge who would be hearing the claim. He asked to see this document, which she provided to him and he read it in the waiting area.

After Mr Modha had read the statement he took photographs on his phone, which he alleges he did whilst sitting opposite Ms Brown who was aware of this.

The Defendant disputed these facts, and one of the Defendants Mr Brake, gave a witness statement arguing that he had sat next to Ms Brown's bag which presumably contained the statement and he left that bag unattended a for a couple of minutes whilst he went to the toilet. Mr Modha was present in the waiting area at this time.

Decision

Judge Paul Matthews concluded that Ms Brown did lend Mr Modha her copy of this witness statement so that he could find out the nature of the defence and having read it, he photographed it.

He accepted that Ms Brown had said that she did not authorise him to photograph it, but this was irrelevant because the act of deliberately showing the draft witness statement to opposing counsel was enough to waive privilege.

Accordingly, the witness statement was found to be admissible in evidence under CPR Practice Direction 32, paragraph 27.2.

Covid-19 as force majeure

Dwyer (UK) Franchising Ltd v Fredbar Ltd & Bartlett [2021] EWHC 1218 (Ch).

Facts

The Claimant entered into a franchise agreement with Fredbar (the First Defendant) and Mr Bartlett (the Second Defendant).

In March 2020, Mr Bartlett was notified by the NHS that his son was deemed vulnerable and as such he should self-isolate for the next 12 weeks in order to avoid contracting Covid-19.

Clause 30 of the agreement contained the following force majeure clause:

"This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause which the Franchisor designates as force majeure including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder, and natural disasters."

Mr Bartlett approached the Claimant about terminating the agreement under Clause 30 and on the basis that there was a drop in the demand for his profession (plumbing).

The Claimant refused this request and stated that plumbers were key workers and that the drop in demand did not constitute a force majeure ("FM") event.

The First Defendant purported to terminate the agreement by letter dated 16 July 2020 as the Claimant had failed to comply with Clause 30 by refusing to designate the circumstances as FM.

The Claimant alleged that the Defendants had repudiated the contract and claimed damages.

Decision

ICC Judge Jones held that "*a critical factor had been ignored for the purpose of the discretion"* of the Claimant in focussing purely on business concerns and failing to consider the safety of Mr Bartlett's son.

This was a repudiatory breach of agreement, however, on 2 April 2020 the Claimant had offered Mr Bartlett furlough, which Mr Bartlett had accepted. By accepting this offer and not attempting to terminate at this point, he affirmed the agreement.

Therefore, when purporting to terminate the contract in July 2020, Mr Bartlett had committed a repudiatory breach himself.

Specific Disclosure

Good Law Project Ltd v Secretary of State for Health And Social Care [2021] EWHC 1237 (TCC)

Facts

This was an application made by the Claimants, seeking the following orders;

1. For further information under CPR 18, as set out in schedule A of the order; and
2. For specific disclosures under CPR 31.12, to identify documents that falls with the classes of documents set out in schedule B of the order.

The proceedings concerned challenges by way of judicial review, to contracts awarded by the defendant for the supply of PPE, from the interested parties.

The claimants' position argued that the information provided through the defendant's evidence were supplied very late and incomplete, therefore, they were unable to interrogate and respond to the defendant's evidence.

The defendant's position was that requests for information and documents were made at a very late stage. No orders for standard disclosure on a standard basis was made by the court or sought by the claimants and the claimants' requests at this stage would increase the costs and derail the timetable for the trial.

Decision

Mrs Justice O'Farrell, upon considering the tests of CPR 18.1 and CPR 31.12, assessed each request made by the claimants and granted orders for searches to be carried out against items numbered 1-2 and 6-7 as set out in Schedule B of the order. The court held that no orders were needed, for items numbered 3-5 and 8-20 as sufficient information/documentation was previously disclosed and/or were provided as part of this application.

Can a Contractor be liable for defective glass cladding?

125 OBS (Nominees1) v Lend Lease Construction (Europe) Ltd [2017] EWHC 25 (TCC)

The Defendant was appointed under a design and build contract to carry out an extensive redevelopment of 125 Old Broad Street, into a prestigious 26-stoery office building in the City of London.

The works were carried out between 2008 and 2012 and there were 17 spontaneous failures of the glass panes on the building. Whilst some shattered glass was retained in its frame until it could be removed, some was ejected away from the building to the street and pavement below. The failures were caused as a result of nickel sulphide inclusions within the glass which had not been adequately remedied by heat soaking.

Between 2012 and 2013, half of the glass was placed in storage, and a further 4 failures occurred.

The Claimant claimed damages, including the costs of re-cladding the building.

The Defendant argued that their only obligation under the contract was to install glass that had been soaked in accordance with the relevant European Standard (but with a holding period of four hours); and having complied with this obligation, the risks of the failures had been accepted by the Claimant.

The Claimant submitted that the Defendant breached various obligations relating to the quality and suitability of the glass cladding.

Decision

Mr Justice Stuart – Smith J, having assessed the issues in details, rejected the Defendant's arguments and found that the contract imposed separate obligations on the Defendant in addition to the obligation to heat soak, including that the glass was to have both design life and a service life of 30 years. He further found that as a matter of fact a substantial proportion of the glass had not been heat soaked in accordance with the requirement of the contract.

Accordingly, the Judge dismissed the Defendant's case and held that they were in breach of contract and therefore liable to pay substantial damages to the Claimant, including costs to reglaze the building, loss of rental and costs paid to third parties arising out of damages to the building of local businesses.

Fitness for purpose – Construction Contract

MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59

The Respondent party in this case was appointment under the design and build contract, to design, fabricate and install the foundations for 60 wind turbines for the Robin Rigg wind farm in Solway Firth in Scotland.

The contract included various general obligations such as, services to be formed with due care and diligence and works to be fit for purpose etc.

The contract also made reference to EON's Technical Requirements; a document which placed minimum requirements that were to be taken into account by the Contractor. Amongst other obligations, the Technical Requirements required for the foundations to be in accordance with a document known as J101 (this provides for certain mathematical formula to calculate aspects of the foundation structures). The J101 was intended to deliver a service life of 20 years.

The Respondent party performed the works in accordance with J101, but due to an error, the design did not have a service life of 20 years and failed. The parties agreed the cost of the remedial works in the sum of €26.25m. However, the dispute was left to the Court to decide which of them was liable and/or who bore the risk of an error in the J101.

Technology and construction court ("TCC") and Court of Appeal

At first instant, TCC held the Responding Party responsible for the remedial works as they failed to comply with the terms "fitness for purpose" and the "requirement the design life would be 20 years.

The Decision of the TCC was overruled by the Court of Appeal an EON was awarded nominal damages of £10 only. This is because the Court Appeal considered that the breach of a separate testing obligations would not have revealed the error in J101.

Supreme Court

The decision of the Court of Appeal was overruled by the Supreme Court and the Decision of the TCC was restored.

The Judgment was given by Lord Neuberger with which, Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge agreed.

It was held that there was a contractual duty that the design would give a lifetime of 20 years and this was breached by the Contractor. The foundation neither had a lifetime of 20 years, nor was the design fit to ensure one.

Fitness for purpose – breach of contract and breach of warranty

Williams Tarr Construction Limited v Anthony Roylance Limited, Anthony Roylance [2018] EWHC 2339 (TCC))

This case relates to a construction project based in Cheshire and the works on the site included construction of a retaining wall as the site was lower than the adjoining land, which was occupied by housing; and itself sloped markedly from South to North.

The Claimant was the main contractor who appointed Construction Site Services (UK) Ltd ("CSS") as their sub-contractor to design and install the retaining wall. The second Defendant was a chartered civil engineer and the first Defendant was a company formed by and controlled by him. The second Defendant provided civil engineering service in respect of the site, either in his personal capacity or through the first Defendant. There were no formal evidence showing direct engagement of either Defendants by the claimant.

The installation of the retaining wall was undertaken by the fist Defendant and during the course of the works a band running sand was encountered. This means the water flows behind the retaining wall were greater than had been anticipated. Later on, it was apparent that the problems were in the installation of the retaining wall. The response to these included the engagement of the defendants by the claimant in November 2010.

Key disputes

The claimant argued that defendants were engaged to design and provide a solution to the problems with the retaining wall, ensuring that the wall would be fit for purpose.

The Defendants submitted they were only asked to design a drain which would resolve the problem with the water inflow and that the engagement did not require either of them to put forward a solution to the problems with the wall let alone warranting that the wall would be fit for purpose. The second Defendant provided a design for a drain and there was no suggestion that the design was defective or deficient as a drain.

The Claimant successfully adjudicated against CSS contending that the deficiencies in the wall were the result of failures on the part of CSS in the course of construction and installation of the wall. However, the Claimant did not benefit from the Adjudication as CSS went insolvent following the Adjudication.

The Defendants submitted that the CSS insolvency was the true reason why the Claimant brought this claim against them and that they have done so towards the end of the limitation period in an attempt to find a solvent party from whom to seek compensation. The Defendants further summitted that the allegations made against them are inconsistent with the case which the Claimant asserted against CSS in the Adjudication.

Decision

HH Judge Eyre QC, upon hearing the parties and upon reviewing the witness evidence dismissed the claim and concluded that the "*November 2010 engagement was one whereby the claimant engaged the second defendant to design a new high level drain which was to be installed behind the Retaining Wall. The second defendant was obliged to exercise reasonable care and skill in that design. He was not, however, engaged either expressly or impliedly to design or to re-design the Retaining Wall nor did he warrant that after his works that wall would be fit for its purpose".*

Fitness for purpose – Singapore High Court

Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd [2019] SGHC 122.

The Plaintiff in this case owns and operates data centres in London, Paris, Amsterdam, Frankfurt, Madrid, Sydney and Singapore.

The Defendant is a firm of consultancy services for mechanical and electrical ("M&E") engineering systems.

In 2008, the Defendant was appointed by the Plaintiff as its M&E consultant for the extension to its data centre in Singapore for an agreed fee of $595,000.00. Dispute arose as the Defendant failed to design a system that meet the Plaintiff's need and the Plaintiff sued the Defendant for damages in excess of $23.8 million, general damages, interest and costs.

The Plaintiff's argued that the Defendant failed to comply with an implied term in the contract that required the Defendant to ensure that the design met the Plaintiff's needs and that it was fit for purpose.

The Defendant denied and submitted that the scope of work varied as the project developed. The Defendant for unpaid fees.

Decision

Having assessed the submissions, the Court considered two questions "fit for what purpose" and "for to what standard", and held that it was not clear whether the Plaintiff's "fitness for purpose" argument was asserted "as a matter if law or as a matter of fact".

Justice Quentin Loh declined to find an implied term in law and held that the case law relied on by the Plaintiff concerns the obligations of contractors and not the designers or M&E consultants. Justice Loh also declined to find an implied law in fact as the Plaintiff failed to establish legal requirement for such implication.

The Court rejected the Plaintiff's submission that it was an implied term of the Contract for the Defendant to ensure that its design was fit for their intended purpose. In doing so the Court said that an implied term for fitness for purpose would not have been necessary for business efficiency as the Defendant would already be under a duty to use reasonable care and skill in performing its contractual obligations.

The Plaintiff was awarded nominal damages of $1,000 only for the Defendant's breach of obligations regarding the provision of additional cooling. The Court allowed the Defendant's counterclaim for a total of $71,347.60.

Requirements of a Payment Notice, Adjudicator's breach of natural justice and severing part of an adjudicator's award

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)

Facts

A dispute over an interim payment application arose between Downs Road Development LLP (the Employer) and Laxmanbhai Construction (the Contractor);

During the project, the Employer sent out two payment notices during each payment period. In respect of the disputed interim application, the first payment notice was unrealistically low.

An adjudicator decided the Contractor was owed a net sum of £771,045.48.

The Employer commenced Part 8 proceedings, challenging the ability to enforce the adjudicator's award because the adjudicator had not addressed a line of the Employer's defence (in respect of the Contractor's installation of a capping beam). However, the Employer asserted the adjudicator was correct in his determination of the gross value of the payment application.

The Contractor argued that the adjudicator's decision was enforceable but that it is entitled to the sums applied for in its interim application. The Contractor also asked the Court to decide that the Employer's payment notices were invalid.

Decision

The Judge decided a Pay Less notice, and the knowledge that it can be used to subsequently alter the amount the Employer considers to be due, does not mean that a payment notice cannot conform to the provisions of the Contract and/or HGRCA 1996.

The Judge decided that the first Payment Notice was not a genuine payment notice because it did not comply with section 110(2)(a) of the HGCRA 1996 and was not a valid Payment Notice.

The Judge, in respect of if the adjudicator breached the requirements of natural justice, stated that the main consideration is if the adjudicator deliberately failed to address a material issue in the case.

The Judge concluded the capping beam contra-charge had been used as a defence in respect of how much was due under interim application 34, it was therefore relevant to the matter at hand. The Judge concluded the adjudicator should have addressed the capping beam defence.

As a result, the adjudicator's decision that the sum of £103,826.98 remained outstanding to the Contractor under interim application 34 was not enforceable. The reason being the contra-charge was worth £149,692.30 and the non-consideration of this meant the additional money awarded was not safe.

The judge noted that enforcement of part of an adjudicator's award may be possible. However, the court must consider the following:

- If the particular part of the award can be enforced separately from the rest of the decision in a safe manner;
- If the decision contains a series of decisions which can be separated from each other or if the award is one decision with a series of related considerations;
- The Court is not in a position to create an 'artificial result';
- The Court can enforce part of a decision, even if this has the effect of benefitting a party which was overall unsuccessful in the adjudication. However, this instance is likely to create an artificial decision.