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Construction Case Law Update

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Case 1

Dynniq UK Limited (Claimant) –v- Lancashire County Council (Defendant) [2017] EWHC 3173 (TCC)

- **Read the whole contract before you sign it.**

Background

Dynniq entered into a contract with Lancashire County Council (LCC) for:

a. The maintenance of traffic lights and associated equipment; and
b. The construction of new or replacement traffic lights and equipment.

The contract included a number of specific option schedules.

A dispute arose:

- Dynniq contended that whenever a Task Order was raised (i.e. a job) they were within their rights to charge a separate fee for traffic safety and management.
- LCC contended that this fee was already included in the overall price as per the terms of the contract.

Dispute

Schedule 9 of the contract was entitled "Units and Method of Measurement".

"(xxviii) Traffic safety and management within and/or adjacent to the Affected Property as described in clause 117 of MCHW Traffic safety and management shall only be separately measured under Series 101 when instructed on a Task Order by the Overseeing Organisation for the exclusive use by or for the benefit of the Overseeing Organisation for one or more third party…"

Overseeing Organisation = LCC

Dispute

Schedule 11 of the contract was entitled "Price List".

"Traffic safety and management shall only be measured under Series 100 when instructed on a Task Order by the Overseeing Organisation for the exclusive use by or for the benefit of the Overseeing Organisation or one or more third party."

Overseeing Organisation = LCC

Decision

"What matters is the objective meaning of the language used, to be derived from the natural usual meaning of the words in the contract, when seen against the background/context of the contract. Where there are rival interpretations, one test is to consider which interpretation is more consistent with business common sense."

The court found that the contract worked as follows:

a. Defendant (LCC) raises a Task Order;
b. The work that is the subject of the Task Order is measured and priced in accordance with the Price List.
c. The total becomes the sum due and payable to the contractor under the contract for performing the work in the Task Order. All of the prices in the Price List are deemed to include each of the matters referred to in the preamble (i.e. labour, taking delivery of plant, etc.)

Decision

What about Traffic Safety and Management?

(xxviii) of the Preamble and the Note at the start of Series 100 (in the Price List) can only have one meaning:

- The costs of traffic safety and management are generally deemed to be included in the prices in the other parts of the Price List.

What we learnt

- Read the contract.
- Just because you enter into this type of contract often, do not assume it is the same text each time.
- If you read something, and it does not make sense, do not ignore it.
- You can generally put whatever you want into a contract.

Case 2

Blue –v- Ashley [2017] EWHC 1928

- **The human capacity for wishful thinking knows few bounds.**

Background

- January 2013 Mr Tracy arranges for the five men to meet at 6:00pm for half an hour in the Horse and Groom for a couple of informal drinks.
- However, half an hour turned into an evening of drinking.
- An hour or so in…

Contract or no Contract – you decide

- Mr Tracy initiates a conversation about Sports Direct share price.
- Mr Clifton and Mr Blue both recall Mr Ashley pointing out that if Sports Direct share price doubled from the current £4 to £8, the company would have the same market capitalisation as Marks and Spencer.
- The topic arose of offering Mr Blue an incentive to achieve such an increase in the share price.
- Mr Ashley says…

- Mr Blue says…

Contract or no Contract – you decide

You guessed it – the share price hit £8 inside three years.

So was Mr Blue entitled to £15 million? Contract or no contract?

Decision

The trial judge conducted a review of the basic requirements for a binding contract:

1. **Offer and acceptance (an agreement)**
   - An agreement forms when an offer is made and accepted.
   - The intention of the offeror is therefore of paramount importance.
2. **Intention to create legal relations**
   - Even where a real offer is accepted, it does not necessarily follow that a genuine contract is created.
   - It is further required that both parties must have intended to create legally enforceable rights and obligations and not merely moral obligations.
3. **Consideration**
   - The law will not enforce a promise for which nothing has to be done in return.
4. **Certainty and completeness of terms**

Decision

There was an agreement reached between Mr Ashley and Mr Blue.

However the agreement reached would not have reasonably been understood as a serious offer capable of creating a legally binding contract.

No reasonable person would have thought the agreement was a serious one intended to create a legally binding contract and no one who was actually present did in fact think so at the time.

Case 3

Enviroflow Management Ltd –v- Redhill Works (Nottingham) Ltd (2017) (Ex tempore judgement)

- **Can you recover your adjudication costs?**

Background

- This was a payment dispute between Enviroflow and Redhill regards internet installation works.
- Enviroflow brought the matter to adjudication.
- The Adjudicator awarded Enviroflow £81,000 (plus interest), as well as its "reasonable costs" of recovering the debt, some £14,900.
- The sums weren't paid and so Enviroflow brought enforcement proceedings to enforce the debt.
- One of the issues the judge considered was whether the adjudicator had jurisdiction to award Enviroflow its costs of the adjudication.

Let's set the scene

- The Construction Contracts (Northern Ireland) Order **1997**
- Bridgeway Construction Ltd –v- Tolent Construction Ltd **(2000)**
- The Construction Contracts (Amendment) Act (Northern Ireland) **2011**
- The Late Payment of Commercial Debts (Interest Act) 1998 as amended by The Late Payment of Commercial Debts Regulations **2013**
- Lulu Construction Ltd –v- Mulalley & Co Ltd **(2016)**

Decision

What the judge is key:

"Accordingly, by reason of the 1998 Act, Enviroflow was entitled to seek its reasonable costs by reason of an **implied term**. However, such an implied term was caught by s108A of the 1996 Act (s7A of the 1997 NI Act) and was ineffective unless **an agreement had been made in writing.**"

On the facts, no agreement had been made in writing.

What we learnt

The perceived understanding of this is that while a party may have an **implied right** under the Late Payment Act 1998, the **express** provisions of the Construction Act 1997 require any agreement to comply with s7A, that it be made **in writing** and made **after the notice of an adjudication is given**.)

If you don't comply with the express provisions of one Act, you can't take advantage of the implied terms of another act.

Case 4

MT Højgaard a/s –v- E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59

- **Does a reasonable skill and care obligation prevail over other requirements? Depends on the contract drafting.**

Background

- E.ON (employer) engaged HØjgaard (contractor) to design and install the foundation structures of two offshore wind farms in the Solway Firth.
- The parties' contract contained a variety of provisions relating to the standard to which the foundations were to be designed and built by HØjgaard.
- HØjgaard (via its design sub-contractor) designed the foundations in accordance with J101. They even appointed the Norwegian agency to evaluate and approve its foundation designs.
- Within three years of their installation, the foundations began to fail.

Dispute

- Who should bear the costs of the remedial works? (26.5 million EUR)
- E.ON argued that HØjgaard should bear the costs, since the foundations did not have a service life of 20 years.
- HØjgaard argued that E.ON should bear the costs, on the basis that they had designed the foundations in accordance with J101, as required by E.ON's technical requirements.

Decision

1. The High Court decided in favour of E.ON.
   HØjgaard appealed
2. The Court of Appeal reversed the decision.
   E.ON appealed
3. The Supreme Court reversed the Court of Appeal's decision.
   Lord Neuberger re-asserted established case law in this area:

What we learnt

Contractors should be alert to negotiating their contracts so as:

- Compliance with a prescribed design will, of itself, be deemed sufficient to meet any separate obligation to achieve prescribed criteria.
- In the event of any inconsistency between the obligation to comply with a prescribed design and the obligation to achieve prescribed criteria, the former shall prevail.
- That the obligation to achieve prescribed criteria shall only apply to those parts of the project of which there is no prescribed design.

Case 5

North Midland Building Limited –v- Cyden Homes Limited [2017] EWHC 2414 (TCC)

➢ **Concurrent delay – deal with it.**

Background

- Cyden Homes Limited (Employer) employed North Midland Building Limited (Contractor) to build a sizeable house in the English Midlands.
- Cyden Homes Limited was the corporate vehicle through which the Dyson family chose to structure the different transactions involved in constructing the house.
- Cyden and North Midland agreed certain bespoke amendments to the standard form contract which was the JCT Design and Building Contract 2005.
- One of the amendments concerned the way in which extensions of time would be dealt with in the case of concurrent delays.

Dispute

- North Midland (Contractor) lodge various extension of time claims, grounded on different 'Relevant Events', one of which was the weather that caused delay.
- Cyden (Employer) replied citing various different delay events caused by North Midland (Contractor), such as the lighting to the main house, and the asphalt roofing.
- Some of these events overlapped and so we had "concurrent delay".
- What did the contract say about concurrent delay:

> *"…any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account."*

Decision

- The court found that the express wording was crystal clear, i.e. where there was a concurrent delay; the contractor had no right to claim for an extension of time.
- Timely reminder that that court will enforce what two parties have agreed – it will not reverse a 'bad bargain'.

What we learnt

- It pays to directly address the issue of concurrent delay in your contracts.
- Common law approach continues to evolve and brings with it a great degree of uncertainty, not to mention legal costs in pursuing or defending disputed time claims.
- There is far greater value in maintaining control and contracting for how concurrent delay will be dealt with from the outset.

Case 6

Imperial Chemical Industries Limited (ICI) v Merit Merrell Technology Limited (TCC)

- **Epic discussion and "smash and grab"**

Background

Matter decided in the TCC by Mr Justice Fraser:

a. 16 issues; and
b. Liability only (quantum trial to follow!)

89 page decision.

- ICI employed Merit Merrell under an NEC3 contract to carry out work in relation to the construction of a new paint manufacturing facility.
- It ALL went wrong!

Dispute

We are not going to go through all 16 issues

- Smash and grab adjudications
  - What are they? See *ISG v Seevic* case
  - What does this case say about them?

Decision

- In the ICI case, MMT has made two interim applications for payment for significant sume (£7m and £800k)
- ICI failed to issue any pay less notices in relation to those applications for payment
- MMT adjudicated twice and was awarded £7m and £800k

- The contract was then terminated meaning that there was no opportunity for ICI to use Clause 50.5 of the NEC contract to rectify the situation
  - Under 50.5 the PM can correct in subsequent assessments and wrongly assessed amount in earlier payment certificate.
- MMT argued that there was no mechanism in the contract or at law to "fix" the £7m and £800k even if they were overpayments
- Court disagreed and held that there is a right to look at payments again following termination or in the next payment cycle
- Caveat – fact specific and contract specific
- Addendum – notice of dissatisfaction?

How to avoid this issue

MAKE SURE PAY LESS NOTICES ARE ISSUED ON TIME

MAKE SURE PAYMENT APPLICATIONS GO OUT AT THE RIGHT TIME

Case 7

Autoridad del Canal de Panama –v- Sacyr SA and others [2017] EWHC 2228

- **Bonds, guarantees and arbitration.**

Background

- Owners/operators of the Panama Canal employed Sacyr to widen the canal.
- As part of the project structure there were 3 Advanced Payment Guarantees
- This case is really about what that means – what is an advanced payment guarantee?

Bond or guarantee?

- The difference between a bond and a guarantee
  - Guarantee
    - "See to it"
    - A secondary obligation – to get money, it must be first established that the contractor is in breach
    - Any defences that are contained in the underlying contract (and caps!) usually apply to the guarantee
  - Demand Bond
    - Primary obligation to pay
    - Stand-alone obligation to pay – just make a claim in the right way
  - Fraud / misrepresentation

How do you know a bond when you see one?

In this case, the Court provided the following helpful guidance:

- If the document isn't provided by a bank or other financial institution, general assumption that it is a guarantee and not a demand bond (unless you can demonstrate otherwise – clear wording and agreement on the point)
- Courts will consider it an on demand bond generally if
  - Issued by a financial institution
  - Relates to a contract in another jurisdiction
  - Contains the words "on demand"
  - Does not contain clauses excluding or limiting the defences available to the guarantor

Conclusion

If you're asked to procure a bond for a client, and the wording contains the word "guarantee" start asking questions.

Case 8

Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Limited [2017] EWHC 2197

- **What you meant to agree doesn't really matter if the drafting isn't clear**

Background

- NHS Trust employed a company to install and set up a computer infrastructure system
- Same old story – Trust alleged that there were defects in the system, company didn't fix them, NHS Trust terminated the contract
- NHS Trust had spent money on other kit, software and staff expenses in anticipation of having the new computer system in place. When the system didn't work, the Trust had obviously wasted this expenditure
- Defendant argued that there was a cap on liability in the contract that protected it against the Trust's claim

The Cap on Liability clause

- "The Liability of either party for Defaults shall be limited…for claims arising after the first 12 months of the Contract, the total Contract Charges paid in the 12 months prior to the date of that claim."

The Trust argued that the clause simply didn't work because the reference to "that claim" [singular] which defined the relevant 12 month period, was not defined or clear. They said it could not have been a reference to "the claims arising" referred to earlier in the clause because if that was the intention it would have said "each such claim" or something similar."

Decision

The Judge refused to strike out the cap but gave a helpful reminder as to how Courts look at contractual interpretation when the words are unclear, imprecise or plainly wrong

- KEY POINT which should be concerning:

> The test is objective and the actual or subjective intentions of the parties are irrelevant and must be disregarded;

Put another way – the courts don't care what you meant to write. The test is this...

The test

"What a reasonable person having all the background knowledge which would have been available to the parties would have understood them to have meant"

- So take care
- Get advice
- Don't be loose when drafting / or don't be drafting at all!

Case 9

Victory House General Partner Limited v RGB P&C Limited [2018] EWHC 102 (TCC)

- **Changing things as you go along? Be careful**

Background

- Victory House employed RGB to convert a former office building into an 87-bedroom hotel.
- The project became delayed and Victory House became very concerned about a specific item of work, namely getting a transformer installed
- The parties, in good faith at the time, signed (executed as a deed) a "memorandum of understanding" (this was the title on the document) which provided that:
  - Three payments would be made following the achievement of three milestones relating to the transformer, install, power on, testing and commissioning completion.

Dispute

- Victory House made the first two payments and while the transformer was behind time on the programme there were no issues at that point.
- Then the contractor made an application for payment under the underlying building contract.
- Victory House did not issue any payment or pay less notices in relation to that application for payment.
- The contractor launched a smash and grab adjudication at which point a more complex dispute arose as to how the "memorandum of understanding" inter-linked with the building contract

Pausing to take stock and consider the point

- The contractor argued that it was simply a memo of understanding and not binding at all – therefore no impact upon underlying building contract

- The Employer argued that the memo was a binding contract and superseded the payment provisions of the underlying contract

Any thoughts? Binding or not? Money to be paid or not?

Decision

Binding. However…

- Payless notice still needed if monies properly applied for – smash and grab – you can't apply early, but you can apply unjustly!

To learn:

- Take care to make sure that what you've agreed is what the other parties understands has been agreed.
- Think about how your agreement sits with other contracts
- What happens if things don't go according to plan
- Be clear and comprehensive in drafting
- Get advice or someone else to review drafting
- If in doubt, issue pay less notice!!

Questions?


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