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Eight takeaways of 2018

Manus Quigg
Brodies LLP
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Payment – Interim Accounts

- *S&T (UK) Ltd v Grove Developments Ltd*
 - The court considered the validity of a Pay Less Notice.
 - The employer can ask an adjudicator to look at into the true value of the works under an interim application even if they have failed to comply with the contractual notice provisions.
 - A second adjudication on the true value of an interim account is a different dispute to a “smash and grab” adjudication.
 - The employer can only exercise the right to raise an adjudication on the true valuation *after* it has paid the Notified Sum.

Payment Notices

- *Systems Pipework Ltd v Rotary Building Services Ltd*
 - Systems Pipework was engaged as subcontractor to carry out work in two stages.
 - On 17 May 2016, Systems Pipework emailed Rotary a revised final account and asked for a review.
 - On 2nd September 2016 Rotary provided Systems Pipework with a lengthy document described in the covering letter as the “*final account assessment for the works carried out on the above project by your company*”.
 - Under the contract Systems Pipework had 14 days to disagree with a final account notification, otherwise it was binding.
 - The question for the court was whether Rotary’s letter was sufficient to constitute a notification under the contract.

Payment Notices

- The court found that the 2 September 2016 assessment was not a notification because
 - it described itself as an assessment not a notification of the amount due;
 - it failed to specify the sum that was said to be due; and
 - failed to refer to the relevant clause in the contract.
- The court observed that:

“if a notice under a certain clause has a draconian effect pursuant to the contract, the notice should make it clear that it has been issued under that clause”.
- The court held that a Notice of Adjudication was sufficient to constitute dissent to the notification as required by the contract in any event.

Defects – design vs workmanship

- *SSE Generation Limited v Hochtief Solutions AG & Another*
 - The contract contained a fitness for purpose obligation on the contractor to build a tunnel that would not collapse for 75 years.
 - The contract also limited the contractor's design duties to those of reasonable skill and care.
 - There was a major collapse in the tunnel 6 months after handover.
 - The court held that the defect was not design related and the contractor complied with his reasonable skill and care duties.
 - The defect was linked to implementation of the design (workmanship).

Extensions of Time - Prevention principle

- *North Midland Building Ltd v Cyden Homes Ltd*
- The contract provided at clause 2.25.1.3(b) that:

“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 in relation to extension of time.”
- The court considered that the amended clause 2.25.1.3(b) was “*crystal clear*” in its meaning. It was unambiguous and plainly sought to allocate the risk of concurrent delay to NMBL.
- NMBL argued that the prevention principle would rescue them from the clause to which it had agreed.

Extensions of Time - Prevention principle

- The court rejected this argument for the following reasons:
 - The prevention principle was not an overriding rule of public or legal policy.
 - The contract included an entitlement to an extension of time in the event of an act of prevention by the Employer and so the prevention principle was not engaged.
 - The prevention principle had no obvious connections with the separate issues that may arise from concurrent delay.
 - Clause 2.25.1.3(b) was designed reverse the result in previous authorities which provided that a contractor was entitled to an extension of time for concurrent delay. Those authorities were unconnected to the prevention principle.
 - Most important of all - the amended clause was an agreed term. There was no suggestion that the parties could not contract out of the effects of the prevention principle.
- The court concluded that parties are free to amend the terms of the contract and allocate the risk of concurrent delay as they wish.

Adjudication and liquidation

- *Michael J Lonsdale (Electrical) Limited v Bresco Electrical Services Limited*
 - The contract was terminated and both parties claimed wrongful termination. After leaving site Bresco went into liquidation.
 - Bresco commenced an adjudication seeking payment for works completed and loss of profit.
 - Michael Ltd argued that the adjudicator had no jurisdiction and sought an injunction from the court to prevent the adjudication continuing.
 - The Construction Act 1996 gives a party to a construction contract the right to refer a dispute to adjudication "*at any time*".
 - However, the court decided that the right to adjudicate is not absolute, where the party referring the dispute to adjudication is in liquidation and the dispute includes any claim for monies to be paid to them.

Compensation Events

- *ICI v Merit Merrell Technology (MMT)*
 - The court considered whether it was competent for an employer to challenge a project manager's (PM's) assessment of a Compensation Event (CE).
 - MMT argued that where the PM has reached an agreement on a CE he has done so in his role as agent for the employer - it is not then open to the employer to renege on that agreement.
 - Similarly, the court could not revisit the assessment.
 - The court held that the contractual dispute resolution provisions empower an adjudicator to "*review and revise any action or inaction of the project manager*". The court cannot have less power than the adjudicator.
 - The court was required to consider the agreement reached on each CE to determine whether the parties had intended this to be the final position or an interim position.

Project insurance

- *Haberdashers' Aske's Federation v Lakehouse Contracts & Ors*
 - The court considered whether a subcontractor was a co-insured under a project insurance policy when other insurance was also in place.
 - Following a fire allegedly caused by one of Lakehouse's subcontractors (CPR), the project insurers made payment to the employer under the project policy and then sought to recover from CPR.
 - The insurance policy had an implied term which prevented recovery from a co-insured and that the insurance policy extended to subcontractors.
 - However, the subcontract between Lakehouse and CPR contained an express term requiring CPR to obtain its own insurance (which it did).
 - Since the subcontract expressly required CPR to obtain its own insurance, the parties never intended CPR would benefit from the project insurance.
 - CPR was not a co-insured under the project insurance.

Fairness in Adjudication

- *Equitix v Bester Generacion*
 - Equitix was a special purpose vehicle (SPV) set up to procure the design and construction of a biomass plant.
 - As a result of delays, Equitix elected to terminate the contract and submitted an interim account claiming c£11.5million.
 - An adjudication was raised as to the validity of the termination and the accuracy of the calculation. The adjudicator awarded Equitix c£9.8million.
 - Bester failed to make payment.
 - At enforcement proceedings Bester argued that there should be a stay of execution pending final determination of the sum due.

Fairness in Adjudication

- The court set out again the main principles to consider when deciding whether to grant a stay:-
 - Adjudication is intended to be a quick and inexpensive method of arriving at a temporary result
 - Adjudicators' decisions should ordinarily be enforced
 - The court must exercise its discretion having regard to points 1 & 2 above
 - The probable inability of a party to repay the sum awarded at adjudication may constitute "special circumstances" allowing the court to grant a stay
 - If the successful party to the adjudication is insolvent (or there is no dilute that they are insolvent) then a stay will be granted
- Given that the contract had been terminated, the interim account was in truth a final position and, following payment, Equitix would have no incentive to remain in existence.
- As a matter of fairness the court granted a partial stay in execution awarding Equitix just under half the sum awarded by the adjudicator.
- How will this work in Scotland?



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