



Dispatch

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

Duties of a project manager

The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd

[2012] EWHC 2137 (TCC)

Disputes arose between Ampleforth College and their contractor Kier Northern, which were settled through mediation. The project manager was TTPM. HHJ Keyser QC noted that there was an implied term of the contract between the Trust and TTPM that TTPM would exercise reasonable care and skill. It was common ground that TTPM owed to the Trust a substantially similar duty of care at common law. Following the "Bolam test", that duty is: "the standard of the ordinary skilled man exercising and professing to have that special skill".

The Judge also noted that it may be impossible in any event, to define with precision the expression "project manager". In general terms, a project manager will act as the representative of the employer for the purpose of co-ordinating the different aspects of a construction project. Here, there was no dispute that TTPM was engaged to perform the full range of duties of a project manager, and these included facilitating, assisting and being involved in the procurement of the building contractor and the building contract.

During the project, the works were carried out under various letters of intent. This meant that Ampleforth had not been able to claim any liquidated damages for delay against Kier. The Trust did not contend that TTPM was wrong to advise that the works be commenced under a letter of intent; it was accepted that, in view of the perceived importance of achieving early completion and, specifically, early commencement of the works, it was acceptable to advise commencing the works under a letter of intent rather than waiting until a formal building contract could be executed. However the Trust argued that TTPM should have advised the Trust:

- (i) Of the limited protection afforded to it by letters of intent as compared with an executed contract, in particular with regard to the availability of liquidated damages and the possibility of holding Kier liable for design defects;
- (ii) Of the increasing risk that the repeated issue of letters of intent would make it less likely that Kier would execute the contract; and
- (iii) Of the need to take resolute action to procure the execution of the contract by: (a) taking positive action to remove specific obstacles, (b) identifying, by list, all outstanding matters and maintaining constant pressure on Kier to address them; (c) bringing commercial pressure to bear at a senior level; (d) threatening to withhold payment until all the outstanding matters had been dealt with; (e) threatening not to issue further letters of intent.

The Judge noted that, TTPM in performance of their role acted as:

"co-ordinator and guardian of the client's interests; efforts to finalise the contractual arrangements were of central importance. The execution of a contract is to be seen not as a mere aspiration but rather as fundamental. It is the contract that defines the rights, duties and remedies of the parties and that regulates their relationships. Standard-form contracts, such as the JCT contracts, are precise, detailed and structured documents; their elaborate nature reflects the complexities of the projects to which they relate and attempts to address the many and varied problems that can arise both during the execution of the works and afterwards. By contrast, letters of intent such as those used in the present case are contracts of a skeletal nature; they pave the way for the formal contract, once executed, to apply retrospectively to the works they have covered, but they expressly negative the application of most of the provisions of the formal contract until it has been executed. They do not protect, and are not intended to protect, the employer's interests in the same manner as would the formal contract; that is why their "classic" use is for restricted purposes.

HHJ Keyser QC held that TTPM was not under any absolute obligation to procure the execution of a formal contract. However, even if the outcome in this case (a project carried on from start to finish without an executed contract) did not of itself dictate the conclusion that TTPM was negligent, it was sufficient to suggest that something went wrong with the project. First, the evidence showed that it is extremely unusual for a building project of this scale to proceed from commencement to completion pursuant to letters of intent. Why, then, was no contract signed? To suggest that a contract should have been in place no later than April 2004 was hardly to suggest unreasonable haste. Works had started in early December 2003; by the expiry of the fourth letter of intent construction had been going on for about four months, and the works covered by the letters of intent accounted for more than 25% of the contract price.

The Judge felt that TTPM had failed to take the steps reasonably required of a competent project manager for the purpose of finalising the contract and was therefore negligent and in breach of contract. In particular, approaching the situation on the basis of the repeated issue of letters of intent was not a proper response to the continuing difficulties regarding the execution of the contract: "it effectively treated the contract as a dispensable luxury". The Judge considered that TTPM failed adequately (i) to focus on the matters that remained outstanding before a contract could be signed, (ii) to work urgently to resolve those matters one by one, (iii) to advise the Trust of the need to ensure that a contract was signed, and (iv) to bring proper pressure to bear on Kier and on the situation generally to that end. That pressure would have included letting it be known that there would be no more letters of intent.



Procurement: limitation and tender caveats Turning Point Ltd v Norfolk County Council [2012] EWHC 2121 (TCC)

In December 2011 the Council invited Turning Point and others to tender, sending them the ITT which included a condition that the Council: *"will accept no caveats to proposals or variant bids..."*

Turning Point raised a number of questions on the ITT. The Council responded in January 2012. Despite this, Turning Point still considered that the information provided was inadequate or incomplete. Nevertheless, Turning Point submitted a tender, which included a Note on their pricing schedule stating that:

"...due to the lack of full and complete TUPE information, it is assumed that the restructure of staffing will be achieved through natural wastage and therefore we have assumed no redundancy costs. If redundancies were to occur, we would wish to enter into further discussions."

On 12 March 2012, the Council informed Turning Point that they had not been successful as their tender contained a qualification. Turning Point complained and on 28 March 2012 issued proceedings claiming that the information provided at the tendering stage was wholly inadequate and incomplete. The Council denied any breach of the 2006 Regulations and asserted that the proceedings were brought too late as they were not within 30 days of when Turning Point either did or should have become aware of the inadequacies (if any) in the tender information – as required by Regulation 47D. Mr Justice Akenhead held that the allegations relating to breaches of the 2006 Regulations were time-barred. He considered that Turning Point must have known of the inadequacies (if any) of the information by no later than 9 February 2012 when they submitted their tender to the Council. Turning Point had not issued their claim until 28 March 2012. Whilst the Court may extend the 30-day time limit, the Judge did not consider that there was any good reason to do so. He stated that:

"a good reason will usually be something which was beyond the control of the given Claimant; it could include significant illness or detention of relevant members of the tendering team."

With regard to the Note, Mr Justice Akenhead held that this was a clear qualification or at the very least a caveat; it was either an actual or prospective contractual document as, if accepted, it would have been incorporated into the subsequent contract. Had the Council accepted it, they would have been responsible for redundancy costs. The Judge did not consider that the Council should have sought clarification from Turning Point before rejecting their tender as the ITT had made it clear that there were to be no qualifications or caveats – a requirement which he considered was perfectly fair, reasonable and common. Furthermore, there was no express entitlement within the ITT for the Council to go back to tenderers on the pricing schedule for clarification – nor did he consider there to be an implied obligation for the Council to do so. This case provides another strict reminder to those seeking to make a claim that they must do so within the prescribed 30-day period and the Court is only likely to extend this time for a "good reason" – this being usually something which was beyond the control of the claimant.

Adjudication: equitable set-off Beck Interiors Ltd v Classic Decorative Finishing Ltd [2012] EWHC 156 (TCC)

CDF were engaged by Beck to carry out internal and external decoration works. Disputes arose and an adjudicator held that Beck was entitled to the sum of £36k plus VAT. CDF refused to pay arguing that the sum was not due as Beck owed CDF the sum of €60k relating to a projects in Dublin. Beck issued enforcement proceedings. CDF said that they were entitled to set-off against the adjudicator's decision sums they claimed were due under a separate contract in Dublin. In the absence of a contractual right to set-off, did CDF have any equitable set-off rights? Mr Justice Coulson held that the matters raised by CDF were not an arguable defence to Beck's claim for the following reasons:

- (i) The general principle is that it is rare for the court to permit the unsuccessful party in an adjudication to set-off against the sum awarded by the adjudicator some other separate claim. That would defeat the purpose of the Housing Grants Act;
- (ii) There are two possible exceptions; firstly where there were express set-off provisions in the contract, and secondly where the adjudicator did not order immediate payment; instead giving a declaration as to the proper operation of the contract;
- (iii) Neither of those exceptions applied here. There was no express contractual set-off provision in the subcontract and the adjudicator had told CDF to pay Beck *"without further ado"*.
- (iv) There remained the question as to whether CDF had any right of equitable set-off. Reference was made to the case of *Federal Commerce & Navigation Limited v Molena Alpha Inc* [1978] 1 QB 927 where Lord Denning said:

"It is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. It is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."

(v) CDF's cross claim concerned a contract in Dublin and did not arise out of the same transaction that lay behind the adjudicator's decision. They were different contracts, entirely different projects, in two separate countries (and therefore two separate jurisdictions) and in two separate currencies. CDF did not therefore have any entitlement to equitable set-off.

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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