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The construction & energy law specialists

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Dispatch

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

Disclosure of documents under an audit clause

Transport for Greater Manchester v Thales Transport & Security Ltd

[2012] EWHC 3717 (TCC)

The parties entered into a contract for the supply of a new tram operating system. Disputes arose and Thales submitted claims for increased costs and extensions of time. TGM made various requests to Thales for documentation. Thales refused to provide much of the material requested. TGM noted that the information was being sought in order to enable TGM to understand the basis upon which Thales had made its claims and to carry out a review of those claims. Clauses 27 and 28 of the contract provided that:

"27.1 The Supplier shall for a period of at least 12 years … maintain accurate, up-to-date and complete records relating to its obligations under this Agreement ("Records") (in a form suitable for inspection under clause 28) relating to the performance of its obligations under this Agreement including: (a) the acquisition and properties of all materials, parts and items of equipment included in the manufacture and/or supply of the Deliverables; (b) the design and/or the supply and installation of the Deliverables …

28.1 In addition to the information otherwise to be submitted or provided to [TGM] under any other provision in this Agreement, the Supplier shall submit to [TGM] or to any Auditor, or ensure that there is submitted to [TGM] or such Auditor, within such period as [TGM] or such Auditor may reasonably require (having due regard to the time and costs involved in providing such information but disregarding any costs of less than £100 per request), such other information, records or documents in its possession or control or in the possession or control of any auditors, agents or Sub-contractors as [TGM] or such Auditor may reasonably request (including any information requested from [TGM] by the Department for Transport) and which relates to the Records.

TGM brought Part 8 proceedings seeking some 53 types of document to which it asserted that it was entitled to access. The reasons given for the right to inspect were either "*to audit information supplied under the ... Contract*" or "*to verify that Thales has complied with its obligations under the... Contract*". Thales agreed to provide 33 of the 53 categories. Mr Justice Akenhead noted that TGM had a very real interest in determining the responsibility for the allegedly poor (or satisfactory) performance by Thales of its obligations under the Contract, as it may be established. This led the Judge to conclude that:

(i) The documentation which was disclosable, as required by the contract, by Thales included contemporaneous documents recording what Thales had done had or not done pursuant to the Contract.
(ii) This could include documents which recorded the cost of labour, materials, plant or suppliers. This was because it related to the performance of obligations. The fact that a cost had been incurred, say in respect of a team of engineers, demonstrated that there had been an attempt to perform the obligations.
(iii)The Judge dismissed the argument that as this was a fixed price contract, these records were immaterial.
(iv) It was not only the source or original contemporaneous records which have to be disclosed but also other related information and records. Documents, such as reports or internal audits, created after the events in question which had been recorded originally, which addressed previous events or matters otherwise recorded earlier, are linked to the supply of the Deliverables or the performance (or non-performance) by Thales of its obligations under the Contract.
(v) The request for documents or information must be reasonable and, if it is not, Thales did not have to comply with the request.
(vi) The request only had to be complied with if the purpose was either to enable TGM to vet information supplied under the Contract or to enable it to verify whether Thales had complied with its obligations.
(vii) The fact that documents which were otherwise discloseable under Clauses 27 and 28 were confidential was immaterial and could not be used as an excuse to withhold disclosure, although, once disclosed, TGM was required to comply with any confidentiality clause.
(viii) Purchase orders between Thales and subcontractors /suppliers, as well as records showing payments made to these groups, were disclosable, albeit that this category was not the subject of an Order;
(ix) Project specific board meeting minutes, including from the UK Board, were also disclosable - to the extent that they were in Thales' possession;
(x) The Judge also disagreed that internal design review minutes formed an unreasonably broad category. The quality and completeness of the design were factors which might impact upon progress.

However, certain of the requests were unreasonable. Certain categories were considered to be too broad, for example "*records that demonstrate to what standards the works for the Project have been installed.*" Further, requests relating to the departure of project directors were described as a "fishing expedition". The reasons why senior personnel move on may well be confidential, a factor to be taken into account where the request is for tangential information. It was common ground that advice given by lawyers would be privileged. However, subject to issues of privilege (which was not explored further in this case) project reviews which were carried out by consultants, on a regular basis, even though at a high level, were to be provided.

Of course, this case is entirely dependent on its facts and the specific wording of the audit clauses in question. However, it does serve as a useful reminder of the potentially wide scope of such clauses.

Adjudication: alleged breach of natural justice

Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi)

[2013] EWHC 87 (TCC)

Arcadis was employed by Sanofi to carry out "remediation" works at Sanofi's site in Dagenham. The remediations included soil washing, chemical treatment and off-site disposal methods in order to allow future redevelopment and use of the land for industrial purposes. The Contract incorporated the NEC3 Engineering and Construction Contract June 2005, as amended. Disputes arose and there were two adjudications. Sanofi sought to challenge a decision made by the adjudicator in the second. It was particularly concerned that the second adjudicator had been given and considered the decision of the first adjudicator. Sanofi said that the adjudicator "*took an erroneously restrictive view of his own jurisdiction, with the result that he decided that he was bound by Adjudication Decision 1 and by the first adjudicator's reasoning in Adjudication Decision 1*" and that Arcadis "*brought about the adjudicator's error by a misguided attempt to seek a tactical advantage or otherwise influence him*".

Mr Justice Akenhead had no hesitation in saying that it was neither improper nor contrary to the rules of natural justice for the decision in the first adjudication to be put before the second adjudicator. Arcadis had succeeded in the first adjudication in relation to very similar issues both in fact and in law. The first adjudicator's findings on what the contract meant were at the very least germane and could well be thought to be persuasive. The Judge felt that adjudicators must be trusted, generally at least, to be able to reach honest and intelligible views as to the extent to which such earlier decisions are relevant or helpful or not.

Indeed, on the facts, it was clear that the second adjudicator had decided the issues on their own merits and not (only or at all) because he felt that he was bound by the first decision. Further the Judge did not think that it was improper or wrong for Arcadis to put the first decision forward. The Judge thought that it would be a "rare case" in which the adjudicator's jurisdiction or conduct could be challenged in later enforcement proceedings because they looked at and considered any material put forward by either party.

It was also suggested that the adjudicator "went off on a frolic of his own" by "splitting the difference" on the quantum between an adjusted Arcadis forecast figure and the Project Manager's adjusted forecast figure. The Judge did not think this was a case in which it could be said that there was any breach of the rules of natural justice. Arcadis argued that the proper approach to quantification (subject to liability) was, contractually, to be based on what it did (or what should or could reasonably have been) forecast, whilst Sanofi argued that the value needed to be determined by reference to the work actually done and the actual cost. Both arguments were respectable and it was clear that the adjudicator formed the view that the forecast basis, that is the basis advanced by Arcadis, was the right one. Remember that it was not the role of the court to consider whether the adjudicator was right to do this. Having therefore decided that the forecast approach was right, the adjudicator looked at the possible forecast figures and, ultimately, he was drawn to Arcadis' figure and to the Project Manager's figure. Whilst the Judge described the act of "splitting the difference" as Solomon-like in its simplicity, the adjudicator was effectively choosing between two figures, both of which had an evidential basis. Crucially, he did not come up with some basis of assessment upon which the parties had not had an opportunity to comment.

Case update: costs and costs budgets

Henry v News Group Newspapers Ltd

[2013] EWCA Civ 19

We reported on this case in Issue 144. The question for Senior Costs Judge Hurst had been whether there was good reason to depart from the court-approved costs budget. The case was subject to the Defamation Proceedings Costs Management Scheme. Both parties had exceeded the budgets approved under that scheme. Those representing Henry had failed to comply with the terms of the Practice Direction, so that neither the Court nor NGN were aware of the significant increase in costs such that the budget was being exceeded. This led the Costs Judge to conclude, albeit reluctantly, that if one party is unaware that the other party's budget has been significantly exceeded, they are no longer on an equal footing, and the purpose of the cost management scheme is lost. There was therefore no good reason to depart from the budget. This decision has been reversed on appeal. The CA noted that on the facts of this case, there was good reason to depart from the approved costs budget. The CA decision is important for what it did not do. It is a decision handed down before the introduction, on 1 April 2013, of the new civil litigation costs reforms. These rules impose even greater responsibility on courts for the management of costs and proceedings. It is telling that LJ Moore-Bick added that the new rules will:

"impose greater responsibility on the court for the management of the costs of proceedings and greater responsibility on the parties for keeping budgets under review as the proceedings progress...they lay greater emphasis on the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so...I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake."

The April issue of Fenwick Elliott's companion newsletter Insight will provide full details of how the new costs rules will affect you.

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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