



Dispatch

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

Notice provisions

Bluewater Energy Services BV v Mercon Steel Structures BV and Others

[2014] EWHC 2132 (TCC)

One of the many cases Mr Justice Ramsey had to consider was whether or not Mercon had failed to comply with the notice requirements in clause 14 in respect of any claimed variations. The relevant clauses stated as follows:

"14.3 (a) If the CONTRACTOR considers that an occurrence has taken place for which it is entitled to receive a VARIATION, the CONTRACTOR shall request without delay in writing that BLUEWATER issue a VARIATION...

(b) If the CONTRACTOR fails to submit requests for VARIATIONS in accordance with Clause 14.3 (a) when it considers or should reasonably have considered that an occurrence has taken place for which it is entitled to receive a VARIATION and/or fails to provide supporting estimates in accordance with Clause 14.1, the CONTRACTOR shall, at the sole discretion of BLUEWATER, forfeit any right to receive such VARIATIONS and any rights concerning adjustment to the CONTRACT PRICE and/or SCHEDULE OF KEY DATES."

Bluewater argued that compliance with clause 14 was a condition precedent to recovery in respect of the disputed VORs. It was for Mercon to prove that, in respect of each disputed VOR, it complied with the requirements for notice or that, in respect of that particular VOR, Bluewater exercised its discretion unequivocally to consider the VOR in any event. Mercon raised a number of defences including that compliance with the administrative provisions of clause 14 was not a condition precedent.

Further, Mercon said that a refusal to consider a VOR only because there was a procedural defect in making it would not be a proper exercise of discretion and that the courts readily uphold notices that have achieved their purpose, even if there is some technical flaw. If a party's rights under a contract are contingent upon performance of an obligation, that obligation must be clearly set out. If there was any genuine ambiguity in the wording as to whether the notice requirement was a condition precedent, then it should not be construed as being a condition precedent.

Mercon also submitted that if it failed to submit a request or provide supporting estimates in due time, then it did not lose its rights to extra time or money but rather at the sole discretion of Bluewater, it would lose any right to receive such Variations and any rights concerning adjustment to the Contract Price and/or Schedule of Key Dates. The loss of rights for non-compliance with clause 14 was not automatic but a matter for Bluewater's discretion

and Bluewater did not say that it was entitled to and was exercising its discretion or that, it had any or any proper basis for so doing. Such a contractual discretion must be exercised for the proper purposes of the contract as noted by LJ Rix in *Socimer International Bank Ltd v Standard Bank London Ltd*.

Looking at clause 14 as a whole, the Judge considered that variations were a matter for Bluewater to issue, instruct or authorise. Clause 14.3(b) referred to Mercon failing to submit requests in accordance with clause 14.3(a) "when it considers or should reasonably have considered that an occurrence has taken place" or failed to provide supporting estimates in accordance with clause 14.4. However, the provisions as to the forfeiture of rights were subject to the qualification that the rights shall "at the sole discretion of Bluewater" be forfeit. The Judge agreed with Mercon that LJ Rix's decision about contractual discretion in *Socimer* therefore applied. The underlying purpose is that the discretion should not be abused. Rather, Bluewater's exercise of the discretion was limited, as a matter of necessary implication, by concepts such as honesty and the need for the absence of arbitrariness.

Here, the notice provisions were necessary, in the context of making adjustments to the Contract Price and Schedule of Key Dates, so that Bluewater as the decision maker had information in a timely manner so that it could properly assess those adjustments. In the view of the Judge:

"In such circumstances the absence of information given at a particular time may have no effect on Bluewater's ability to make those adjustments. It would clearly be an abuse for Bluewater to reject a request for a Variation or to seek to forfeit Mercon's rights to additional payment or an extension of time, merely because the information was not given "without delay" or some information was missing. To do so would mean that Bluewater was entitled to have work carried out for which Mercon would receive no payment and for Bluewater to cause delay and then also recover liquidated damages for that delay. No clearer case of abuse can be made out and would be contrary to the limitations on Bluewater's discretion in terms of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality."

Bluewater had not sought to justify any exercise of its discretion to forfeit Mercon's rights. It merely said that it was for Mercon to establish that it complied with the contract provisions. That was not sufficient. Bluewater should have decided whether to exercise its discretion to forfeit Mercon's rights to an adjustment. Mere lateness or lack of some information was not an adequate basis for doing so under the Contract.



PFI agreements and practical completion Laing O'Rourke Construction Ltd v Healthcare Support (Newcastle) Ltd & Others

[2014] EWHC 2595 (TCC)

The proceedings here arose out of the construction of facilities at two hospitals in Newcastle. The project was undertaken under a PFI scheme under which there was provision for an Independent Tester who had various functions of inspection and certification under the contracts. The works were to be carried out in nine phases. Phase 8 concerned two Clinical Office Blocks which Laing said was completed in mid-2012. However, the Phase Certificate of Practical Completion had not been issued by the Independent Tester. Laing therefore sought declarations in relation to the manner in which the Independent Tester was to act when deciding whether or not to issue such a certificate. For the past two years the blocks had stood empty. The Independent Tester identified five areas of the works about which the Trust had complained and which it, the Independent Tester, said were preventing it from issuing the necessary completion certificate. These included certain toilet areas which were said to be too small, insufficient daylight levels, the presence of certain structural steelwork and high-level windows that were said not to be shown in the drawings and should not be there, and a dispute about potential overheating.

The issue for Mr Justice Edwards-Stuart was whether the Trust was correct in asserting that any breach of contract relating to the quality or conformity of the works required the Independent Tester to withhold the completion certificate, or whether, as Laing said, all that was required was compliance with the Completion Criteria set out in the contract. Clause 22.5 of the Project Agreement said that:

22.5.1 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied, subject to clause 22A.3.4 that completion of a Phase has occurred in accordance with the Completion Criteria, issue a Phase Certificate of Practical Completion to that effect stating the date upon which, in his opinion, the Phase Actual Completion Date occurred ... The issue of a Phase Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining the relevant Payment Commencement Date, that the Phase Actual Completion Date has occurred on the date stated in such certificate.

22.5.2 The Independent Tester shall issue the relevant Phase Certificate of Practical Completion notwithstanding that there are Snagging Matters relating to such Phase ...

22.5.5 The issue of any Phase Certificate of Practical Completion in respect of a Phase shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects."

Laing submitted that clause 22.5.1 of the Project Agreement was absolutely clear in requiring the Independent Tester to issue the completion certificate if he was satisfied that completion of a Phase had occurred "in accordance with the Completion Criteria". There was no provision in the Project Agreement that required the Independent Tester to be satisfied that all the work had been carried out strictly in accordance with the contract before issuing a completion certificate.

Laing submitted that the building had to be fit for use and occupation consistent with the purposes for which it had been designed and built, as reflected by the provisions of the Project Agreement. A breach of the specification that did not have any materially detrimental effect on the amenity value and functional use of the building was not one that should prevent the issue of a completion certificate: still less, the existence of a dispute between the Trust and the Contractor as to what the contracts meant. The terms of the contracts did not prevent the Trust from making a claim for damages in respect of any nonconformity or defects that existed at the time of practical completion.

The Trust argued that if the Trust could identify any nonconformity with the terms of the contract and bring it to the attention of the Independent Tester, he would be bound to refuse to issue a completion certificate if he agreed that the nonconformity alleged did in fact exist. It did not matter whether the nonconformity would or would not adversely affect the amenity value or functional use of the offices.

The Judge considered that clause 22.5 required the Independent Tester to issue the completion certificate when he was satisfied that completion had occurred in accordance with the Completion Criteria. If the Independent Tester reasonably considered that a departure from the specification had not had and will not have any material adverse impact on the ability of the Trust to use the buildings for the purposes anticipated by the contract, then he may conclude that the Completion Criteria have been met. As a matter of business efficacy and commercial common sense, the Judge could not see any justification for importing a requirement that any breach of the specification, however technical or minor, must prevent the certificate from being issued.

The existence of a dispute about whether a nonconformity existed or prevented the offices from being taken into use as anticipated by the contract was not relevant to the exercise of the Independent Tester's judgment. He had to decide for himself, after having heard from the parties. If he concluded that the alleged nonconformity did not have or was not likely to have a materially adverse effect on the use of the building as contemplated by the contract, then he could issue the completion certificate and leave the Trust to its remedy in damages.

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