Fenwick Elliott
The construction & energy law specialists

Issue 181 July 2015

Dispatch

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

Adjudication and payless notices

Caledonian Modular Ltd v Mar City Developments Ltd

[2015] EWHC 1855 (TCC)

Caledonian sought the enforcement of an adjudication decision of just over £900k in respect of the non-payment of what was said to be an interim payment application made on 13 February 2015. Mar said that the claim was not made until 19 March 2015. If Mar was right, it was common ground that the payless notice of 25 March was within time and provided a complete defence to the claim.

Mr Justice Coulson explained why he was dealing on enforcement with an issue which had already been decided by the adjudicator. He said that the facts of this case were an exception to the general rule. If the issue were a short and self-contained point, that requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant might be entitled to have the point decided by way of a claim for a declaration. This is all in accordance with paragraph 9.4.3 of the TCC Guide. The Judge also stressed that this procedure will rarely be used.

Caledonian's interim applications 1-14 all followed the same format. They were accompanied by a letter which set out the detail of the interim application, the total amount due, the amount previously certified, and the net payment due. The letter also identified the date on which a payment notice was to be received and the date for final payment. The interim applications were made towards the end of each successive calendar month. The document attached to the letter was called an "application summary". In addition to providing a detailed breakdown of the sums, it also identified the "change in the amount due", in other words the net sum being claimed in the application.

On 30 January 2015, Caledonian issued application for payment number 15. This was in the same form as all the previous applications. On 5 February 2015, Mar sent, what was agreed was, a valid payless notice which had the effect of all but wiping out the sum claimed in application 15. On 12 February 2015, Mar sent an email concerned with the ongoing negotiations as to the value of the final account including the Combisafe scaffolding system. The next day, Caledonian sent a reply which concluded:

"Given your interim assessment below, please amend/update the current payment notice issued by Gareth [Waton] to take into account the interim assessed figure for the Combisafe hire of £125,792.87.

We ask that you review the instruction given on the variation 020 as issued and we have updated our account as attached."

This email, together with its attachments was said to amount to a new claim for an interim payment (No. 16) and/or a payee's notice to the same effect. The email enclosed three documents. The first was entitled "Final Account updated 13/2/2015". This document set out exactly the same figures as interim application 15 with the addition of extra over costs from the extended Combisafe hire. The second was a breakdown document in similar form to that attached to the previous interim applications, but with the words "Final Account" added immediately before the words "Application Summary". It still bore the words "Application number 15". The rest of the document included reference to it being based upon 28 day payment terms. The third document attached to this email was entitled "Variations to works after CSA Revision 10 December 2013". It included the Combisafe hire extra over in the sum of £6,643.25, but there was no document identifying a claim for £125,792.87 as mentioned in the 12 February email.

On 16 February 2015, Mar received by registered post the same three documents attached to the email of 13 February. As the Judge noted, Mar were "puzzled" as to what they were and so they asked: "Can you confirm who this was sent by and to what it pertains in regards to the standing of the account, is it just an update for information only?" Caledonian did not know the answers and sent a holding email to Mar saying they would look into it. Four days later, on 20 February, they replied saying this:

"Re: posted update of the account, there is nothing in the paperfile but I can see from looking at the e-file that James [Stimpson] did an update on the upstream fa and appln as a result of the change of proprietary scaffold dates – previous summary went past 8th".

Nothing further happened until 19 March 2015 when Caledonian sent Mars five different invoices, dated 19 March 2015, in the total sum of £1,524,903.37. Attached was a breakdown, which was a copy of the 'Final Account Application Summary' sent on 13 February. The figures were precisely the same. A week later, on 26 March 2015, Caledonian responded to that invoice and breakdown, attaching a payless notice, breakdown and supporting documents.

At the adjudication, Caledonian said that the invoice of 19 March was a default notice and that their original interim payment claim, now referred to as application for payment number 16, had been made on 13 February 2015. The adjudicator agreed, even though the application for payment was early in the payment cycle.

The Judge disagreed and said he had "no hesitation" in concluding that the documents sent on 13 February 2015 were not an application for an interim payment or a valid payee's notice. His reasons included:

(i) None of the documents stated that they were a new application for an interim payment. They said variously that they were a "final account application summary" and an "updated account". The interim application number itself (No.15) was the same as the one which had been the subject of a valid payless notice served just 8 days earlier, on 5 February;

(ii) The invoice of 19 March 2015 did not say that it was in some way a default payment notice or that the payee's notice had originally been provided on 13 February 2015. If that had been Caledonian's position, they would have said so in clear terms.

(iii) In between the email of 13 February and the invoice of 19 March, Mars expressly asked what the 13 February documents were. In the view of the Judge "*entirely unsurprisingly*" Mar were confused as to what, if anything, they were supposed to do with those documents. The explanation given made no suggestion that the documents of 13 February were in fact an entirely new interim application 16, or that a fresh claim had been made less than a fortnight after the last one and not at the month's end.

Caledonian had had three opportunities to say clearly that these documents were a new application for an interim payment and/or a payee's notice. Caledonian failed to do so. If Caledonian had intended to serve a valid payee's notice on 13 February, they could and should have said that that was what they were doing:

"It is also important to remember that the claimant's alleged entitlement to be paid £1.5 million odd as a result of the second adjudication does not stem from the underlying merits of their claim. Those have not been considered by the adjudicator. The alleged entitlement only arises because, if the documents of 13 February 2015 were indeed a fresh claim, no payless notice was issued in time, so the sum falls due automatically."

The Judge noted that recently following the amendment to the HGCRA, there had been a large increase in the number of cases where the claimant contractor argued that the employer had failed to serve its notices on time, which meant that there was an automatic right to payment in full of the sum claimed. Thus the failure to serve a payless notice within a short period challenging the payee's notice can have draconian consequences, usually meaning a full liability to pay: e.g., *Galliford Try Building Ltd v Estura Ltd* (Dispatch 178). However the Judge made the crucial point that:

"if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place."

That had not happened here. All of the previous applications for interim payments, properly set out the sum due by way of interim payment. It was not, therefore, as if Mar did not know how to meet the basic requirement of clarity. But on 13 February, Caledonian did not say, clearly or at all, that they were making a fresh application for an interim payment. Moreover, when asked what the documents were, Caledonian did not say that they amounted to a fresh claim for an interim payment or a payee's notice. It would therefore be quite wrong now to treat the documents of 13 February as if they were.

Further, it was "fair inference" that the 13 and 20 February 2015 documents did not say that this was a new application for interim payment because that was not how Caledonian themselves viewed those documents. All they were doing was arguing about the value of certain variations. This was an update of the final account, not a new interim payment claim or payee's notice. Whilst during final account negotiations it can be common for the contractor's account to be regularly updated, that does not mean that each update is a new claim for an interim payment.

Any suggestion that the documents of 13 February constituted interim application 16 would be wrong. The document was still called application 15 when it was sent out. This was not a typographical error, because no-one would have anticipated application 16 until at least the end of February. It was never in fact called application 16 until 19 March and, when it was, it was met with a valid payless notice. It was also wrong in law because interim application 15 had been provided only a fortnight earlier and had been the subject of a valid payless notice. No further interim application could validly be made here until the end of February, in accordance with the 28-day cycle that the parties had agreed and followed. Finally, the Judge in strong terms said that the suggestion that the documents of 13 February gave rise to an undisputed entitlement to over £1.5 million:

"[defied] common sense, and would be contrary to the purpose of the notice provisions in the 1996 Act. It is simply not permissible for a contractor to make a claim for £1.5 million (interim application 15 on 30 January); to have it knocked back through the payless notice mechanism; to update that same claim 8 days later by adding one small variation worth £6,000; and then, by reason of that update alone, miraculously to become entitled to the £1.5 million, despite the fact that the claim for the vast bulk of that sum had already been the subject of the valid payless notice.

Such a sequence would make a mockery of the notice provisions under the Act and the Scheme. It would encourage a contractor to make fresh claims every few days in the hope that, at some stage, the employer or his agent will take his eye off the ball and fail to serve a valid payless notice, thus entitling the contractor to a wholly undeserved windfall. The whole purpose of the Act and the Scheme is to create an atmosphere in which the parties to a construction contract are not always at loggerheads. I consider that the claimant's approach would achieve the opposite result."

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