

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

Dispatch

Adjudication – same dispute

Mailbox (Birmingham) Ltd v Galliford Try Building Ltd
[2017] EWHC 1405 (TCC)

This Part 8 case followed an adjudicator's decision which decided the extent of Mailbox's entitlement to an extension of time. Mailbox said that the decision finally established (subject to any subsequent challenge at court) Mailbox's entitlement to liquidated damages. In other words this meant that Galliford could not commence another adjudication about extensions of time in relation to a part of the works.

As Mr Justice Coulson explained, the case involved a clash of two principles. Once a crystallised dispute has arisen, a defending party in adjudication cannot seek to limit the defence previously advanced and in particular cannot save parts of that defence for another day. However, in a second adjudication, a contractor is entitled to defend themselves against a claim for liquidated damages by relying on a full extension of time claim, even though they have already made a limited extension claim in an earlier adjudication.

During 2015, Galliford made a number of applications for an interim extension of time across all the sections of the project. Whilst the Judge accepted that the issues raised in claims and correspondence referred "particularly" to section 1, the "whole tenor" of Galliford's claims went to delays and damages for delay generally.

Mailbox served notice that Galliford were not proceeding regularly and diligently, terminated the contract and claimed liquidated damages (LADs) in excess of £5 million. In August 2016, Mailbox served notice of adjudication framing the dispute as being about "Mailbox's entitlement to liquidated damages".

The Notice made reference to all the sections of the project. Galliford said in their adjudication reply that they would shortly be submitting a full extension of time submission and if Mailbox did not recognise their full entitlement, then separate dispute resolution proceedings would follow.

Galliford then asked the adjudicator to take account of three events in order to determine Galliford's entitlements to extension of time for them and to highlight Mailbox's "wrongful approach" to claiming LADs. No other relevant events were relied on by Galliford.

Mr Justice Coulson said this:

"In my view, this was an odd (and potentially risky) approach for GTB to adopt. None of the pre-adjudication correspondence had sought to limit their response to the claim for liquidated damages in this way: on the contrary..."

The Galliford approach failed to acknowledge that the detailed claims for extensions of time had been provided to Mailbox well before the termination and so were part of the crystallised dispute.

Mailbox said that Galliford were not entitled to cherry-pick various Relevant Events for the purposes of the current adjudication but then submit further applications for extension of time as and when they chose in separate proceedings or subsequent adjudication. Mailbox continued that the adjudicator had been asked to decide Mailbox's entire entitlement in respect of the totality of the liquidated damages. Galliford could not limit the adjudicator's jurisdiction to determine the dispute referred by limiting the defence which it put forward in the adjudication. If Galliford brought further adjudication proceedings seeking further extensions of time based on additional Relevant Events, then that would be an attempt to reopen the adjudicator's final and binding decision on responsibility for the entirety of the liquidated damages and consequential responsibility for delay.

Galliford said that as the adjudication response did not put before the adjudicator all the entitlements they had to adjust the Contract completion date, Mailbox were wrong to assert that the disputes submitted to the adjudication encompassed "a decision on the responsibility for the totality of pre-termination delays".

The adjudicator said that the dispute concerned Mailbox's claim for the payment of LADs from Galliford. As to jurisdiction, the adjudicator decided that the scope of the adjudication was determined by the matter stated in the notice and referral, and Galliford could not unilaterally restrict the scope merely by limiting the issues upon which they chose to run their defence. The adjudicator's decision that Galliford pay liquidated damages was enforced at the TCC. Mailbox then brought this case before Mr Justice Coulson. They did so because they suspected that Galliford were about to bring a second adjudication, which is what happened.

The second adjudication was about whether or not Galliford were proceeding regularly and diligently and was in part related to whether there was any entitlement to an extension of time. The extension of time sought would go well beyond that which was considered and granted by the adjudicator in the first adjudication. The adjudicator said that he was of the view that the first decision was only on the basis of the three relevant events. Therefore he could go on to consider the entirety of the Galliford claim.

The Judge considered the issues between the parties by examining first the claim for LADs, then the claims for extensions of time, and then the claim for wrongful termination. In terms of LADs, Mailbox were entitled to retain the entirety of the liquidated damages awarded by the adjudicator (and the subject of the enforcement judgment), unless and until the liquidated damages claim was challenged in court and the court reached a contrary view on the detailed claims. An adjudicator cannot sensibly decide an entitlement to liquidated damages without first deciding the contractor's entitlement to an extension of time.

In a case as here, where an employer's entitlement to liquidated damages has been fixed, a claim for an extension of time has become redundant.

In the pre-adjudication correspondence, Galliford had talked generally about their entitlement to extensions of time. The Judge recognised that at the time of the adjudication, Galliford's detailed claims for an extension of time were more advanced on some sections than others. That was not uncommon. But this did not mean that the crystallised dispute did not encompass all aspects of delay, across all the sections of the work. This was the key point here.

Given that the crystallised dispute between the parties concerned responsibility for the entirety of the delays, Galliford were not entitled to seek to defend themselves by reference to just a few of the potential relevant events, and keep others back for another day. The Judge noted that Galliford could have put forward more than the three events, even if they might not have been finalised. Instead Galliford chose to stick with what the Judge called "a high-risk policy" of attempting to dictate which of their extension claims were in and which were not. In the event, that proved to be an unwise course.

Accordingly, Galliford were not entitled to seek any further extensions of time in the second adjudication. However, that left the question of whether Galliford were proceeding regularly and diligently with the work or not. Here Mailbox were wrong to suggest that because an extension of time had been fixed, the issue of the regular and diligent performance of the work could only be considered by reference to that finding. Galliford ought to be entitled to take whatever points they choose about their regular and diligent performance of the work because these were not matters which the adjudicator had to or could consider in the first adjudication. In respect of the termination dispute, Galliford were entitled to rely on all the facts and matters available to them to demonstrate that they were proceeding regularly and diligently with the work at the time of the termination.

Claims management

Ais Pipework Ltd v Saxlund International Ltd
[2017] EWHC 1523 (TCC)

As part of an application for summary judgment, HHJ Grant had to consider a contractual regime for making applications for payment. In applications for summary judgment, a court is asked to dismiss a claim (or part of a claim) on the grounds that a party has no real prospect of success. The court does this by considering the pleaded cases and will not cross examine witnesses. In the case here, the Judge made one or two useful observations about the extent to which the parties had followed the contractual requirements when presenting payment applications.

In the box headed "Description of goods" were the words "All invoices for dayworks to be accompanied by signed weekly timesheets". The purchase order did not stipulate by whom the weekly timesheets were to be signed, although it was accepted that it was more probable that they would be signed by the applying party. In the box headed "Terms of payment" was the sentence "All payments to be made 35 days from the end of the month in which the approved invoice and any supporting documentation is received". The purchase order did not stipulate who was to approve the invoice. Again, it was accepted that it was more probable that invoices would be approved by the paying party. A potential issue was that it was for the claiming party to ensure that invoices were accompanied by weekly timesheets which it had signed. However here, it was accepted that the invoices were presented without weekly timesheets. The court did not have an explanation about why the contractual machinery was not followed.

This failure to follow the contract machinery was one reason why a full hearing was required.

Service of adjudication proceedings

Lobo v Corich & Anor
[2017] EWHC 1438 (TCC)

Issues sometimes arise about whether adjudication proceedings have been properly served. The comments of Mr Justice Stuart-Smith here, whilst dealing with an extreme case, provide some helpful guidance.

Section 115(3) of the Housing Grants Act 1996 requires service "by any effective means". This is not the same as the formal requirements of the CPR in relation to service of documents for the purposes of legal proceedings. Effective service does not of itself mean that the party to be served must come to know of the adjudication: if a notice or other document is addressed, pre-paid and delivered by post to the addressee's last known principal residence it shall be treated as being effectively served. Clause 1.7.3 of the contract in question (JCT Intermediate) provided that notices may be given or served "by any effective means" and that notice shall be duly given if delivered by hand to the recipient's address stated in the contract particulars or to such other address as the recipient may from time to time notify to the sender.

The address noted in the contract particulars was 7 Gunter Grove. Corich had not notified any other address as provided for by clause 1.7.3.1 and so 7 Gunter Grove remained the contractual address for the service of notices. This was the case, even though Corich had said in an email (sent after the contract had been terminated) that he would not receive documents that were sent there.

To meet that potential difficulty, Lobo had also served the Notice on 25 Gunter Grove which was an effective address for service because Lobo was able to demonstrate that it was Corich's most consistent and reliable address throughout the relevant period. It was also an effective address because Corich received the Notice even though, on the evidence, he took the conscious decision not to look at it.

Further, Lobo agreed to Corich's request that all correspondence should be copied to him by email and the Judge held that if it had been necessary to do so, he would have held that the sending of the Notices to Corich by email at his request was sufficient to comply with clause 1.7.2, being the electronic supply of documents as requested by the party in question. This too would have constituted effective service under the Act.

Accordingly, here the Adjudication Notice had been effectively served and the adjudication was properly constituted, with due notice being given.

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Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986

Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN



www.fenwickelliott.com