FENWICK ELLIOTT

The construction & energy law specialists

Issue 286 – April 2024

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

Dispatch

Conclusivity clauses

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd

[2024] EWHC 591 (TCC)

Judge Nissen KC explained that the key issue here was the interplay between a "*conclusive evidence*" provision, and adjudication proceedings issued for the purposes of preventing that provision from taking effect. The contract was the JCT Design & Build Subcontract Agreement 2011, as amended.

Following practical completion, on 21 October 2022, the construction manager provided a statement of the Final Sub-Contract Sum. On 21 November 2022, QFS gave notice that it disputed the content of that statement in its entirety. QFS started three adjudications within a short space of time, No. 8 on 25 November, and Nos. 9 and 10 on 15 and 16 December 2022.

On 19 December 2022, QFS issued another Adjudication Notice. The dispute referred was: "*the calculation of the Final Sub-Contract Sum i.e., the true value of the Final Sub-Contract Sum.*"

QFS calculated the Final Sub-Contract Sum at £71,587,425 plus VAT. On 22 December 2022, the contract manager issued a Final Payment Notice identifying a Final Sub-Contract Sum of £31,041,884 excluding VAT. BPS claimed that this Final Payment Notice had become evidentially conclusive.

The judge noted that clause 1.8.1 provided that a Final Payment Notice was conclusive of various matters listed unless clause 1.8.2 ("*the saving provision*") was engaged. The saving provision was engaged if (amongst other things) adjudication proceedings were commenced prior to or within 10 days after the receipt of the Final Payment Notice. Adjudication No. 11 was commenced a few days before receipt of the Final Payment Notice. Accordingly, in theory, the saving provision was engaged. However, the Referral was not served within seven days, but in May 2023. As a result, BPS claimed that the Final Payment Notice had become evidentially conclusive.

What happened was this: In light of the three ongoing referrals, there were concerns about the timing of Adjudication No. 11. The parties therefore agreed that QFS was obliged to serve the Referral on 13 January 2023 unless an unforeseen or unforeseeable reason arose which precluded service on that date. If that happened, there would be an extension to deal with the issues that had arisen.

This was a mutually agreed variation to the Sub-Contract for which there was consideration, namely that BPS would not argue that the prosecution of the adjudication in accordance with the original timescale would give rise to a breach of natural justice.

QFS did not serve the Referral on 13 January 2023. QFS was, therefore, in breach of its obligation to serve the Referral on that date. No explanation for delay was given by QFS at the time. On 31 January 2023, QFS said that it intended to issue its Referral in another two weeks or so. It still gave no reason for the further delay. BPS gave notice to QFS that it now required service of the Referral within a reasonable time. That did not happen. Therefore, the prosecution of an effective adjudication based on the Notice dated 19 December 2022 was bound to fail because QFS had not served its Referral by the agreed date.

BPS said that, as a result, the proceedings validly commenced by the Notice of Adjudication dated 19 December 2022 had reached a conclusion. Therefore, the proceedings were a nullity and so concluded. They had come to an end, but the Final Payment Notice remained unchanged as there was no decision or settlement which impacted upon it.

QFS said that clause 1.8.2 did not require a decision, award, or settlement in order for the first part of the saving provision to be effective. Proceedings only reached a conclusion once and if there had been either a decision or a settlement. When that occurred, the Final Payment Notice took effect subject to those matters. Here, the adjudication proceedings were concluded by the decision issued in September 2023.

The judge said that clause 1.8.2 worked like this. The first phase of the saving provision in clause 1.8.2 was engaged upon the commencement of relevant proceedings and continued to apply until the subject matter of proceedings had been concluded. Then the second phase of the saving provision was applicable. Clause 1.8.2 used the expression "subject matter" in respect of the scope of that which was, pending a decision or settlement, not caught by the conclusive evidence. This showed the importance placed by the contracting parties upon the content of the underlying dispute. The clause, as a whole, contemplated that proceedings had to be commenced and, thereafter, concluded, albeit, the parties did not intend that the first phase could continue to infinity.

In the context of clause 1.8.2, "conclusion" meant either a decision, award, or judgment (as appropriate) or a settlement. Therefore, a "conclusion" did not include the ending of an adjudication, which has become a nullity. As set out in the first part of the saving provision, the Final Payment Notice did not have conclusive effect in relation to the subject matter of those adjudication proceedings pending their conclusion. The judge noted that:

> "*The conclusive effect of the Final Payment Notice will have been challenged by the commencement of proceedings and, pending their conclusion, there is no conclusive effect given to the Final Payment Notice in respect of its subject matter. That is what the first phase of the saving provision says. However, one way or another the proceedings which have been commenced will yield a conclusion, thereby engaging the second phase, unless they have been abandoned in the meantime.*"

What mattered was that the decision was responsive to the subject matter of the dispute raised within time in respect of the Final Payment Notice.

The consequence of this was that, although the adjudication started on 19 December 2022 became a nullity because QFS failed to serve its Referral by the date which had been agreed, it had no bearing on the question of whether the adjudication proceedings had reached a conclusion.

> "*Standing back, I consider this outcome strikes the right balance between, on the one hand, recognising the benefits of a conclusive evidence provision ... and, on the other hand, allowing a true value of the works to be undertaken and paid for on the other. BPS had known that the Final Sub-Contract Sum was in dispute even before the Final Payment Notice was issued. In accordance with clause 1.8.2, QFS had challenged the Final Payment Notice within time. From that moment, BPS will have understood that it could not, by that shortcut, obviate the need for the parties to investigate the true value of the account. That exercise was duly undertaken by the adjudicator.*"

However, if the adjudication proceedings which had been timeously commenced pursuant to clause 1.8.2, were subsequently abandoned, then the saving provision would fall away.

Here, the judge noted that the principal reason that QFS did not serve a Referral on 3 February 2023 was because it erroneously concluded that it did not need to. It was not because it intended to abandon the adjudication proceedings commenced on 19 December 2022. Further on, 3 February 2023, BPS proposed a without prejudice discussion to settle the account. Throughout the exchanges which followed, QFS made it clear that they intended to pursue Adjudication No. 11 unless a settlement could be reached.

The discussions ended on 5 May 2023 when QFS said that they were going to reissue Adjudication No. 11. This was done on 10 May 2023. The Notice was in materially identical terms to the December Notice of Adjudication and advanced the same dispute as the first Notice. It could not be said that QFS was dragging its heels or that BPS was dissatisfied with the speed at which the discussions were taking place.

The result of all this was that the judge enforced the adjudicator's decision, reached in September 2023, awarding QFS some £3.2 million.

When can you make a claim under the UCTA?

South East Water Ltd v Elster Water Metering Ltd

[2024] EWHC 620 (TCC)

SEW brought a claim to recover losses consequential upon the failure of automated meter reading electronic units. One of the issues that arose was whether, or not, SEW had a real prospect of showing at trial that it dealt with Elster on the latter's standard terms of business, which would bring into play an argument that part of the terms (to be found in Sched. 11) were unreasonable in accordance with the Unfair Contract Terms Act ("UCTA").

HHJ Davies noted that the approach to be taken – following the CA case of *African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845 – was that:

(a) The onus of proof is on the party seeking to rely on UCTA to prove that:
   - (i) the term is written;
   - (ii) the term is a term of business;
   - (iii) the term is part of the other party's standard terms of business; and
   - (iv) that the other is dealing on those written standard terms of business.

(b) For a term to be a part of the other party's standard terms of business, it has to be shown that that other party habitually uses those terms of business. It is not enough that they sometimes do and sometimes do not.

(c) "*A party who wishes to contend that it is arguable that a deal is on standard business terms must, ... produce some evidence that it is likely to have been so done. This cannot be difficult in a proper case since anonymised requests about prospective terms of business can be made and participants in the credit market may well have knowledge of how particular lenders go about their business. It cannot be right that any defaulting borrower can just assert that business is being done on standard terms and that the lender then has to disclose the terms of other (how many other?) transactions he has entered into before he is entitled to summary judgment.*"

Applying that general approach, which the Judge said could not be said to be specific to the particular market in that case, the credit market, the same onus of proof rested upon SEW.

Here, the evidence that had been adduced was consistent in suggesting that Elster did not habitually use Sched. 11, the subject of SEW's complaint. This was, in the words of the judge, "fatal" to SEW's case. SEW had to either produce some evidence that Elster did habitually use Sched. 11 at the time or some evidence showing grounds for a belief that such evidence is likely to be available at trial.

Whilst what evidence is required in any individual case is, of course, fact-specific, here the Judge considered that SEW could have at least attempted to do so by way of enquiry of other contracting water companies / utilities. There was no evidence that this had been attempted or reason to think that such companies would have had any good reason not to assist if they had been approached and able. Instead of SEW raising the issue, it was Elster who, by providing disclosure of other transactions, demonstrated that it did not habitually use Sched. 11 in similar transactions at around the same time.

Even though this dealt with the UCTA question, the judge also noted that even considering the "objective interpretation" of Sched. 11, its meaning was plain and obvious from the clear words used. The clause was intended to have the effect of limiting SEW's entitlement in respect of any claim in relation to a faulty AMR unit identified in operation to the cost of an equivalent replacement device and any incidental costs to the warranty. It was in the view of the judge:

> "*frankly, hard to see how its wording could have been improved in terms of conveying its intended effect to the intended reader. It has the undoubted merit of simplicity and clarity instead of being concealed in a thicket of legal boilerplate.*"

Further, the manner in which the relevant term was incorporated and brought to the attention to the other party was a very significant factor. This was not a term buried in a mass of small print. It was introduced quite openly in a letter written in response to a request for clarification during the course of contract negotiations.

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.

Dispatch is a newsletter and does not provide legal advice.

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