FENWICK ELLIOTT

The construction & energy law specialists

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

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Dispatch

Net Zero

Transport Action Network Ltd, R (On the Application Of) v Secretary of State for Transport

[2021] EWHC 2095 (Admin)

This case was a challenge by judicial review to the decision by the Secretary of State for Transport ("SST") to set the "Road Investment Strategy 2: 2020-2025" ("RIS2"). The case was brought by TAN, a not-for-profit company, that campaigns for "more sustainable transport." Section 3(5) of the Infrastructure Act 2015 requires the SST, when setting a road investment strategy, to: "*have regard, in particular, to the effect of the strategy on (a) the environment*". To succeed, TAN needed to show that the decision was irrational; in other words, a decision which was beyond the range of rational responses to a given set of circumstances or information, or one which was based upon flawed logic. TAN said that the SST did not comply with that obligation, failing to take into account the effect of the strategy on achieving amongst other things:

(i) the objective of the Paris Agreement for State Parties to reach peaking in green-house gas ("GHG") emissions as soon as possible and to achieve "rapid reductions" thereafter in accordance with best available science; and

(ii) the net zero target for the UK in 2050 contained in s.1 of the Climate Change Act 2008 (CCA 2008).

The Paris Agreement, adopted on 12 December 2015 and ratified by the UK on 17 November 2016, provided that countries should hold the increase in global average temperature to: "*well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels*". Mr Justice Holgate noted that the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that the Agreement objectives were met. The specific legal obligation imposed was to meet any target communicated by the state in question. In order to reflect the change in temperature target set by the Paris Agreement, the CCA 2008 was amended to read: "*(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.*"

In short, Article 4.1 of the Paris Agreement seeks to achieve net zero globally during the second half of the twenty-first century and the UK committed itself to achieving that target by 2050. Mr Justice Holgate noted that:

Article 4.1 of the Paris Agreement acknowledges that some human activities will always generate GHG. Other actions can remove GHG from the atmosphere, such as the planting of trees and carbon capture and storage. The long-term goal of the Agreement is a balance between anthropogenic sources of GHG emissions and the removal of such gases by 'sinks'. That in effect is what is meant by net zero."

The Judge also referred to the case of R (Friends of the Earth) v Heathrow Airport [2020] UKSC 52 where the Supreme Court held that: "*the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that the objectives of the Agreement were met*". This meant that the Paris Agreement was not to be considered an obviously material consideration and so the SST had had a discretion as to whether or not to take it into account. In fact, the Judge said that the net zero target had "*plainly*" been taken into account in the setting of the RIS 2. The legislation required that the SST set an investment strategy to have in regard to its effect on the environment, without any specific reference to climate change.

The real issue for the Judge raised by this challenge was whether the SST failed to take into account implications for the net zero target in s.1 of the CCA 2008 and carbon budgets leading towards that target. Were these obviously material considerations to which he was legally obliged to have regard. The Judge held that the SST would have known of challenges and difficulties facing the road transport sector regarding climate change, and also the: "*policy commitment to reduce GHG emissions in the transport sector overall 'further, faster'*". What mattered here was that the SST was considering the adoption of a national policy at a high strategic level for the purpose of public investment. He was advised of the impact of the programme on the net zero targets but that did not mean that the SST needed to be shown the supporting numerical and other analyses. The Judge did note that:

"Some people might think that it would have been better if the SST had been supplied with at least some of that analysis and that that would not have involved overburdening the Minister. However, this was not the test for a public law challenge."

It is likely that there are going to be an increasing number of court cases relating to net zero and other environmental concerns, some of which will be of more direct relevance to the construction industry, and Dispatch will continue to keep an eye on these. For example, on 21 July, construction minister, Anne-Marie Trevelyan, noted that:

"It's likely that, going forward, government tenders will place greater emphasis on climate change. We have made it very clear that whole-life value rather than upfront cost is key, and carbon impact is a critical element in assessing broader value."

Liquidated damages

Triple Point, Inc v PTT Public Company Ltd

[2021] UK SC 21

We reported on this case in *Issue 226*, where Sir Rupert Jackson in the CA reviewed the general principles concerning the operation of liquidated damages clauses in termination or abandonment cases. He noted that, where the contractor fails to complete and a second contractor steps in, three different approaches had emerged:

(i) the clause does not apply;
(ii) the clause only applies up to termination of the first contract;
(iii) the clause continues to apply until the second contractor achieves completion.

He further noted that, whilst the textbooks tend to treat category (ii) as the orthodox analysis, this approach was not "free from difficulty".

At first instance, the TCC had held that PTT was entitled to recover (i) the costs of procuring an alternative system; (ii) wasted costs, but subject to a cap of US$1,038,000; and (iii) liquidated damages for delay pursuant to Article 5.3, totalling US$3,459,278.40, which were not subject to the cap.

Ultimately, the question whether a liquidated damages clause ceased to apply or continues to apply up to termination, or even conceivably beyond that date, depended upon the wording of the clause itself. There was no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss. Sir Rupert Jackson considered the relevant clause had no application here where the contractor never hands over completed work to the employer. The consequence of this analysis was that PTT was only entitled to recover liquidated damages of US$154,662 in respect of Triple Point's delay of 149 days in completing stages 1 and 2 of Phase 1. This did not leave PTT without a remedy for non-completion. Those damages were at large, rather than fixed in advance, and PTT would be entitled to recover damages for breach of other articles in the contract, assessed on ordinary principles.

PTT appealed to the Supreme Court. The key issue was whether the liquidated damages clause, which provided for liquidated damages to be paid for each day of delay by the contractor "*from the due date for delivery up to the date [the employer] accepts such work*", meant that liquidated damages were payable in respect of work which had not been completed before the contract was terminated. Lady Arden rejected the CA's analysis (or "*their radical re-interpretation of the case law on liquidated damages clauses*") noting that the CA had departed from the generally understood position that, subject to the precise wording of the clause, liquidated damages would accrue until the contract was terminated. It is only at that point that the contractor becomes liable to pay damages for breach of contract. Lady Arden noted that the CA's approach was:

"*inconsistent with commercial reality and the accepted function of liquidated damages. Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract.*"

The Supreme Court also had to consider whether damages for Triple Point's negligent breach of the contract were within the liability-cap which excluded "*fraud, negligence, gross negligence or wilful misconduct*". The court ruled that "*negligence*" meant damages flowing from a breach of contractual duty to exercise reasonable skill and care and so were not subject to the cap. However, the claims for liquidated damages were subject to the cap as the clause included the words: "*Except for the specific remedies expressly identified as such in this contract*".

Adjudication & collateral warranties

Toppan Holdings Ltd & Anr v Simply Construct (UK) LLP

[2021] EWHC 2110 (TCC)

THL sought summary enforcement of an adjudication decision. Simply said, the Adjudicator did not have jurisdiction to decide the dispute because the contract in question, a collateral warranty, was not a "*construction contract*".

In the case of *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* (*Dispatch 159*), Mr Justice Akenhead had said that the collateral warranty in question was to be treated as a construction contract. He noted that the recital to the warranty set out that the underlying construction contract was "*for the design, carrying out and completion of the construction of a pool development*" and that clause 1 of the warranty related expressly to carrying out and completing the Works. Further, clause 1 contained express wording whereby LOR "*warrants, acknowledges and undertakes*":

"*One should assume that the parties understood that these three verbs, whilst intended to be mutually complementary, have different meanings. A warranty often relates to a state of affairs (past or future); a warranty relating to a motor car will often be to the effect that it is fit for purpose. An acknowledgement usually seeks to confirm something. An undertaking often involves an obligation to do something. It is difficult to say that the parties simply meant that these three words were absolutely synonymous.*"

The collateral warranty here did not include the verbs "*acknowledges*" or "*undertakes*". Simply warranted that:

(1) It "*has performed and will continue to perform diligently its obligations under the Contract*";
(2) In carrying out and completing the works, it "*has exercised and will continue to exercise*" reasonable skill, care, and diligence; and
(3) In carrying out and completing any design for the works, it "*has exercised and will continue to exercise*" reasonable skill, care, and diligence.

Deputy Judge Bowdery QC, whilst noting that the collateral warranty referred to both a past state of affairs and future performance, did not consider that it could be construed as a "*construction contract*". It was not an agreement for "*the carrying out of construction operations*". Mr Justice Akenhead had accepted that not all collateral warranties would be agreements for the carrying out of construction operations. For example, in *Parkwood*, the warranty was executed before practical completion which meant it partly related to future works.

Here, the collateral agreement was executed, 4 years after practical completion, 3 years 4 months after the Settlement Agreement, and 8 months after the remedial works had been completed by another contractor. The only matter left after the Settlement Agreement was any potential liability for latent defects. The only latent defects discovered after the date of the Settlement Agreement were defects which had been remedied months before the collateral warranty had been executed.

Therefore, the Judge considered that, where a contractor agrees to carry out uncompleted works in the future, it will be a very strong pointer that the collateral warranty is a construction contract, and the parties will have a right to adjudicate. However, where the works have already been completed and, as in this case, even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate. The Judge could not see how "*applying commercial common sense*", a collateral warranty executed four years after practical completion, and months after the disputed remedial works had been remedied by another contractor, could be construed as an agreement for carrying out of construction operations.

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.

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