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The construction &
energy law specialists

Issue 269 - Nov 2022

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

Dispatch

Case Summary

Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council
[2022] EWHC 2598 (TCC)

This claim arose out of the construction of Blackburn Bus Station, which was subject to significant cost increases and delay overrun. The contract, based on amended JCT terms, was terminated by Blackburn/Darwen BC (BDBC) before work was finished and BDBC proceeded to have the work completed by a replacement contractor. The administrators of Thomas Barnes (TB) brought claims for monies said to be due under the contract on a proper valuation of the works done at termination (including claims for prolongation) and damages for wrongful termination. BDBC disputed the claim in its entirety.

Witness evidence

TB called a number of witnesses. HHJ Davies commented that three continued to: "*harbour a real grievance against*" those who they blamed for the failure of the project and the subsequent failure of TB. However, they were wrong to do so. TB had been struggling since the early 2010s and only had two live contracts at the time, both of which caused the financial problems. The Judge commented that:

"This misplaced opinion and strong grievance ... plainly coloured their recollection of events which was, inevitably, poor anyway as to the details, given that they were giving evidence about events occurring 7 to 8 years ago. None of them had much, if any, direct involvement with the project at site level and, thus, much of the detail of their evidence was second hand commentary anyway."

Further, the statements did not comply with the requirements of Practice Direction 57AC. In the view of the Judge they were:

"replete with commentary and opinion notwithstanding that each had signed confirmations of compliance which included the required statement that they understood that the purpose of their witness statement was to set out matters of fact of which they had personal knowledge and not to argue the case, either generally or on particular points."

In the view of the Judge, a witness who produced and signed a witness statement, which they knew or should have known failed to comply with the rules, could not complain if a court takes that into account when assessing their credibility. The Judge also said that, given the passage of time, he would need to be very convinced before being able to prefer witness evidence over the contemporaneous documents on a particular point. Contemporary documents were a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned.

Expert evidence

TB's delay expert was criticised on the basis that they had: (i) failed to follow the specific guidance given in the SCL Delay and Disruption Protocol in relation to the as-planned versus as-built windows analysis method which they used; and (ii) produced an overly-simplified analysis, based on a retrospective longest path analysis method, which failed to investigate and engage with all of the potential causes of delay to the critical path of the works.

The Judge agreed, noting that the expert had formed a view as to the causes of critical delay from their instructions and reading of the contemporaneous documents and TB's witness statements which was then "*reverse-engineered*" into a fairly simplistic Gantt chart. What the expert did not do was undertake an open-ended analysis from first principles.

TB said that the approach of BDBC's expert was flawed because they conflated a prospective and a retrospective approach to critical path analysis and were unduly reliant on computer modelling, when was what really required was a close focus on actual events. The Judge accepted this up to a point, but noted that the expert had undertaken a detailed and conscientious analysis of the project by reference to the contemporaneous documents as and when they were provided with them.

Delay: concurrency and criticality

Both experts referred to the SCL Protocol in their reports. TB's expert adopted the as-planned versus as-built windows analysis method, whereas BDBC's expert chose a hybrid of the time slice windows analysis and time impact analysis. It was suggested that neither followed their chosen method. The Judge agreed but cautioned that it would be wrong to attach too much importance to a close analysis of whether each had properly chosen or loyally followed the particular method selected. This was because the SCL Protocol itself discourages such an approach. The objective of the Protocol is to provide useful guidance. Paragraph 11.2 states that:

"irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common sense perspective."

The Judge further said that the common objective of each method was to enable the assessment of the impact of any delay to practical completion caused by particular items on the critical path. If an expert: "*selects a method which is manifestly inappropriate for the particular case, or deviates materially from the method...without providing any, or any proper, explanation, that can be a material consideration in deciding how much weight to place on the opinions expressed by the expert.*"

There was a substantial measure of agreement between the experts. The two most significant issues were the question of the materiality of the delay to the roof coverings and the question of responsibility for the delay in respect of the hub internal finishes. The Judge considered that one possible consequence of this was that the court would need to consider whether there were concurrent causes of delay. The Parties were agreed that the law here was accurately summarised in *Keating on Construction Contracts* 11th edition at 9-105:

"(i) depending upon the precise wording of the contract, a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and
(ii) depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the 'but for' test. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible."

This is different to the approach of the SCL Protocol which states that: "*True concurrent delay is the occurrence of two or more delay events at the same time.*" This "first in time" approach, which has been followed in certain Commercial Court cases, for example, *Saga Cruises BDF Ltd & Others v Fincantieri SPA, (Dispatch* Issue 195), would result in a subsequent delaying event being disregarded unless they actually served to increase the critical delay caused by the first event.

The Judge commented favourably on the approach of BDBC's expert who presented "compelling evidence and analysis" in both written and oral evidence to the effect that the contemporaneous written records showed very clearly that TB experienced significant delays in starting the roof coverings, due to difficulties in sourcing scaffolding and roofing subcontractors. In contrast, the Judge commented of TB's expert that if they:

"had read with the same care the records which [the other expert] referred to, and which [TB's expert] confirmed he had been provided with, he could not have failed to observe the delay in starting the roof works and the overall delay in completing them … [TB's expert] comment in paragraph 12.6.4 either shows that he did not do so or, if he did, he preferred not to volunteer that the roof works were delayed for reasons which did not entitle the claimant to an EOT."

BDBC's expert said that the baseline programme showed the roof coverings on the critical path. The roof cladding could not progress until the roof coverings had begun, and the roof coverings needed to be progressed before a start could be made on the internal finishes and services to the hub. The Judge agreed this was obvious.

TB's expert was criticised on the basis that, by measuring only the movement of a specific activity from the as-planned to the as-built date, they had failed to take into account the progress and performance of other critical building activities such as the roof coverings. The Judge accepted that TB's expert was fully aware of the importance of the roof but had discounted its relevance in favour of the concrete topping and the walls being critical to the finishes. By not properly considering the criticality of the roof to the finishes as well, TB's expert had failed to give proper consideration to the importance of the roof coverings.

Concurrent delay: the Judge's approach

The Judge was clear that the court is not compelled to choose only between the rival approaches and analyses of the experts. Ultimately, it is for the court to decide, as a matter of fact, what delayed the works and for how long. Here, the Judge concluded that there were concurrent causes of delay:

"It is not enough for the claimant to say that the works to the roof coverings were irrelevant from a delay perspective because the specification and execution of the remedial works to the hub structural steelwork were continuing both before and after that period of delay. Conversely, it is not enough for the defendant to say that the remedial works to the hub structural steelwork were irrelevant from a delay perspective because the roof coverings were on the critical path. The plain fact is that both of the works items were on the critical path as regards the hub finishes and both were causing delay over the same period."

BDBC had suggested that, during much of period of the roof delays, the concrete topping/hub works were still in float. This meant that the critical path only switched from the roof delays to the topping/hob works once the float had been used up. The Judge disagreed:

"Whilst I am prepared to accept this evidence from a theoretical delay analysis viewpoint, comparing the as-planned programme with the position at various points in time, it does not seem to me to be a sufficient answer to the point on causation, which is that on the evidence the fact is that the delay to the remedial works to the hub structural steelwork and the delay to the roof coverings were both causes of delay over the period … where the roof coverings were delayed."

In the view of the Judge, TB could not say that, because there was a problem with the hub structural steelwork identified in October 2014, which was not finally resolved until January 2015, all of the delay between those dates was only caused by this. To do so ignored the fact that, for a very considerable period of time, there was also a problem caused by the delay to the roof coverings which was itself a cause of delay to the critical path.

The Judge came to his own conclusions, based on the totality of the evidence presented, expert, witness and contemporary. In doing so, he did not fully accept either of the expert's positions. In the Judge's view, both delays were causes of delay to the critical path. The result was that TB was entitled to an EOT of 119 days. However, TB was only entitled to recover for prolongation for the lesser period of 27 days' net of the concurrent delay due to the steel frame deflection.

This approach is in line with the *Keating* view in that TB was entitled to an EOT because the topping/hub delay was an "*effective cause of delay*" even though TB was also responsible for the concurrent delays caused to the roof coverings. However, this does appear to be contrary to the SCL Protocol approach in that the two delays did not emerge at the same time, and so there was not true concurrency. That said, there may be good reason for that and we do not know, of course, everything that was discussed and considered during the hearing.

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