



Technical

3 Important Construction Cases Decided in the Past Year

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Introduction

This Article considers three recent Decisions from the English Courts. The issues within the cases centre around:

1. Final Account Mechanisms within Contracts,
2. Application of the Hague Convention post-Brexit; and
3. Design Life of Building Elements.

Final Account Mechanisms within Contracts

***JSM Construction Limited v Western Power Distribution (West Midlands) plc* [2020] EWHC 3583 (TCC)**

Background and Findings

The Local Democracy, Economic Development and Construction Act 2009 (*“the Construction Act”*) and The Scheme for Construction Contracts (England and Wales) Regulations 1998 (*“the Scheme”*) sets out minimum payment mechanisms in Construction Contracts for determining what payment becomes due and when. If a Construction Contract does not comply with the minimum requirements as set out in the Act, then payment terms from the Scheme are implied. The Scheme includes provisions for both periodic/stage payments and for a final payment. The final payment is described in the Scheme as *“the payment of an amount equal to the difference between (a) the contract price, and (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract”*.

In *JSM Construction Limited* (*“JSM”*) and *Western Power Distribution (West Midlands) plc* (*“Western Power”*), the TCC considered whether the Contract, which did not have a Final Account procedure, was compliant with the Construction Act.

JSM was engaged by Western Power to install 2 high voltage cables and ductwork in Birmingham. It was a bespoke Contract that included a mechanism for interim payments but contained no mechanism for a Final Account process. JSM issued its *“Final Application”* in July 2019 making a claim for £1.5m. Western Power did not make any payment against this Application, leading to JSM commencing proceedings.

One argument put forward to the Court was whether the Contract between JSM and Western Power complied with the requirements of the Construction Act or whether terms would be implied into the Contract, enabling JSM to make its "*Final Application*" under the Scheme.

Western Power applied for JSM's claim to be struck out. Western Power argued that JSM was only contractually entitled to a series of interim payments and not to any final payment.

When reviewing the payment mechanisms of the Contract, the main consideration of the Court was whether the Contract, as a whole, provided an adequate mechanism for determining what payments were required and when.

Payment mechanisms and their adequacy are decided on a case-by-case basis, considering the specific circumstances of the matters presented. In order to provide context to its Decision, the Court gave an overview of the JSM and Western Power Contract and set out its understanding of how the Contract in question operated. When turning to the question regarding the sufficiency of the terms as presented, the Judge (Mr Justice Pepperall) stated that the stage payments in the JSM and Western Power Contract "*might well be adequate for establishing what payments were due*" (paragraph 42).

The Construction Act does not necessarily require a Final Payment procedure for a Construction Contract to be compliant, even though one is included in the Scheme.

The Court found it could not be certain that JSM's Application was invalid and, as such, Western Power's attempt to strike out the claim failed.

Conclusion

Caution needs to be applied with interim valuations, and Parties cannot necessarily rely on a Final Account procedure to make corrections or raise claims. Each Interim Valuation must take into account all matters that arise at the time of application. Sweeping up matters in a Final Account may not be an option, and entitlement to payment might be lost if one fails to take into account all matters at the time. It is crucial for organisations to understand the specific procedures in the Contract it is working on, particularly any bespoke amendments.

Application of the Hague Convention post-Brexit

Motacus Constructions Limited v Paolo Castelli SpA [2021] EWHC 356 (TCC)

Background and Findings

Paolo Castelli entered into a Contract with Motacus to complete works at One Bishopsgate Plaza Hotel in London. The Contract stated it was subject to the Laws of Italy, and any disputes would be submitted to the “*exclusive jurisdiction*” of the Courts of Paris, France.

This is one of the first cases to consider the Application of the Hague Convention on Choice of Courts 2005 (“*Hague Convention*”) following the United Kingdom (“*UK*”) leaving the European Union (“*EU*”). Before the UK left the EU the jurisdiction of UK Courts and the Courts of EU Members, in cases linked to more than one European Union Member State, could be determined by the Brussels Regulation.

As the Contract was for works being carried out within England, the Contract was subject to the Local Democracy, Economic Development and Construction Act 2009 (“*the Construction Act*”). The Construction Act gives the Parties to eligible Construction Contracts the right to refer disputes to Adjudication.

Adjudication has been described as a method of “*obtaining an improved cashflow quickly*” (Lord Justice Coulson in The Court of Appeal in *Bresco v Lonsdale*). It is sometimes described as a “*pay now, argue later*” process as the Adjudicator’s Decision may result in a payment followed by Litigation/Arbitration to finally determine the dispute.

In the case before the Courts, a dispute had arisen between Paulo Castelli and Motacus about the sums due between the Parties. Motacus referred the dispute to Adjudication and obtained a Decision in its favour. Paolo Castelli did not pay the sums the Adjudicator had decided were due. This led to Motacus applying to the Courts in England to enforce the Adjudicator’s Decision.

Paolo Castelli argued that the English Courts did not have jurisdiction as the Contract stated that the Courts of Paris had exclusive jurisdiction.

Motacus argued that the two exceptions in the Hague Convention gave the English Courts jurisdiction. The exceptions were:

- Article 6(c) - an exception where “*giving effect to the [exclusive jurisdiction clause] would lead to a manifest injustice or would be contrary to public policy*”; and
- Article 7 - an exception in the case of “*interim measures of protection*”.

Motacus argued that, to seek enforcement by the Courts of Paris, would result in a “*speedy mechanism*” being removed when dealing with Construction Disputes. The Court disagreed and found that the UK Parliament would have considered this when drafting the Hague Convention, and would have provided Parties with the ability to derogate from the Hague Convention. As this had not been provided by UK Parliament, this argument failed. The Judge dismissed Article 6(c) as being applicable.

The Court also considered Article 7 and stated that the enforcement of an Adjudicator’s Decision was an interim measure of protection. Adjudication is binding until final determination in Litigation or Arbitration. The Judge stated that Adjudicators’ Decisions are “*not closed but are capable of expansion*”. *The concept extends to “any decision that is not a final and conclusive decision on the substantive merits of the case”*. With this consideration in mind, the Court enforced the Adjudicator’s Decision.

Conclusion

This case confirms that the English Courts are willing to enforce an Adjudicator's Decision in everything but the most unusual of circumstances. It also establishes that the "*pay now, argue later*" principle applies even to Contracts of an international nature where jurisdiction lies elsewhere but England, certainly where this other jurisdiction is within the EU. Provided that the Contract qualifies as a "*construction operation*", as defined under the Construction Act, the right to Adjudication and subsequent enforcement by the Court is likely to apply.

Design Life of Building Elements

Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC)

Background and Findings

Volkerfitzpatrick Limited (“VFL”) was engaged by Blackpool Borough Council (“Blackpool BC”) to construct the Starr Gate Tram Depot in Blackpool. The Depot was only forty metres from the sea and, as one would expect, was subject to harsh conditions such as high winds and salt spray (“*just your average summer day in Blackpool*” we hear you say). The Depot was constructed with a galvanised steel portal frame and galvanised “*cold formed components*” used for the secondary steelwork (purlins and cladding rails etc.).

In 2015, which was around three years after completion of the construction of the Depot, sections of the roof detached. Inspections were carried out and Blackpool BC believed that numerous components were showing signs of premature corrosion.

Blackpool BC commenced proceedings against VFL on the basis that elements of the Depot, and specifically the “*building structure*”, did not meet their “*design life*” which was intended to be fifty years.

The Contract was a modified NEC3 Contract with the Works Information requiring:

1. There was to be no “*non-standard*” or “*unusually onerous*” maintenance requirements.
2. The materials and design were to be “*suitable, durable and appropriate for a sea front location*”; and
3. “*Unless otherwise specified in the Functional Procurement Specification, have a design life of at least 20 years*”. The term “*design life*” was defined in the Contract.

The first consideration of the Court was to establish what was meant by “*building structure*” as this was to have a fifty-year “*design life*”, as opposed to other components of the building which were subject to a twenty-year “*design life*”.

The meaning and extent of contractual “*design life*” was considered by the Court. The Court reviewed BS EN 1990:2002 which noted a period where a structure may require “*anticipated maintenance*” but not “*major repair*”.

The Court believed that the definition of “*design life*” was somewhere between “*anticipated maintenance*” and not requiring “*major repair*” and noted that “*it cannot realistically be thought that a structure should be intended to be maintenance free for the whole of its design life*”. It can nonetheless be reasonably assumed that “*it ought not to need major repairs over that period*”.

The Court found that “*anticipated maintenance*” could be best identified as maintenance which is not “*non-standard*” and/or not “*unusually onerous*”.

The Court also noted that environmental conditions should be noted when carrying out a design and, if those conditions would likely result in the required maintenance being greater than would normally be needed, the Employer’s consent needed to be sought.

Finally, in reaching its Decision, the Court considered the impact that the environmental conditions had on the Depot as a matter of fact.

The first areas considered were where rust had formed and the galvanised coating of the steel had been removed. It was held that the operator of the Depot, with knowledge of the local conditions, could be reasonably “*expected to undertake limited and localised works, not going beyond reasonable maintenance*”. This could be maintenance such as removing the areas of rust build-up and repainting the affected areas. Nonetheless the Court could also not specifically state that any of the rust would prevent the building component from achieving its design life.

On a second item described as blistering on the cladding, VFL argued that the design life of twenty-five years could be achieved if the cladding was regularly cleaned which it stated Blackpool BC was failing to do. The cladding was being cleaned once a year, however, the Court found evidence to suggest that the cladding required cleaning four times a year. In contrast to the issue surrounding the build-up of rust, the Court found that, whilst cleaning might sound routine, these arguments were “*actually deceptive when one considers what would be involved in terms of frequency and cost*”. It was on this basis it was found that the cladding was in breach of its intended design life.

Conclusion

On NEC projects, it is crucial to understand the requirements of the Works Information and ensure that specifications are well defined to avoid uncertainty and ambiguity.

For all Contracts, if a specific “*design life*” is required for components, this should be clearly defined and caution should be applied when using “*catch all*” phrases.

Care and diligence is required when drafting Contracts, or reading the procedures of the Contract, and it is important to ensure that there is clarity on what is intended.