Technical

Quarterly Case Law Update (Article 69)

Date: 17 November 2021

Introduction

This Article considers three recent Decisions from the English and Scottish Courts.

Whether Successive Payment Applications Constitute a Single Dispute or Separate Disputes

In the recent case of *Quadro Services v Creagh Concrete Products,* Quadro entered into an oral contract to provide Creagh with labour for a construction project in Woking. The contract was a Construction Contract under the Housing Grants, Construction and Regeneration Act 1996 and the Adjudication provisions in the Scheme applied.

Over time, Quadro submitted three Payment Applications. For the first two, Quadro submitted its invoice in response to Creagh's request.

Creagh did not pay the invoices submitted for the Woking contract. As there were monies owed by Creagh to Quadro on other projects, Quadro's Solicitor wrote to Creagh seeking payment of all outstanding amounts.

Subsequently, Quadro referred the unpaid amounts for the Woking contract to Adjudication. Creagh challenged the Adjudicator's jurisdiction on the basis that each unpaid amount was a separate dispute and that, as a result, the Adjudicator did not have jurisdiction.

Quadro argued that each issue was a sub-issue to an overarching dispute. The Adjudicator decided that he had jurisdiction, that the total amount owed was indeed a single dispute and that Creagh should pay Quadro the sums owed under the three invoices.

The case came before the TCC as a request for Summary Judgment due to Creagh's non payment following the Adjudicator's Decision.

Counsel for Creagh argued from the "*rule of thumb*" in *Witney Town Council v Beam Construction*. This "*rule of thumb*" is that, if deciding one dispute depends upon first deciding another, then a causal link exists which points to there being only a single dispute.

Watson HHJ did not agree with Creagh that this should extend to the argument that, if claims can be decided individually, then it strongly points to a conclusion that there are several disputes. Indeed, it was held that they may form sub issues within an overarching dispute but that this would always be a question of fact.

As the first two applications were agreed and the third was not challenged, or even that each invoice could be decided individually, was held not to prevent each being a sub-issue within the wider dispute.

The Adjudicator's Decision to award Quadro the sums invoiced in the three Payment Applications was enforced by the TCC.

It is worth noting each of Quadro's Payment Applications was assessed cumulatively and, this creating a causal link, helped to establish that there was in fact a single dispute. It is perhaps not so clear what the case would be if the Payment Applications had not been assessed cumulatively.

Conclusion

When drafting your Notice of Intention to Refer, be careful and ensure that you are referring a single dispute and "*payment*" is a sufficiently broad description of the dispute to allow you to introduce a number of "*sub disputes*" associated with payment. Similarly, ensure that "*delay*" is broad enough to bring in numerous delay events under a single Adjudication.

Considering Good Faith and the Omission of Works

Whilst in these Articles we usually focus on the Courts of England and Wales, recently there has been an interesting case in the Scottish Courts regarding the omission of works and the upholding of obligations of good faith.

Civil Law Jurisdictions recognise good faith in the sense of "*playing fair*" or "*coming clean*" (*Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] QB 433) but English Law does not have such a blanket approach.

The application of good faith in English Courts can range from being seen as something that is "*inherently repugnant*" (*Walford v Miles* [1992] 2 AC 128) to requiring a party to act honestly (*Sutcliffe v Thackrah* [1974] AC 727) where a Certifier was required to have an honest belief in a Payment Certificate's true value.

So clearly, the standard form contracts' attempts to compel "*mutual trust and co-operation"* (NEC4 Clause 10.2) and "*trust* [and] *fairness*" (JCT SBC/Q 2018 Schedule 8 Clause 1) will not provide predictable outcomes.

In the recent case of *Van Oord UK Ltd v Dragados UK Ltd*, Dragados entered into a contract for the design, management and construction of works in Aberdeen to expand a Harbour. Dragados engaged Van Oord under an NEC3 Option B Subcontract to carry out soft dredging works but also contracted part of the same scope under Van Oord's subcontract with two other subcontractors, as a part of their relative scopes of subcontract.

Dragados issued instructions to Van Oord under the subcontract to omit one third of the subcontract scope for soft dredging works. This had the effect of reducing the contract sum by 49% due to a compensation event which was valued, not according to the rates in the bill of quantities (the subcontract allows for this to be done by agreement), but according to Defined Cost under the Shorter Schedule of Cost Components.

Van Oord had argued that the transfer of soft dredging works was prohibited under the terms of the subcontract. Clause 14.3 in the subcontract had been amended to expressly include for a transfer of scope only in the event that this was instructed by the Project Manager under the main contract. Van Oord argued that a provision that allowed such an instruction of Dragados to constitute a compensation event under the subcontract did not apply as no such instruction had been given under the main contract.

It was held that, by allowing for this particular situation for instructing the omission of works, it was to be inferred that Dragados was not entitled to omit the soft dredging works and transfer them in the way it had done and was therefore, in breach of contract.

However, it was also held that despite the instruction of Dragados being a breach of contract, the compensation event mechanism still applied and the rate for Van Oord carrying out the work should be reduced.

On Appeal, Van Oord sought entitlement and payment for the unamended rate in the bill of quantities. This was on the basis that Dragados had manipulated the subcontract in such a way that it was able to omit the easier dredging works, leaving only the more difficult ones, having first insisted on an average rate for the dredging regardless of its difficulty.

The price reduction mechanism was also considered (under the compensation event procedure) as sitting alongside the duty of "*mutual trust and co operation*" in Clause 10.1 of the subcontract. This clause was held to have weight as it "[reflected and reinforced] *the general principle of good faith in contract*".

Whilst the Court did not consider whether there had been a breach of Clause 10.1 or not, it did consider that the instruction to omit works (being a breach of contract) was not an instruction given "*in accordance with* [the] *subcontract*" (Clause 27.3). As a result, even though the Defined Costs of Van Oord would be reduced, the compensation event mechanism would not operate to reduce the contract sum.

This case reiterates the point that the power to legitimately instruct the omission of works depends upon the exact wording of the contract. More interestingly, however, is the light that is shone upon "*good faith*" clauses.

It is worth re-emphasising that this case was decided in the Scottish Courts so is not binding in England and Wales, but it is hoped it will be persuasive in future decisions where "*good faith*" clauses are in consideration.

Conclusion

Whilst it is often believed the obligations in standard forms of contract to act in "*mutual trust and co-operation"* or "*trust* [and] *fairness*" are little more than fine words with no real binding implications, this case shows that that is not the case, certainly under Scots Law.

Eco World - Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd

In *Eco World - Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd*, Eco World engaged Dobler to design, supply and install façade and glazing works for three residential blocks under a JCT 2011 Construction Management Trade Contract. Dobler contracted to carry out the works for the sum of £8.6m and to complete by 30 April 2018.

The contract contained liquidated provisions at the rate of £25,000.00 per week, but with a "*holiday*" period of 4 weeks and capped at 7% of the Contract Sum.

The contract allowed for Eco World to take over part of the works before Practical Completion of the whole of the works. Eco World did so, taking over Blocks B and C in June 2018 prior to the achievement of Practical Completion by Dobler in December of the same year.

A dispute came before the Court regarding the assessment of the Final Account, and the right of Eco World to apply the liquidated damages as stated in the contract.

Eco World submitted before the Court that the liquidated damages provisions were void and/ or unenforceable as the contract did not contain any measures to reduce the rate of liquidated damages, where the Employer had taken possession of parts of the works prior to Practical Completion being achieved.

The Court held that the provisions were clear and certain, and the liquidated damages mechanism was operable as there was one completion date for the whole of the works and an agreed rate for the failure of Dobler to achieve Practical Completion prior to that date.

Further, the liquidated damages clause failed the test in *Makdessi v Cavendish Square Holdings BV* [2016] A.C. 1172 as the amounts were neither unconscionable, exorbitant or extravagant.

Conclusion

This case is a reminder of how the Law of liquidated damages provisions changed in Makdessi, and that the Court will not lightly find such a provision to be a penalty or unenforceable, particularly if the clause has been negotiated with the benefit of appropriate Counsel and where the party concerned has a legitimate interest in enforcing a primary obligation under the contract.