

Legal Briefing

Ted Lowery considers whether the introduction of a delay report re-set the clock for a dispute

MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd

[2020] EWHC 1413 (TCC)

Before Mrs Justice O'Farrell DBE

In the Technology and Construction Court

Judgement delivered 5 June 2020

The facts

During 2016 MWHTP engaged BBK under an amended JCT Design and Build sub-contract to carry out mechanical and electrical services at a new laboratory in Hull.

Clause 2.17.1 of the sub-contract provided that if became reasonably apparent that the works were likely to be delayed, BBK should give notice of same. Clause 2.17.2 required that as soon as practicable thereafter BBK was to provide particulars including as estimate of the delay to completion. Clause 2.17.3 required BBK to forthwith notify MWHTP of any material change in the estimated delay and clause 2.18.2 required MWHTP to decide on any extension of time within 16 weeks of receipt of the particulars.

On 2 March 2018 BBK issued a notice of delay and claimed a seven week extension of time due to MWHTP's delayed builder's work including first side boarding, mist coating and studwork. BBK issued further notices on 13 April, 29 June, 1 October 2018 and 27 February 2019 citing lack of progress by MWHTP on studwork and claiming a cumulative extension of time of thirty-one weeks. MWHTP did not respond to any of these claims.

On 30 July 2019 BBK served an expert's report which concluded that MWHTP's under-resourcing and delayed boarding and studwork had caused a critical delay of 282 days to BBK's works. MWHTP again failed to respond so BBK commenced adjudication on 8 August 2019. MWHTP participated in the adjudication but reserved its position on jurisdiction. In a

decision dated 10 October 2019 the adjudicator awarded BBK an extension of time of 282 days.

In a Part 8 application issued on 22 January 2020 MWHTP contended that the expert report amounted to a new notification for the purposes of clause 2.17.1 where the report relied upon the novel ground of delay to second side boarding and included a critical path analysis not previously submitted. MWHTP further argued that if not a new notification, the report contained further particulars of earlier notifications and that in either case there could be no crystallised dispute until MWHTP responded or the 16 week period provided for in clause 2.18.2 expired.

In reply, BBK submitted that the five earlier delay notices comprised adequate notice and particulars of the delay claim and that MWHTP's failure to respond to any of these gave rise to a crystallised dispute well before the commencement of the adjudication. BBK additionally contended that the service of notices under clause 2.17.3 did not necessitate fresh notices under clause 2.17.1 or re-start the 16 week period.

The issue

Did the adjudicator have jurisdiction to determine BBK's extension of time claim?

The decision

The judge found that the 16 week period was triggered by receipt of the clause 2.17.1 delay notice and the particulars required by clause 2.17.2, although she observed that the notice and particulars could be provided in the same document. She also found that a notice under clause 2.17.3 would not re-start the 16 week period unless it concerned a delay claim that was so different to any previously notified claims that it would as a matter of fact and degree, amount to a new notice displacing the original.

The judge stated that MWHTP's failure to respond to any of the five notices of delay preceding 30 July 2019 meant that a dispute in respect of the cumulative delay claim crystallised 16 weeks after MWHTP's receipt of the notice dated 27 February 2019. Having failed to respond, MWHTP could not contend that it was awaiting particulars pursuant to clause 2.17.2.

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Finally, the judge found that on a proper analysis, the expert report served by BBK did not include any novel issues sufficient to re-start the 16 week period. Although the extension of time claimed in the report was longer than that previously claimed, the grounds relied upon were not materially different to those asserted in previous notices, for example, delays to MWHTP's preceding builders' works and the references to second side boarding were covered by the mist coating delays previously highlighted. Thus the expert's report comprised evidence in support of BBK's claims in a dispute that had previously crystallised.

Commentary

Expert's reports are typically introduced in support of delay claims at a late stage, often shortly before adjudication commences. Although each case will turn on its own facts, this judgment suggests that as long as the report does not substantially digress from the grounds upon which delay has previously been claimed, the report will not in itself give rise to a new and potentially uncrystallised dispute.

Ted Lowery
July 2020