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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

Expert evidence

Glover & Anor v Fluid Structural Engineers & Technical Designers Ltd & Ors

[2024] EWCA 1257 (TCC)

We have discussed this case before, see *Dispatch*, Issue 283. The main dispute related to damage to neighbouring properties following renovation works, including the creation of a new basement. The parties were given permission to call structural engineering and quantum expert evidence.

During the finalisation of the joint statement of the structural engineering experts, AXA's expert expressed concern that there appeared to have been involvement from the Glovers' lawyers which resulted in "*significant changes*" to the experts' views. Following correspondence between the parties' solicitors about the issue, the claimants' solicitors conceded that their conduct was not fully in compliance with the applicable rules and/or guidance.

AXA said that the claimants should prepare an application seeking permission to change their expert, which must include provision of disclosure of the instructions to the first expert, including in relation to the joint statement and the proposed changes to the draft statement. The claimants' application did include drafts of the changes made to the joint statement. The judge drew attention to an email from the claimants' solicitors which included:

> "*Please see attached our amends to the joint statement. I accepted Howard Tucker's previous changes and made our amends in track (but I have removed the metadata so it doesn't show PMC made the amends).*
>
> *You will see the amends are with the intention of staying faithful to the pleaded issues rather than the plethora of objections raised by [...] which are more appropriate for the comment boxes. We have also covered off other pleaded issues which the engineering experts are expected to cover including all pleaded theories of negligence and the remedial workscope ...*
>
> *We would be grateful if you could review and confirm if you agree with the changes and where you wish to make further changes to the statements and your comments, to make these.*"

The judge referred to the applicable principles to joint statements to be found at paragraph 13.6.3 of the TCC Guide:

> "*Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement.*"

The judge noted that what was clear from the correspondence was that the claimants' solicitors believed it was permissible to amend the draft statement where it was thought the content did not reflect the pleaded issues and said the same to AXA's lawyers:

> "*Such a belief, however misguided, is not the same as a deliberate and knowing disregard of the applicable principles.*"

The real difference between the parties was the circumstances in which permission should be given for a replacement expert and the conditions to be attached to any such permission. When considering what to do, the judge did so on the basis that the facts disclosed "*substantial and impermissible interference in the expert statement process*" which was contrary to both authority and the applicable guidance issued by the TCC.

The judge also had regard to the overriding objective of enabling the court to deal with cases justly and at a proportionate cost. Justice was best served by maintaining the trial date if at all possible and ensuring that AXA had sufficient disclosure to understand the original expert's views. As a result, if the consequence of a replacement structural engineering expert had been to lose the trial date, then for that reason alone, the judge would not have granted permission.

The judge did decide to give permission for the replacement expert. The reasons included that:

- It was not disputed that structural engineering evidence was central to the issues in this case. Without it, the claimants would likely be at a very significant and possibly insurmountable disadvantage.
- The expert evidence could be timetabled in a way which preserved the trial date and did not cause unfairness to AXA.
- The limited evidence available did not support a conclusion that there was an attempt to change the opinion of the first expert on the central issues in dispute. This was not a case of "expert shopping".
- The conduct complained about was not that of the claimants but their solicitors, and there had been a full and frank admission and an apology to the court and AXA.

The decision to change the expert was made to provide a fair and swift resolution of any concerns of non-compliance and the independence of the expert. Further, the extent of disclosure given, in addition to the first expert's report, met the concern to ensure that full information is available to AXA.

Conditions Precedent

Tata Consultancy Services Ltd v Disclosure and Barring Service

[2024] EWHC 1185 (TCC)

In part of a lengthy decision about an IT modernisation project, both parties suggested that to recover either compensation for delays or delay damages, the other party had to comply with certain conditions precedent. Having reviewed a number of authorities, Mr Justice Constable, whilst stressing that the overriding principle was that every contract must be construed according to its own particular terms, set out a list of the relevant matters that need to be

considered when considering whether or not a clause is a condition precedent:

> "*(2) there is nothing as a matter of principle which prevents parties freely agreeing that the exercise of a particular right to payment or relief is dependent on compliance with a stated procedure, but parties will not be taken to have done so without having expressed that intention clearly;*
>
> *(3) the language of obligation in relation to procedure to be complied with (e.g. 'shall') is necessary, but not sufficient;*
>
> *(4) the absence of the phrase 'condition precedent' or an explicit warning as to the consequence of non-compliance is not determinative against construing the regime as one of condition precedent;*
>
> *(5) however, the absence of any language which expresses a clear intention that the right in question is conditional upon compliance with a particular requirement is likely to be, at the very least, a powerful indicator that the parties did not intend the clause to operate as a condition precedent;*
>
> *(6) the requisite 'conditionality' may be achieved in a number of different ways using different words and phrases when construed in their ordinary and natural meaning;*
>
> *(7) the clearer the articulation, purpose and feasibility of the requirement to be complied with (in terms of substance and/or timing), the more consistent it will be with the conclusion that, depending on the rest of the language used, the requirement forms part of a condition precedent regime.*"

Here, Clause 5.6 provided in "*plain language*" that DBS "*shall not be liable to compensate [TCS] for Delays to which Clauses 7 or 8 apply unless [TCS] has fulfilled its obligations set out in, and in accordance with, Clauses 5.1, 5.2 and 5.3*". This wording had the effect of making compliance with Clauses 5.1 to 5.3 a condition precedent to any entitlement to compensation under Clauses 7 or 8.

However, this condition precedent regime applied only to DBS's liability to compensate TCS for "Delays", a defined term. This meant that a failure to comply with the condition precedent would not impact upon TCS's entitlement to relief as described in other clauses, here the "authority" clause. As a result, non-compliance would not prevent TCS from defending itself from DBS's claims, whether for Delay Payments or for damages for breach of contract provided it established that the failure to achieve a completion date was the result of such an "authority" clause.

This left the question of whether TCS's own claims for damages, as opposed to contractual compensation, would be caught by Clause 5.6. DBS argued that the objective intention of the parties cannot have been that (having expressly agreed that the payment of delay compensation in certain circumstances was subject to a condition precedent) TCS could circumvent that regime by claiming damages for breaches of other terms of the Agreement.

The judge agreed. TCS's potential entitlement to claim both loss and expense pursuant to Clause 7.4 and general damages at common law for Delays (as defined) were subject to compliance with the regime at Clauses 5.1 to 5.3. The ordinary meaning of the language used in Clause 5.6 ("*liable to compensate [TCS] for Delays*") was wide enough to cover both claims brought under, and for, breach of contract. Finally, the judge noted that:

> "*the purpose of a notice regime is to give an employer the opportunity to engage in the mitigation of delay, particularly delay which it knows is going to be claimed has been caused by a matter for which the employer is to blame. In this context, a construction which requires a contractor to notify the employer only for the purposes of a contractual right to compensation, but allows the same claim on the same facts to be advanced at common law without having given notice is uncommercial. It also runs contrary to the risk and reward allocation set out expressly.*"

When it came to delay damages, where a milestone was not achieved due to issues with testing, by Sub-clause 6.1, DBS was required ("*shall*") to "*promptly issue a Non-conformance Report*". Clause 6.1 concluded, "*The AUTHORITY will then have the options set out in Clause 6.2*". No non-conformance reports were issued.

The judge considered that, when looking at ordinary language of the clause, the word "*then*" in the last sentence of Clause 6.1 made clear, at the very least, that the entitlements in Clause 6.2 happened after the matters dealt with in the preceding words of Clause 6.1 had been engaged. The entitlements in Clause 6.2 were clearly linked to Clause 6.1, through the conditional phrasing of "*If … then …*" The judge noted that:

> "*the rationale for the imposition of a notice regime as a condition precedent is to know where a party stands contemporaneously, and to allow the defaulting party to rectify its default.*"

Further, the use of the word "*promptly*", rather than a specified number of days, did not preclude the condition-precedent nature of compliance. Whether a report had been given "*promptly*" was a question of fact and is sufficiently certain in meaning to be given effect to.

That, however, was not the end of the story. Clause 5.2 required TCS to submit a draft Exception Report to TCS: "*not later that five (5) Working Days … after the initial notification*". TCS said that it had assumed that DBS would not rely on Clauses 5.1 to 5.3 as a condition precedent. The judge agreed with that for a number of reasons, including:

- DBS did not, in discussions and negotiations: "*articulate any reliance upon the provisions at the time*". The: "condition precedent was simply not a live point."
- There was an assumption by TCS that, whilst it was still necessary to produce an Exception Report, no technical point on 5 Working Days was being taken against it and that any entitlement would be determined in light of the substantive merits.
- DBS did not take any point that TCS were not entitled to bring a claim because no Exception Report had been served within 5 Working Days. One witness gave evidence that the first time they could remember seeing the 5 Working Days point being taken by DBS was in the pleadings.

This was not a case of acquiescence by nothing more than silence. DBS had not reserved their position. It was clear, on DBS's own evidence, that it also considered that the 5 Working Day requirement had "fallen by the wayside". It would have been obvious to DBS that TCS was engaging in the project in a way, to DBS's benefit, that it may not have done faced with a denial of entitlement to compensation based on the 5 Working Day point.

As a result, DBS was now estopped from arguing that TCS had no entitlement to compensation for delay on account of its failure to comply with Clause 5.3.

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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