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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.

Issue 293 – November 2024

Dispatch

Case update: notices and conditions precedent

FES Ltd v HFD Construction Group Ltd

[2024] CSIH 37

We discussed this case in Issue 285. The parties had entered into a contract for fit-out works based on the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 edition), as amended. During the project, FES had encountered various delays, including site closure due to the COVID-19 pandemic. There was a dispute about FES's entitlement to an extension of time and their claim for related loss and expense. A preliminary issue arose as to whether or not the giving of a notice in terms of clause 4.21 was a condition precedent for recovering loss and expense. The adjudicator and the court, at first instance, said that it was. As FES had not given the required notice, then they would have no entitlement to direct loss and expense. FES appealed.

Clause 4.20.1 provided that:

> *"If in the execution of this Contract, the Contractor incurs … any direct loss and/or expense as a result of any deferment of giving possession of the site … or because regular progress of the Works … has been or is likely to be materially affected by any Relevant Matter, he shall, subject to … compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense."*

Clause 4.21.1 provided that:

> *"4.21.1 The Contractor shall notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should become) reasonably apparent to him."*

Lord Carloway highlighted what he saw as the fundamental problem with FES's position, namely the fact that the words found in clause 4.20.1 made it clear that a claim for loss was to be conditional on the procedural requirements set out in 4.21. Clause 4.20.1 used the words: "*subject to … compliance with the provisions of clause 4.21*". In effect, FES was asking the court to ignore those words.

Lord Carloway did comment that court was not being asked to assess whether or not FES did notify "*as soon as*" it became "*reasonably apparent*" that loss had arisen and whether an initial assessment had been sent "*as soon as reasonably practicable*". Those terms were "*relatively flexible*" and the judge noted that: "*if it were called upon to do so, the court would approach them in that light; no doubt affording the pursuers considerable leeway, given the consequences of non-compliance*".

What mattered was the plain meaning of the words used. Here, there was no ambiguity in the wording. Therefore, there was no need to analyse any further, looking, for example, at what may be regarded as commercial common sense. In fact, this would have been of little assistance to FES. Lord Carloway concluded that:

> *"The need to be duly notified and advised of the potential liability within a limited (but not certain) timespan is a reasonable condition before a claim could be considered and ultimately determined. There is no nonsensical or absurd result arising from giving the words in the clause their ordinary or plain meaning in the context of the contract, or clauses 4.20 and 4.21, as a whole."*

Adjudication: how many contracts?

George Beattie & Sons Ltd v Gareloch Support Services (Plant) Ltd

DBN-A107-20

Beattie was engaged to assist in the removal of the Glen Mallan jetty. The contract was made up of a number of documents, including four quotations and correspondence accepting those quotations. Having issued four invoices which were paid without objection, Beattie issued a fifth for £60,000. Gareloch issued a pay less notice in the sum of £30,000, which Beattie did not accept. Gareloch then refused to pay. An adjudicator decided that the pay less notice was invalid.

Gareloch said that the adjudicator had exceeded their jurisdiction by considering multiple contracts, rather than a single contract, when determining the dispute. The sheriff held that the four separate quotations and acceptances amounted to a single contract and that only one contract had been referred to the adjudicator. Further, Gareloch had failed to make a valid challenge to the adjudicator's jurisdiction.

On appeal, Appeal Sheriff O'Carroll noted that the court should consider what the parties meant by the language used in the contract. The correct approach was to consider what a reasonable person would have understood the parties to have meant – that reasonable person possessing all the background knowledge reasonably available to the parties at the time of the contract. This was what the sheriff had done. She considered in detail the evidence and arguments for and against the one contract argument. There were a number of arguments in favour of the one contract position, including the use of "*phases*" by the parties to describe the works and the request by Gareloch that a single invoice number be used by for all invoices, a request which was followed.

The sheriff also considered the factors said to point towards a series of separate contracts. However, taken singly or together, these were not enough to demonstrate that there was more than one contract. All the work carried out by Beattie was done under a single contract and that was what was referred to the adjudicator who had jurisdiction to determine the dispute arising from that contract.

Appeal Sheriff O'Carroll considered that the appeal rested on the proposition that taking account of all the factors, the sheriff ought to have reached the opposite conclusion. In other words, Gareloch was seeking to reargue their earlier submissions. However, it was

the sheriff's task to determine the facts, analyse and weigh them appropriately, reach conclusions, and determine the legal issue.

Appeal Sheriff O'Carroll noted that it was common ground that the dispute concerned a single invoice number 4138, which Gareloch refused to pay because Beattie refused to agree a set off of £30,000. It was also common ground that the invoice was for work referable to two or more of the quotations.

Importantly, it was also common ground that the invoice did not ascribe separate charges to work attributable to different quotations, no breakdown was given. It would not be possible for either of the parties to separate the charges in that way on that invoice. Adjudication was intended to eliminate or reduce payment delays and simplify dispute resolution. But, if Gareloch's arguments were correct, it would have been impossible for Beattie to have referred the dispute to adjudication at all. It was only necessary to state the argument to see the manifest impracticality of such an approach. The reality, as determined by the sheriff, reflected in the composite nature of invoice 4138, was that the parties entered into a single contract for all the work involved and only a single adjudication on that invoice was required.

This conclusion meant that the second issue fell away. However, Appeal Sheriff O'Carroll noted that, unless the respondent to a referral challenges jurisdiction properly, it will be bound by the adjudication and cannot resist subsequent enforcement proceedings on the basis of lack of jurisdiction. The judge referred to the Inner House decision in *Hochtief Solutions AG v Maspero Elevatori S.p.A* (2021 SLT 528) who held that in deciding whether a challenge to jurisdiction had been properly made:

> "*the critical question is whether it made its challenge 'appropriately and clearly' … Such a threshold test is required, because the adjudicator and the referring party must be given an opportunity to assess whether the challenge is a good one. No purpose is served by continuing with a flawed adjudication.*"

Here, there was no express challenge and the test set out there was not satisfied.

Adjudication enforcement: costs

ATG Services (Scotland) LTD against Ogilvie Construction LTD

[2024] CSOH 94

Ogilvie refused to pay an adjudicator's decision of £1 million claiming that there had been breaches of natural justice. ATG had been appointed a sub-contractor for a groundworks package at a project for the construction of a housing and care facility. The dispute arose in connection with an interim payment application made by ATG. The adjudicator decided that ATG had made a valid application for payment, that there was no valid payment notice and that no valid pay less notice had been issued by Ogilvie, and that the final date for payment had passed without full and proper payment of the notified sum.

Ogilvie said that the sub-contract required notices served under it to be sent by first class recorded delivery post to a stipulated address or to such further address as might be notified in writing from time to time, or else by fax. It was further agreed at a pre-contract meeting that any applications for payment had to be submitted to two specified email addresses. The application in question took the form of an attachment to an email sent to a different email address, albeit one that was associated with Ogilvie.

Ogilvie did not seek to argue that it had not duly received the email. Rather, it maintained that the use of a method of service other than that stipulated in the contract rendered what was sent invalid as an application for payment of a notified sum. ATG said that the parties had adopted a course of conduct which treated applications served other than in accordance with the provisions of the contract as nonetheless valid.

Lord Sandison held that Ogilvie's defence was: "entirely without merit" noting that:

> "*To describe an adjudicator as having gone off on a frolic of his own is to maintain that his decision depends to some material extent on a ground which was not suggested to him by the parties and on which he gave them no sufficient opportunity to comment. It is that lack of opportunity to state one's case which permits the categorisation of such a frolic as a breach of the requirements of natural justice.*"

Here, both parties accepted that a live question in the adjudication was whether the Ogilvie's behaviour in having accepted and dealt with earlier payment applications from ATG which had not been made by the means prescribed by the contract meant that it was no longer entitled to insist on the contract requirements. The legal principle being asserted by ATG was entirely clear. It was open to Ogilvie to submit whatever it chose in response. Instead, Lord Sandison said that Ogilvie: "*contented itself with the somewhat delphic pronouncement that ATG had failed to evidence any principle of Scots law upon which it is seeking to rely in relation to its submissions on course of conduct*", adding later that ATG had "*failed to provide a Scots law principle or any authority for their assertions*".

The judge said that the adjudicator was perfectly entitled to prefer ATG's submissions, and even if the adjudicator was wrong in their determination of the law, that would represent no more than an error of law, about which Ogilvie could have no relevant complaint in the context of an adjudication enforcement.

Lord Sandison reminded Ogilvie that: "*It may be tempting to forget from time to time that it is no part of the function of this court to act as a general appeal tribunal in respect of the adjudicator's decision, but it must not be lost sight of that the criticism of the adjudicator in this connection is that he breached the requirements of natural justice by going off on a frolic of his own*". The suggestion here was: "*nothing less than an inversion of reality. No opportunity for injustice to be done was afforded*".

Lord Sandison concluded that the legislative policy of "*pay now, argue later*" that lay behind the relevant sections of the HGCRA judicial policy ought to be to discourage, as far as properly possible, frivolous defences such as those advanced here. This "*unreasonable behaviour*" justified an award of expenses on "*the agent and client, client paying scale*", which is effectively the Scottish equivalent of indemnity costs.

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.

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