



LEGAL BRIEFING

Leander Construction Ltd v Mulalley & Co Ltd [2011] EWHC 3449 (TCC), Mr Justice Coulson

The recent case of *Leander Construction Ltd v Mulalley & Co Ltd* sets out the law in relation to implied terms requiring a party to proceed regularly and diligently.

The Facts

In September 2010, Mulalley (the main contractor) engaged Leander (the sub-contractor) to carry out groundworks, drainage, the concrete framework and other associated works at a development known as Tigers Head in Lewisham. By May 2011 it was clear that the sub-contract works were delayed - each party blamed the other. Mulalley served two withholding notices as a result of the alleged delays, claiming that Leander had failed to carry out the sub-contract works in accordance with the programme dates and period set out in the Activity Schedule. Ultimately, Leander commenced proceedings in the Technology and Construction Court.

Mulalley argued that, although the sub-contract did not expressly state so, Leander had an implied obligation to proceed regularly and diligently with the works. It alleged that this implied term must be incorporated into the sub-contract in order to give the sub-contract business efficacy – or in other words, both parties must have intended this term to be part of the contract, as the contract simply would not work without it from a commercial perspective. Leander argued that there was no such implied term.

The Issue

Did Leander have an implied obligation to proceed regularly and diligently?

The Decision

Mr Justice Coulson reviewed the relevant test for implying a term into a contract (*BP Refinery (Westernport) Pty Limited v Shire of Hastings*) and held that Mulalley had failed to show that the implied term to proceed regularly and diligently was necessary to give the sub-contract business efficacy. Even though this term had not been included, the sub-contract was adequate and still provided the parties with sufficient information to evidence the deal that had been agreed. In addition, all previous authorities pointed the same way: *'the courts are very reluctant to imply additional terms as to the timing or regularity of the contractor's performance prior to the contract completion date'*, particularly where there was already a contractual completion date established in the contract - as there was here.

Commentary

Mr Justice Coulson's reference back to the 1994 case of *West Faulkner Associates v London Borough of Newham* will be of interest to contract administrators. In that case, West Faulkner, a firm of architects, was found to be in breach of their contract administration duties when it failed to give the contractor a notice that he was failing to proceed regularly and diligently with the work. It was an express term of the JCT63 contract that, provided the contractor was served with the requisite notice under clause 25(1), the employer (Newham) was entitled to terminate the contract if the contractor failed to proceed regularly and diligently. West Faulkner failed to serve the notice. The employer sued the architect. Though the architect argued that the meaning of the clause and indeed the term 'regularly and diligently' was obscure, the Court of Appeal held that in this situation no reasonably competent architect could have arrived at the conclusion it did.

When acting as the contract administrator, it is therefore important to fully understand the contractor's obligations. In the *West Faulkner* case, the Court of Appeal held that the term 'regularly and diligently' meant:

"Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contract requirements as to time, sequence and quality of work. Beyond that I think it impossible to give useful guidance. These are after all plain English words and in reality the failure of which clause 25(1)(b) speaks, is, like the elephant, far easier to recognise than to describe."

Accordingly, as a similar provision is included in the JCT 2011 Standard Building Contract, contract administrators must therefore recognise when to issue this 'hurry-up notice' – a term coined by Mr Justice Coulson – or alternatively, seek legal advice.

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