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Legal update ——— July 2017

Projects & construction
Construction case law update

Persimmon Homes Ltd v Ove Arup and Partners Ltd - Court of Appeal (Civil Division) - 25 May 2017

A developer consortium, made up of Persimmon Homes, Taylor Wimpey and BDW (the Consortium) appealed against a decision that Ove Arup (Arup) were exempt from liability for unexpected quantities of asbestos found at the site of a former dock in Barry, Wales. Arup were originally engaged by the Consortium to provide consultant engineering services in relation to their bid for the site. The Consortium's bid was successful and the site was purchased for £53m. The Consortium had plans for a mixed use development on the site and retained Arup as a consultant under an extended agreement (the Agreement). Arup's scope of services included contamination advice.

The Agreement contained deeds of warranty. Clause 4.3 of the warranties provided that "*Liability for any claim in relation to asbestos is excluded*".

The Consortium engaged other consultants and specialist contractors – one of which encountered asbestos at the site. The Consortium claimed that Arup had been negligent in failing to identify and report the asbestos at an earlier stage and commenced proceedings, seeking damages based on paying too high a purchase price for the site and additional costs to rectify the issue. Arup relied on clause 4.3. This specific point was tried as a preliminary issue in the High Court. The judge held that the exemption clause represented a valid and agreed allocation of risk between the parties, that its meaning was clear, and that the court should give effect to that meaning.

The Consortium appealed this, arguing that (1) the phrase "liability for any claim relating to asbestos" in clause 4.3 should be read as "liability for *causing* any claim relating to asbestos", rather than any liability in connection with asbestos. By this interpretation, Arup's liability was only excluded for any claim against them for causing the presence of asbestos; and (2) the judge had failed to apply the contra proferentem rule; which required any ambiguity in an exemption clause to be resolved against the party seeking to rely on it.

The appeal was dismissed. The Court held that the natural meaning of clause 4.3 was clear, and it excluded any claim relating to asbestos, not only claims for causing the spread of asbestos. The Court's view was that the Consortium's contention (that the word "for" meant "for causing") created a bizarre, if not ungrammatical outcome. It was also considered nonsensical for the parties to agree that Arup would not liable if asbestos was moved from one part of the site to another, but would be liable if it was left in place. The Court held that the language used and the application of business common sense, led to the conclusion that the respondents were exempted from liability for any claims relating to asbestos.

Source: Shutterstock

In relation to the contra proferentem rule (and aside from the fact the clause was not considered to be ambiguous in any event), the Court commented that this rule now has a very "limited role" in commercial contracts negotiated between parties of equal bargaining power. In particular, Jackson LJ said: "In major construction projects, the parties commonly agree how they will allocate the risks between themselves, and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach them with horror, or a mindset designed to cut them down", thus indicating our Court's preference to apply contract terms strictly.

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Sutton Housing Partnership Ltd v Rydon Maintenance Ltd - Court of Appeal (Civil Division) - 18 May 2017

Sutton Housing Partnership Ltd (**Sutton**) engaged Rydon Maintenance Ltd (**Rydon**) under a contract based on the National Housing Federation's standard form for the repair and maintenance of its housing stock. The contract was for a 5 year term (2013-2018). The contract included a definition of Minimum Acceptable Performance (**MAP**), defined as the minimum acceptable level of performance as measured by a key performance indicator (**KPI**).

The contract contained provisions (clause 12) allowing Sutton to govern performance by reference to the MAP levels. If a KPI fell below the MAP level, Sutton could serve a notice ordering the required improvement within a specified timeframe. If the required improvement was not achieved, Sutton would be entitled to terminate the contract (clause 13).

Rydon's entitlement to bonuses was also linked to the MAPs, because it was not possible to calculate what bonuses were due without having a set of MAPs.

Within the contract documents was a KPI Framework document, which included 3 examples of performance scenarios. In 2014, Sutton became dissatisfied with Rydon's level of service and served a notice pursuant to clause 12 of the contract. Sutton asserted that Rydon had failed to achieve the contractual MAP and gave it one month to improve its performance levels. Sutton stated that a failure to do so would result in the termination of the contract under clause 13.

Sutton remained unhappy so terminated the contract. Rydon challenged Sutton's purported determination as unlawful and contended that the contract did not specify any MAP level. The dispute went to adjudication and the TCC, both of which found in Rydon's favour: that the contract did not provide for any MAP.

Sutton appeal to the Court of Appeal and argued that the contract did specify MAPs. This disagreement between the parties as to the inclusion (or not) of MAPs centred on the fact that the only place within the contract documents that set out percentage figures for MAP was in the three "example" performance scenarios. The issue for the Court of Appeal was whether these were contractually binding figures, or merely illustrative.

Sutton's appeal was successful. Jackson LJ in the Court of Appeal held that parties must have intended – and any reasonable person in the parties' position must have intended – for the contract to specify MAPs. He stated that it was "self-evident" that Rydon intended to receive the bonuses due to it - which would only be possible if the contract specified MAPs. It was also considered self-evident that Sutton intended to retain their "valuable power" to terminate for poor service. Again, this mechanism would only work if the contract contained MAPs.

Jackson LJ held that "the contract properly constructed must mean that the MAP figures set out in examples 1, 2 and 3 are the actual MAPs for the year 2013 / 2014, not hypothetical MAPs by way of illustration." It was obvious that only the "performance figures" in the examples were hypothetical. The example tables provided a ratio for the MAP figures to be calculated for the year 2014 / 2015. For years 3 -5 of the contract, Sutton was entitled to specify the MAP level; however, the contract didn't get that far into the term for this to be borne out. The judge therefore noted that his conclusion was the only "rational interpretation of the curious contractual provisions into which the parties have entered".

Costain Ltd v Tarmac Holdings Ltd - Queen's Bench Division (Technology & Construction Court) - 28 February 2017

Costain Ltd (**Costain**) had engaged Tarmac Holdings Ltd (**Tarmac**) to supply concrete for a new safety barrier between junctions 28-31 on the M1. The sub-contract agreement between the parties incorporated two documents: the NEC3 Framework Contract conditions (**Framework Contract**) and the NEC3 Supply Short Contract conditions (**Supply Contract**)**,** with amendments.

The two sets of NEC conditions contained different dispute resolution clauses. The Framework Contract allowed adjudication "at any time" and had no reference to arbitration. In the Supply Contract, clause 93 provided for adjudication, which was subject to a strict timetable with a time-bar; followed by a right to arbitrate if either party was unhappy with the adjudicator's decision.

A dispute arose as to defective concrete. Whilst it was accepted that the concrete was defective, the parties could not agree the extent of the remedial works required. After some months of correspondence, a letter of claim was sent by Costain on 12 October 2015 and the pre-action protocol was followed. In the exchanges that followed, Costain requested Tarmac's agreement to refer the claim to court "*notwithstanding that the Supply Contract calls for disputes to be resolved by arbitration or adjudication*". Tarmac's formal response to the letter of claim came on 26 November 2015. In it they refused to refer the matter to court and stated that, pursuant to clause 93.3 of the Supply Contract, the claim was out of time. This was the first reference in the inter-party correspondence to the time constraint. Costain rejected this and argued that the contract allowed referral to adjudication "at any time", relying on the provision in the

Framework Contract. Following further correspondence, Tarmac referred the “jurisdiction dispute” to adjudication in December 2015. The adjudicator found that that claim was time-barred, because of a failure to comply with the time period under clause 93. Despite this, Costain issued proceedings in the TCC for damages of £6m for breach of contract by Tarmac. In response, Tarmac asked the court to stay the proceedings to arbitration, on the basis that there was an arbitration agreement in the Supply Contract.

The arguments that were put to the court were varied and complex. Of particular interest to commentators and practitioners, Costain raised issues as to the course of dealings between the parties, and argued that Tarmac had acted in breach of the “mutual trust and co-operation” provision at clause 10.1 of both the Framework Agreement and the Supply Contract, a clause for which the NEC suite of contracts is well known. Costain argued that, because of the “mutual trust” provision, it was envisaged that the parties would liaise between themselves and agree which of the three dispute resolution routes (adjudication, arbitration or litigation) should be adopted for that particular dispute.

Source: Fotolia

The court dismissed this argument by Costain and commented that it was unworkable, impractical and created uncertainty. What if the parties disagreed as to the preferred forum? And why would the parties ever choose time-barred and prescriptive proceedings over an option without a time-bar? Instead, the court agreed with Tarmac’s analysis, that the contracts intentionally contained two sets of NEC conditions to the govern the two elements of the relationship between the parties: the framework arrangement and the supply arrangement. It followed that a dispute under the Framework Contract would be governed by those conditions; and a dispute under the Supply Contract would be governed by clause 93 of the Supply Contract. Given the nature of the central dispute (defective concrete) the time-bar did therefore apply.

In considering further the impact of clause 10.1, the court made a number of notable observations. The court rejected Costain’s argument that clause 10.1 imposed an express obligation on Tarmac to point of the nature, scope and potential effect of clause 93. Coulson LJ referred to the parallel commonly understood between “mutual trust and cooperation” and obligations of “good faith”. He re-iterated that it means the parties should not improperly exploit the other, but was “uneasy” to impose a more general obligation to act “fairly”, as this would be “*too difficult an obligation to police because it is so subjective*”. In this case, Coulson LJ held that the obligation meant that Tarmac “*could not do or say anything which lulled [Costain] into falsely believing that the time-bar in clause 93 was either non-operative or would not be relied on*” and that it would extend to a positive obligation upon Tarmac to correct an obviously held misunderstanding on the part of Costain; but that it would go no further. Otherwise, the provision would have required Tarmac to put aside its own self-interest.

Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd - EWHC 67 (TCC) - 1 February 2017

The Mailbox (Birmingham) Ltd (**Mailbox**) engaged Galliford Try Construction Ltd (**GT**) to carry out substantial refurbishment works to the office and retail space at Wharfside Street, Birmingham (the **Works**). The contract was based on the JCT DB 2011 and the contract sum was £18.9m. The majority of the works were completed, but on 1 March 2016 a dispute arose between the parties and Mailbox sought to determine the contract between them. The dispute centred on delay, liquidated damages, valuation of the final account and the lawfulness of the termination.

On 19 August 2016, Mailbox issued an adjudication notice. The adjudicator found in favour of Mailbox and ordered GT to pay £2.4m plus interest. Mailbox applied to the court to enforce the adjudication.

GT challenged the enforcement proceedings, arguing that Mailbox was not in fact entitled to have commenced the adjudication proceedings in its own name. This was because GT was aware that Mailbox had assigned its rights under the building contract to the funder of the Works. Mailbox argued that the contract had not been assigned, only charged to the Bank; but even if it had (been assigned), it had been re-assigned back to Mailbox on or by the date the adjudication commenced.

The court ascertained that it had been a condition precedent to Mailbox's loan facility with Aereal Bank PG that Mailbox assign absolutely its "*right, title and interest from time to time*" in "*any agreement to which it is a party*" to the bank. Despite the fact the building contract did not exist at the date of the loan facility, this wording was considered wide enough to cover future agreements, and thus the building contract was captured. Furthermore, a notice of assignment was subsequently served on GT (in January 2014) in

respect of the assignment of the building contract. This notice was considered strong evidence of an absolute and legal assignment of the building contract to the bank.

The court therefore dismissed Mailbox's argument that the building contract had not been assigned. However, on or before the 19 August 2016, the bank re-assigned all rights and benefits under the building contract to Mailbox in a deed of assignment document. The deed of assignment was dated 19 August 2016, though was purportedly executed before this date. Upon the execution of this document by the bank, it became effective as an equitable re-assignment of the rights and benefits under the building contract to Mailbox.

For an equitable assignment to become a legal assignment, certain criteria must be met. One of which is written notice of the assignment being given. Notice of the re-assignment was received by GT on 26 August 2016, 7 days after the adjudication was started. On this date it became a legal assignment. However, for the purposes of determining Mailbox's entitlement to bring a claim, the equitable assignment was sufficient. The court was satisfied that, on 19 August, on the same day as the adjudication was started, Mailbox had beneficial ownership of all rights and benefits under the building contract and was therefore entitled to start adjudication proceedings against GT. Consequently, the adjudicator had jurisdiction to determine the claim and his decision was valid.

Maccaferri Ltd v Zurich Insurance Plc – Court of Appeal (Civil Division) -12 January 2017

In this case, Maccaferri Ltd (**Maccaferri**) had an insurance policy covering accidental death or personal injury with Zurich Insurance Plc (**Zurich**). The policy contained a condition precedent which required Maccaferri to give notice in writing to Zurich "*as soon as possible after the occurrence of any event likely to give rise to a claim*". Maccaferri was also required to give "*immediate notice*" to Zurich on receiving verbal or written notice of any claim.

The facts of the case involved the supply by Maccaferri of Spenax guns to a builders' merchant, Jewson Ltd (**Jewson**). Jewson had in turn hired the guns out to a building company, Drayton Construction Ltd (**Drayton)**. In September 2011 an employee of Drayton was injured when a Spenax gun went off accidentally, hitting him in the face. Maccaferri was notified in September 2011 that an incident had occurred and that the gun should be taken off hire and kept for investigation, but had no further details. By January 2012 Maccaferri knew that someone had been injured, but still no allegation had been made that the gun was faulty.

The injured employee issued proceedings against Drayton in July 2012. Maccaferri was informed that it had been joined to the proceedings as a part 20 defendant on 22 July 2013. Maccaferri notified Zurich of the claim on the same day.

Zurich then refused to indemnify Maccaferri, on the ground that Maccaferri had failed to comply with the condition precedent in the policy concerning notification of possible claims. Zurich submitted that the condition precedent meant that the insured had to give notice of the event to the insurers when he became aware of it and it was likely to give rise to a claim, or when he ought to have become aware.

The court set out as common ground that "an event likely to give rise to a claim" meant an event with, at least, a 50% chance that a claim would arise from it. Further, established case law has decided that the obligation to notify an occurrence as likely to give rise to a claim was to be determined by reference to the position immediately after it occurred.

The court considered whether it was possible to construe the phrase "as soon as possible" as meaning: even if the event was unlikely to give rise to a claim at the time it happened, the obligation to notify would then arise once the insured knew, or should have known, that the event was likely to give rise to a claim. However, the court considered this to be a strained and erroneous interpretation. The court found that Zurich's construction would impose an obligation to carry out a rolling assessment as to whether a past event was likely to give rise to a claim. It was noted that some clauses might have that effect, particularly in professional liability policies, but that was not the clause in the instant policy. Further, he court said that if that was the intended position, Zurich "*could be expected to have spelt it out*."

Therefore the court did not accept Zurich's construction of the condition. It was noted that the condition introduced by Zurich had the potential to completely exclude liability in respect of an otherwise valid claim for indemnity. The court stated that if Zurich wished to exclude liability it had to ensure that clear wording was used to secure that result – and it had not done so.

Finally, it was accepted that, in the light of the actual knowledge Maccaferri possessed at the time of the event, a reasonable person in its position would not have thought it at least 50% likely that a claim would be made. The circumstances of the incident were unclear. Consequently, Zurich was not entitled to rely upon the condition as a ground for denying liability.

AECOM Design Build Ltd v Staptina Engineering Services Ltd – Queen's Bench Division (TCC) - 5 April 2017

AECOM Design Build Ltd (**Aecom**) was retained by Thames Water Utilities Ltd in respect of treatment works

at the Long Reach Treatment works. AECOM subcontracted certain mechanical installation works to Staptina Engineering Services Ltd (**Staptina**). AECOM and Staptina subcontracted on the terms of the NEC Engineering and Construction Short Sub-contract, June 2005. Along the course of the subcontract works, AECOM terminated Staptina's employment although the reasons for termination are unknown. Following termination, an issue arose between the parties as to whether AECOM could make deductions for the cost of defects that had not been rectified, from sums otherwise due to Staptina.

Staptina referred the issue to adjudication and asked for a declaration that "*following termination pursuant to Reason 5 of the Sub-Contract [AECOM] was/is not entitled to make any deductions against [Staptina's] termination account for alleged Defects not rectified or at all, or such declaration as the Adjudicator deems proper.*"

The adjudicator decided that AECOM was, in principle, entitled to make deductions. The adjudicator then went on to decide that those deductions had to be confined to the sum it would have cost AECOM to remedy the relevant defect, either before completion of the sub-contract, or during the defect correction period. AECOM disagreed with the approach taken by the adjudicator and said that the second part of the adjudicator's decision was made outside the scope of the adjudicator's jurisdiction and/or breached the rules of natural justice.

AECOM issued Part 8 proceedings and sought a declaration that those limited parts of the decision that had been made outside the jurisdiction of the adjudicator and/or in breach the rules of natural justice should be severed and rendered unenforceable. Namely, the part of the decision that dealt with how the deductions should be confined. AECOM's position was that the remainder of the decision, that dealt with the point of principle regarding AECOM's entitlement to make the deductions should remain intact.

AECOM sought declarations from the Court that (i) the adjudicator had no jurisdiction to deal with the second part of the decision as that issue had not been referred for determination. AECOM submitted that the question referred to the adjudicator was a point of contractual interpretation only and was therefore to be decided as a matter of principle. According to AECOM, the Adjudicator only had two possible options. The Adjudicator should have either decided "yes" AECOM could make deductions or alternatively, "no" AECOM could not make deductions. The adjudicator was not asked to decide "how" the deductions should be calculated; (ii) even if the adjudicator did have jurisdiction, there had been a breach of natural justice because Aecom did not have a chance to meet the case against it concerning how, in principle, the deduction(s) for defects were to be quantified. The claimant sought to sever parts of the adjudicator's decision on the basis that those parts were made without jurisdiction.

On the issue of jurisdiction, the Court held that it was wrong to suggest that the adjudicator was only entitled to answer the issue (of whether the claimant was permitted to make deductions for defective work) with an answer of either "yes" or "no". The Judge decided that a dispute could not be defined by its potential answers.

Source: Fotolia

On the issue of an alleged breach of natural justice, the Court held that the adjudicator was entitled to decide a point of importance on the basis of the material put before her even if that were a basis for which neither party had contended. The Judge identified that questions of contractual interpretation would often, if not usually, be capable of more than two possible answers. This was not a case of the adjudicator answering the wrong question, as AECOM submit. It is quite possible in circumstances like these that an adjudicator answers the right question, in the wrong way. Therefore, the correct answer, as the adjudicator might see it, might not have been expressly proposed by either one of the parties.

RCS Contractors Ltd v Conway – Queen's Bench Division (Technology & Construction Court)- 4 April 2017

RCS Contractors Ltd (**RCS**) carried out groundworks for Conway across three separate sites in London, Surrey and Wiltshire. The parties did not enter into any written contract(s). A dispute arose in relation to the final account and RCS subsequently referred that dispute to adjudication. During the course of the adjudication, Conway challenged the adjudicator's jurisdiction on the grounds that three separate contracts existed between the parties in relation each of the three sites. Accordingly, Conway submitted that the adjudicator did not have jurisdiction to hear the final account dispute because it was not a single dispute capable of being

referred to adjudication. It was common ground that due to no written contract between the parties, the Scheme for Construction Contracts (England and Wales) Regulations 1998 applied. It was also agreed that an adjudicator, approved under the Scheme, could only decide one dispute at a time.

The adjudicator did not accept the challenge and proceeded to make an award in RCS' favour for almost £60,000. Conway did not make payment and RCS referred the matter to Court for enforcement.

The issue before the Judge was therefore relatively simple. If, as RCS claimed, there was one contract between the parties to cover all three sites then there would be only one final account and the adjudicator had the necessary jurisdiction to decide the dispute. If however, as Conway claimed, there were three separate contracts (one in respect of each site), three separate final account disputes would arise and the adjudicator would not have the necessary jurisdiction to decide the dispute.

The Judge decided that on the balance of probabilities, there was one contract between the parties in respect of all three sites. As such, there was only one final account dispute and the adjudicator had the necessary jurisdiction to decide the claim.

There was limited documentary evidence and the issue was decided on witness evidence. RCS' witness said that, during the relevant conversation with the defendant, he was told, and agreed that, there would be one contract.

The Judge gave five reasons to support his judgment:

- RCS' witness was honest and credible;
- Mr Conway had served a single payment notice and a single pay-less notice on RCS in respect of the final account rather than serving three of each notice;
- Mr Conway's previous advisors referred to the situation as "*a job that was sub-contracted" which suggests that there was one contract;*
- Mr Conway's case appeared to amount to an assertion that simply because there was different documentation relating to different sites, it followed that there were separate contracts. That was not the case;
- Mr Conway was not an entirely satisfactory witness and had no positive case in respect of the conversation upon which RCS relied.

Hutton Construction Ltd v Wilson Properties (London) Ltd – Queen's Bench Division (echnology & Construction Court) - 16 March 2017

By a contract dated 12 November 2014, Wilson Properties (London) Ltd (**Wilson**) engaged Hutton Construction Ltd (**Hutton**) to carry out the conversion of Danbury Palace in Chelmsford into 13 apartments. The works duly proceeded. On 17 August 2016, Hutton served its application for payment no.24. A dispute arose between the parties as to whether Wilson had served a valid payment notice and/or a valid pay less notice in response. Hutton referred the matter to adjudication. The adjudicator found in Hutton's favour and decided that Wilson had failed to serve a valid notice. He awarded payment to Hutton of £491,944.73. Wilson did not make payment to Hutton and Hutton issued an application for summary judgment to enforce the adjudicator's award.

When it came to defending Hutton's application for summary judgment, Wilson did not challenge the adjudicator's jurisdiction, nor did it allege any breach of the rules of natural justice. Instead, Wilson sought to avoid enforcement of the award on the basis that the adjudicator's decision was wrong. Wilson accordingly issued part 8 proceedings, asking the court to decide that Wilson had in fact issued a valid payment notice and/or pay less notice. The issue was whether, upon consideration of the relevant authorities, Wilson's challenge to the adjudicator's decision fell within one of the exceptions to the general rule that an adjudicator's decision is enforceable, even where the adjudicator has been shown to have made an error.

The first exception, the "admitted error" does not apply here. The second exception covers extremely rare situations where the point that is being challenged is so short and self-contained that it can be decided in a very short time frame by way of a declaration. The question for the Judge was therefore whether this second exception applied.

The Judge held that where there was a consensual approach between the parties, as a matter of process, it may be possible to bring this type of challenge. Ordinarily, the party seeking to challenge the validity of the adjudicator's decision would issue part 8 proceedings challenging the decision and seeking a specific declaration. In response, the successful party in the adjudication would issue enforcement proceedings and often the parties would agree that if the defendant lost its part 8 claim, it would pay the sum awarded by the adjudicator.

There was no such agreement in this case. As such, the proper approach for Wilson in these circumstances was to issue a part 8 claim setting out the declarations it sought, or at the very least it had to file a defence and

counterclaim to the enforcement claim, detailing what it sought by way of final declarations. That guidance superseded any support that might be found in the Technology and Construction Court Guide para. 9.4.3 for a more informal approach. Wilson had to prove that the challenge concerned a short, self-contained issue that had arisen in the adjudication, and to which it continued to contest, that there was no need for oral evidence or any other elaboration beyond that which was capable of being provided during the enforcement hearing and that the issue was one which it would be unconscionable for the court to ignore on a summary judgment application.

The Judge decided that Wilson's challenge was wholly inappropriate for consideration on the summary judgment application. Wilson sought to re-run the entire adjudication in a very short time period. That was not the correct process. To allow Wilson's challenge "*would mean that, instead of being the de facto dispute resolution regime in the construction industry, adjudication would simply become the first part of a two-stage process, with everything coming back to the court for review prior to enforcement."* Accordingly, Wilson's challenge to the adjudicator's decision failed.

Glen Water Ltd v Northern Ireland Water Ltd – Queen's Bench Division (Northern Ireland) - 3 February 2017

The water authority (**NIW**) engaged Glen Water Ltd (**GW**) to undertake a project for the upgrade of sludge treatment services in Northern Ireland. GW's works comprised of two stages. The first was an initial construction phase and the second was the service commencement phase. The second phase was essentially a 25 year operation and maintenance period. The parties entered into a project agreement in respect of the same.

The project agreement imposed various obligations on NIW and provided that NIW, as a prudent operator, should maintain the existing sludge treatment assets during GW's construction phase.

In relation to GW's ability to obtain relief and/or claim compensation for any breaches by NIW of its contractual obligations, the project agreement was prescriptive. It was a condition precedent to any claim for compensation by GW, that GW gave prior notification to NIW within 21 days after GW became aware that the compensation event has caused or was likely to cause a delay or incur costs. In addition, GW was required to provide "full details" of that compensation event claim within 14 days of the notification.

Along the course of the works, GW alleged that NIW had breached its prudent operator obligations in that it had failed to maintain the existing assets. GW said that this breach amounted to a compensation event under the project agreement. GW discussed the details of its claim with NIW at a meeting on 14 October 2009. GW then issued a letter to NIW which GW alleged constituted as notification of a compensation event in accordance with the project agreement. GW provided further details of its claim to NIW in December 2009.

NIW denied that any breach had occurred. Furthermore, NIW submitted that if a breach had occurred, GW had failed to comply with the compensation event notification procedure as required by the project agreement. NIW accepted that it had received GW's letter of 20 October 2009, but asserted that this letter related to a different compensation event (the cooling water claim).

GW referred the matter as to whether it had correctly notified the compensation event to adjudication but was unsuccessful. The issue was subsequently referred to the Court for determination.

In the present proceedings, GW submitted that although its letter of 20 October 2009 dealt with the cooling water claim, when considering that letter against the background, the various discussions that had taken place and the other pieces of correspondence exchanged between the parties, NIW had sufficient knowledge to understand that the prudent operator/failure to maintain assets claim was also being notified. In addition, GW said that NIW was obviously aware that a claim may be made against it because an internal NIW document referred to the possibility of the claim being made. NIW disagreed that notification had been given. In addition to its previous submission regarding the content of GW's letter, NIW further submitted that all other compensation event notices had been clearly marked as such and the letter of 20 October 2009 was not identified in this way.

The Judge determined the issue in favour of NIW and decided that GW had failed to give proper notification of the compensation event. The burden was on GW to prove it had given notification but GW had not discharged this burden. It could not be established that GW's letter of 20 October 2009 constituted proper notification. Notification had to be clear and unambiguous, which the letter was not. Simply because the surrounding context and background made the compensation event claim identifiable, did not remedy GW's defect in failing to give proper notification. Whilst the parties had been discussing the issue in various meetings, there was no clear and consistent thread establishing that the pressure steam system claim had been formally notified. GW's claim could not be inferred, given that the letter on which it sought to rely formed part of a chain of correspondence about a

completely separate claim concerning the cooling water. The Judge accepted that the parties had clearly been discussing a variety of issues at the relevant time, but that did not equate to contractual notification of a specific compensation event. GW had not been relied on the 20 October 2009 letter in the adjudication as evidence of its notification. The Judge considered this point to be highly significant.

McGee Group Ltd v Galliford Try Building Ltd – Queen's Bench Division (TCC) - 26 January 2017

Galliford Try Building Ltd (**GT**) were appointed as the main contractor for works at Resorts World in Birmingham. GT engaged McGee Group Ltd (**McGee**) as sub-contractor to carry out the design and construction of the earthworks, substructures, drainage reinforced concrete superstructures and post tensioned slabs and beams. The parties contracted on terms incorporating the JCT Design and Build Sub-Contract agreement (DB Sub/A, 2011 Edition) but the standard form was heavily amended.

A new clause 2.21A was agreed as part of the contract and this clause dealt with the failure of McGee to achieve an Access Condition by the Access Target Date. Under clause 2.21A, GT were entitled to claim loss and expense caused by McGee's failure to achieve the Access Condition. New clause 2.21B provided a cap on McGee's liability as follows:

> *"Provided always that the Subcontractor's liability for direct loss and/or expense and/or damages shall not exceed 10% (ten percent) of the value of this Subcontract order."*

10% of the subcontract order was roughly £1,500,000. On 17 June 2014, GT sent McGee four letters setting out claims its claims for delay and disruption. Between September and December of the same year, GT notified McGee of deductions from sums otherwise due to McGee. These were described as "*reimbursement costs loss and expense and costs associated with McGee's failing to regularly and diligently progress their works*." Each time, the figure deducted by GT for these claims was the same; £1,459,733 which was the same figure produced by the clause 2.21B cap. The Judge noted that until December, it therefore appeared that GT expressly accepted that McGee's liability for financial claims for delay and disruption was limited to 10% of the sub-contract sum.

The following month, the deduction made by GT increased beyond the amount of the 10% cap. At the time of the proceedings, GT's total claim for delay was circa £3.3m of which, they said almost £2.3m was not affected by the cap.

In October 2016, GT sent McGee a statement of the calculation of the final sub-contract sum. This included a document entitled "*Galliford Try Summary Statement of Entitlement to Loss and Expense and Interest*." GT sought to differentiate its delay and disruption claims into two categories. The first category dealt with claims brought under clause 2.21 (McGee's failure to achieve Access Condition) to which GT accepted that the 10% cap applied. The second category dealt with claims brought under clause 4.21 (liability of either party to the other for causing delay and/or disruption to the progress of the works) to which GT said no cap applied. McGee's position was that all of GT's delay and disruption claims were caught by the clause 2.21B cap and therefore McGee's total liability was limited to 10% of the sub-contract price. The Judge was asked to consider how the 2.21B cap should be interpreted.

It was decided that all of GT's claims had the same basis in delay and disruption, and were caught by the cl.2.21B cap. McGee's liability therefore only extended to 10% of the sub-contract sum. GT's argument that the cap did not affect claims under cl.4.21 was rejected. Clauses seeking to limit the liability of one party should generally be treated as an element of the parties' wider allocation of benefit, risk and responsibility and as such, there should be no special rules of interpretation. The Judge considered that clause 2.21B was a straightforward provision seeking to cap the McGee's liability for "direct loss and/or expense and/or damages" at 10% of the value of the sub-contract order. The cap was said not to be referable to claims under particular clauses of the sub-contract or for breach of any express or implied terms. The expression "direct loss and/or expense" meant the financial loss which flowed directly from delay and disruption caused to GT regardless as to which clause that claim was brought under.

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