Murphy's Law

Written by Victoria Tyson

Earlier this year, the English High Court considered a heavily amended FIDIC Yellow Book 1999 contract. Whilst the case is specific to the particular contractual amendments it is worth review. The case *is J Murphy & Sons Ltd v Beckton Energy Ltd*,[1] . It proceeded in court and on an expedited basis as a matter of some urgency because a bond was about to be called for non-payment of delay damages. The Contractor claimed the call would affect his commercial reputation, standing and creditworthiness, and might need to be disclosed in future tenders. He had not paid the delay damages because there had been no agreement or determination of the entitlement to such by the Engineer under Sub-Clauses 2.5 and 3.5.

The Key Facts

- The case concerned an amended FIDIC Yellow Book 1999.
- The Works were delayed. The Contractor (J Murphy & Sons Ltd.) failed to reach a Milestone and no extension of time was granted by the Engineer (Capita Symonds).
- The Employer (Beckton Energy Ltd.) notified the Contractor of its entitlement to delay damages with express reference to Sub-Clause 2.5.
- The Employer, who was in financial difficulty at the time, then gave 23 days' notice of his intention to call on the bond for the Contractor's failure to pay the delay damages within 30 days, as required by a heavily amended Sub-Clause 8.7.
- The Contractor sought a declaration from the Court that: (i) the Employer was not entitled to delay damages under the amended Sub-Clause 8.7 without agreement or determination by the Engineer under Sub-Clauses 2.5 and 3.5; and that (ii) any call on the bond by the Employer would be fraudulent (for which injunctive relief would then be sought).

Employer's claims generally

Sub-Clause 2.5 was largely un-amended and sets out the procedure to be adopted where the Employer considers himself entitled to payment under any clause

[1] [2016] EWHC 607 (TCC).

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of the contractual conditions or otherwise in connection with the Contract (for example, for breach of contract). It is drafted widely, and one would ordinarily read it to include any claim for payment for delay damages under Sub-Clause 8.7.

It stated (with emphasis added):

> "2.5 [*Employer's Claims*]
> If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract … the Employer or the Engineer shall give notice and particulars to the Contractor…The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid…This amount may be

> included as a deduction in the Contract Price and Payment Certificates…"

The Employer's entitlement to delay damages

Unfortunately, Sub-Clause 8.7 was so heavily amended that it is unrecognisable. It was badly done, with the interchangeable use of the terms delay damages and liquidated damages, and most crucially the deletion of the terms that the obligation to pay delay damages be "*subject to Sub-Clause 2.5*". Better drafting would almost certainly have avoided the litigation. As mentioned above, Sub-Clause 2.5 expressly states that it applies where the Employer considers himself entitled to payment under any clause of the contractual conditions, but in the absence of any clear wording to the contrary would Sub-Clause 2.5 still apply (autonomously) where express reference to it in a particular clause has been deleted? The situation was so confusing that the Employer gave notice under Sub-Clause 2.5 despite later asserting that Sub-Clause 2.5 did not apply.

The un-amended Sub-Clause 8.7 states:

> "8.7 Delay Damages If the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*], the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay delay damages to the Employer for this default…"

As amended, it stated:

> "8.7 [*Delay Damages and Bonus*]
> 8.7.1 If the Contractor fails to:
> a) achieve the ROC Accreditation Milestone by the ROC Accreditation Date the Contractor shall pay or allow to the Employer liquidated damages for such delay at the daily rate of £4,000 for each day commencing from the ROC Accreditation Date until the earlier of the achievement of i) the ROC Accreditation Milestone or ii) 31 March 2015; and
> b) achieve the ROC Accreditation Milestone by the ROC Eligibility Change Date the Contractor shall pay or allow to the Employer a Bullet Payment; and
> c) achieve the Taking-Over Date for the Works within the Time for Completion, the Contractor shall pay or allow to the Employer liquidated damages for delay. Such liquidated damages shall be payable at the daily rate of £23,000 for each day after the Time for Completion for the Works up to and including the Taking-Over Date for the Works…
> 8.7.4 Delay damages due pursuant to this Sub-Clause 8.7 shall be deducted from the next applicable Notified Sum following the end of the month in which such delay occurred or where no such Notified Sum is applicable or is disputed, shall be payable within 30 days of the end of the week in which such delay occurred."

The "*Notified Sum*" was another amendment to the standard form contract and was simply a sum stated by the Contractor with no reference to the Engineer.

The Employer's entitlement to call the bond

Sub-Clause 4.2 was also heavily amended and also deleted reference to Sub-Clause 2.5. Apparently, the Employer's lender had insisted on a non-negotiable procedure whereby any claim on the bond would not be subject to any kind of restriction or procedure that would give rise to delay in payment under it.

The un-amended Sub-Clause 4.2 states:

> "4.2 [*Performance Security*]
> The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract in the event of … (b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and*

> *Arbitration*], within 42 days after this agreement or determination …"

As amended, it stated:

> "4.2 [*Performance Security*]…
> 4.2.5 The Employer shall give …23 days' prior written notice to the Contractor of its intention to make a demand under the [Bond] stating the breach the Contractor has committed, during which period and without prejudice to the Employer's entitlement and discretion to claim under the relevant Performance Security at the expiry of the said 23 days, the Contractor may seek to remedy the relevant default and/or breach…
> 4.2.6 If and to the extent i) the Employer was not entitled to make a claim under the Performance Security and/or ii) amounts recovered under any claim under the Performance Security exceed the entitlements and/or otherwise exceed the losses suffered and recoverable by the Employer under the Contract, the Employer shall be liable for and reimburse the Contractor such excess amounts."

Findings

Mrs Justice Carr found that while, on its face, Sub-Clause 2.5 was drafted in the widest possible terms,[2], in this case the right to delay damages under Sub-Clause 8.7 (as amended) was not subject to the Engineer's determination under Sub-Clauses 2.5 and 3.5 for the following reasons:

- The wording "*subject to Sub-Clause 2.5*" had been deleted from the amended Sub-Clause 8.7. Objectively assessed on the facts, this selected deviation from the standard form was consistent with the parties' intention being not to make the Employer's right to delay damages subject to Sub-Clauses 2.5 and 3.5.
- The amended Sub-Clause 8.7 set out a self-contained regime for the trigger and payment of delay damages.
- There were important and substantive differences between Sub-Clause 2.5 and the amended Sub-Clause 8.7, which were resolved if the amended clause was not subject to Sub-Clause 2.5. For example, amended Sub-Clause 8.7 referred to payment by way of deduction from the Notified Sum, whereas Sub-Clause 2.5 referred to payment by way of deduction from Payment Certificates.
- As Sub-Clause 2.5 appeared not to have been properly thought out in the full context of the Contract (viz. the reference to Payment Certificates not the Notified Sum), this undermined the weight to be attached to it.
- The tension that existed between Sub-Clause 2.5 and the amended Sub-Clause 8.7 did not exist between Sub-Clause 2.5 and other sub-clauses
- The fact that the Employer had given notice in accordance with Sub-Clause 2.5 was not a point of substance, as there was no suggestion of any relevant waiver, estoppel, or election.
- Mrs Justice Carr also found that under the amended Sub-Clause 4.2, the bond was a conventional on-demand bond. Any call on the bond to recoup the delay damages would not be fraudulent provided the Employer simply believed that it was entitled to delay damages under the amended Sub-Clause 8.7 even though there had been no agreement or determination of that entitlement under Sub-Clauses 2.5 and 3.5.

Commentary

An Employer's notice under Sub-Clause 2.5 is expressly required in some 14 different sub-clauses of the un-amended FIDIC Yellow Book. As a result of this decision, where reference to Sub-Clause 2.5 in a sub-clause has been omitted and the Employer believes he is entitled to payment or an extension of the Defects Notification Period, the Employer may now not need to give notice under Sub-Clause 2.5 despite its wide wording "*If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract*", and the desirability of the notice. This is consistent with the normal principles of freedom to contract where there are commercial parties of roughly

[2] See: *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd* [2015] KPC 37.

equal bargaining strength. The English courts will not re-write a contract.

Comparisons might be drawn with the Contractor's notice under Sub-Clause 20.1, which is expressly required in some 18 sub-clauses of the un-amended FIDIC Yellow Book. If reference to Sub-Clause 20.1 in a sub-clause has been omitted and the Contractor believes he is entitled to additional time or money, would the Contractor not need to give notice under Sub-Clause 20.1?

Under English law, it will depend upon the parties' intention by reference to what a reasonable person (having all the background knowledge which would have been available to the parties) would have understood the parties to be using the language in the contract to mean[3]. In the case of a clear and irreconcilable discrepancy, more weight will be given to the particular or amended conditions over the general standard form printed conditions.

Where Sub-Clause 20.1 has been (i) omitted, or (ii) where there has never been reference to Sub-Clause 20.1 in a sub-clause (for example in the variation provisions at Sub-Clauses 13.1 to 13.6), and the Contractor believes he is entitled to additional time or money, one would still ordinarily recommend that notice be given under Sub-Clause 20.1 because of the wide wording of Sub-Clause 20.1 "*If the Contractor considers himself to be entitled to any …additional payment, under any Clause of the Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer*….", and because of the obvious desirability of notice of alleged variations.

However, Howard Kennedy does have experience of a Dispute Adjudication Board refusing to dismiss a variation claim for want of a Sub-Clause 20.1 notice.

It is probably right that notice regimes ought only to be applied where they are very clear, given the serious effect they may have on what could otherwise be good claims. This is a philosophy reflected by Mr Justice Akenhead in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[4].

Conclusion

In summary, Sub-Clauses 8.7 in its un-amended FIDIC Yellow Book form is expressly subject to Sub-Clause 2.5, so that the Engineer will agree or determine the delay damages payable by the Contractor to the Engineer. Similarly, Sub-Clause 4.2(b) in its un-amended FIDIC Yellow Book form is expressly subject to Sub-Clause 2.5, so that in order to claim under the Performance Security for amounts due an Engineer's determination may be required. Provided these clauses have not been amended there is no ambiguity.

Whilst this case is specific to the particular contractual amendments, it does serve as a warning to anyone involved in amending the standard form FIDIC contracts or considering a claim under an amended standard form FIDIC contract to consider closely the interplay between the contractual provisions.

Please get in touch at victoria.tyson@howardkennedy.com with your thoughts or to discuss any concerns.

[3] Assessed using the six factors set out in Arnold v Britton [2015] UKSC 36 namely: (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that contract was made, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

[4] [2014] EWHC 1028 (TCC).