FENWICK ELLIOTT

The construction & energy law specialists

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

Adjudication & COVID-19

MillChris Developments Limited v Waters

[2020] 4 WLUK 45

MillChris, a contractor, sought an injunction to prevent a homeowner from proceeding with an adjudication saying that it would not have sufficient time to prepare its defence properly. MillChris noted that its solicitor had been forced to self-isolate at home which made it difficult to obtain evidence. MillChris also noted that a site visit had been arranged which the solicitor would not be able to attend and further that it could not currently appoint an independent surveyor. MillChris had made similar submissions to the adjudicator saying that it was unable to comply with the timetable because of the COVID-19 outbreak, but the adjudicator had decided that the proceedings should continue but gave the contractor a two-week extension to respond.

One current trend that comes out of the recent court judgments as well as comments from arbitrators is a desire to try and proceed where possible and practical. Here Mrs Justice Jefford refused to grant an injunction. This was not a case where there would inevitably be a breach of natural justice if the adjudication went ahead.

For example, the papers could be transported or scanned to the solicitor and extra time had been given to contact the witnesses. The Judge also held that there was no need for both parties to be present at the site visit. The adjudicator could conduct the site visit alone. The visit could be recorded, and the contractor could prepare a list of issues for the adjudicator in advance.

Obviously, each case will turn on its own facts, but the case (and only a summary of the judgment has been reported on Lawtel) suggests that adjudication business should, by and large, continue as usual. The TCC, as always, will expect parties to be sensible, practical and take reasonable steps to ensure that adjudications can proceed in line with the lockdown measures that currently apply.

COVID-19 and working in the TCC

Muncipio De Mariana & Ors v BHP Group Plc

[2020] EWHC 928 (TCC)

The proceedings here arose out of the collapse of the Fundão Dam in Brazil on 5 November 2015, which lead to the release of large quantities of toxic materials. Specifically, this was an application before HHJ Eyre QC, heard remotely by skype, by the Defendants for an extension of time to serve reply evidence from 1 May 2020 to 19 June 2020, which would lead to the vacation of a hearing listed for 8 June. Further time was said to be needed because of problems caused generally by COVID-19.

Whilst the ensuing litigation has been described as the largest class action ever brought in England and of being of unusual scale and complexity, the seven-day hearing in June related to jurisdictional challenges. The evidence included witness statements and expert reports from lawyers, former judges and academics in Brazil. As such, the case is a classic example of one being decided on its own facts. That said, the judgment provides a very useful summary, from a TCC point of view, of the principles the court is likely to adopt when considering similar applications.

The starting point for the Judge was the overriding objective which requires that cases are to be dealt with justly, in ways which are proportionate to the amounts involved, the importance of the case, and the complexity of the issues; and expeditiously and fairly as well as in accordance with, the newly introduced PD51ZA, paragraph 4 of which provides that:

"In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions."

HHJ Eyre QC noted that the principles governing late amendments to pleadings in normal circumstances were of little assistance in determining the approach to be taken to an application for the extension of time for the filing of evidence where it is said that the circumstances of a worldwide pandemic and of national lockdowns have caused delay in the gathering of evidence. First of all, the Judge set out the following principles governing the question of whether a particular hearing should be adjourned if the case cannot be heard face to face or whether instead there should be a remote hearing:

"i) Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.
ii) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.
iii) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.
iv) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.
v) Inevitably the question of whether there can be a fair resolution...by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-

examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing."

The Judge then addressed whether there should be an extension of time for the gathering of evidence because of the effects of the COVID-19 pandemic. Again, the starting point is the overriding objective:

i) The starting point is to stick to existing deadlines and if that is not realistically possible to allow the shortest extension of time that is realistically practicable. "*The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic*."
ii) The court will expect legal professionals "*to make appropriate use of modern technology*." In the same way that the courts are now conducting hearings remotely where this would have been dismissed out of hand only a few weeks ago, the court will expect legal professionals to use methods of remote working and of remote contact with witnesses and others.
iii) While the pandemic and the restrictions imposed to meet it do cause "*real difficulties*", the court expects "*legal professionals to seek to rise to that challenge*." This means going "*further than they might otherwise be expected to go in normal circumstances*" in particular when there are deadlines and trial dates to be met. This means that the court "*can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology*". In other words, to "*roll up their sleeves or to go the extra mile*".
iv) The same approach is expected of expert witnesses, although different considerations are likely to apply where private individuals are involved.
v) "*The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.*"
vi) The court must recognise the realities of the position and try to avoid requiring compliance with deadlines that are not achievable even with proper effort.
vii) The court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods. In the case here, the remote dealings were not between teams located in two or more sets of well-equipped offices with fast internet connections and with teams of IT support staff at hand. Instead they were being conducted from a number of different locations with varying amounts of space; varying qualities of internet connection; and with such IT support as is available being provided remotely. The court also rightly recognised that those working from home may well also be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.
viii) All the above seven factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. Before acceding to an application for an extension of time which would cause the loss of a trial date, the court: "*must be confident that there is no alternative which is compatible with dealing fairly with the case*".

In the case here, the Judge considered that the Defendants had shown that in the current circumstances that even when all proper allowance was made for the use of technology and for the making of extra efforts the exercise of preparing the reply evidence would take significantly longer than was provided for in the timetable laid down. He therefore adjourned the June hearing date.

However, he also noted that this was a complex matter of considerable importance to the parties, but where there would not be any live evidence, which meant that this was clearly a matter which was capable of being determined fairly in a remote hearing. Therefore only a short delay was desirable and the hearing was re-listed for the end of July 2020.

Adjudication: date of service of the notice of adjudication

Flexidig Ltd v M&M Contractors (Europe) Ltd
[2020] EWHC 847 (TCC)

This was an application to enforce an adjudicator's decision, where Flexidig, a subcontractor had been awarded some £225k. One of the objections taken by M&M was that the Referral was served late. The adjudication notice was attached to a covering letter dated 20 November 2019, the underlying notice was dated 22 November, but it was common ground it was created by no later than 20 November so as to accompany the letter bearing that date. It was further common ground that the notice was received on 22 November and certainly no earlier.

M&M said that the adjudicator had no power to act at all because the referral was out of time. M&M said that the true date of the notice was 20 November 2019 because that is when it was sent. It was not disputed that the adjudicator received the reference on 29 November. Mr Justice Waksman said that if the date of the "giving of the notice of adjudication" was the date of the document when it was sent, the subsequent referral would be out of time. On the other hand, if the relevant date was the date of actual or deemed service of the notice, the referral was in time.

Here, the date of giving notice was the date when it came to the attention of the addressee depending on the circumstances and other provisions that may apply. That might be the actual day it came to their attention or, if earlier, some deemed date. Here, under contract, any notice to be "given" shall, if posted, be deemed to be 48 hours after the posting. Here it was posted and it is accepted it was received on 22 November.

The Judge could see no reason, on the basis of authority, principle or language, to say that the giving of notice here meant the sending of it without the consequent receipt, nor is there any practical reason otherwise so to interpret the clause. Equally, for the dispute to be referred to adjudication, the adjudicator must have received the referral. So time does not run until the addressee receives or is deemed to receive the notice. There the key date was 22 not 20 November, and the referral was served on time, namely seven days after receipt of the notice.

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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