The Lords and the LADs

Ian Pease analyses the intricacies of extension of time clauses, in relation to a claim for liquidated and ascertained damages, and the service of notices

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For whom the *Bell* tolls

It has long been the case (see *A Bell & Son (Paddington) v CBF Residential Care and Housing Association* [1989]) that in order to claim the right to deduce liquidated and ascertained damages (LADs), an employer has to have the benefit of a certificate of non-completion of the works from the architect. This is because certainty is necessary where a provision (such as LADs) requires the employer to calculate an exact amount of daily damages.

The recent House of Lords case of *Reinwood Ltd v L Brown & Sons Ltd* [2008] concerned the interaction of this underlying principle with the payment provisions under the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act).

The matter in issue was whether, a right to deduct LADs having arisen, that was cancelled by an extension of time being granted before the 'final date for payment' under the contract. The Lords thought that it was not cancelled and, in so answering, endorsed the judgment of Dyson LJ in the Court of Appeal.

Background case law

Back in the *A Bell & Son* case in 1989, Judge Newey had decided that if a non-completion certificate was issued in relation to a completion date that was then superseded by the subsequent extension of time, then that certificate ceased to have effect. That seemed to be the received wisdom, being endorsed by the Court of Appeal six years later in *JF Finnegan v Community Housing Association* [1996].

However, *Reinwood* set up a certain tension between that principle and the payment provisions under the 1996 Act. There could be no doubt as to the route that Dyson LJ would take in this case, given that when he was in the Technology and Construction Court he was responsible for much of the seminal law on enforcing the 1996 Act's payment provisions. What Dyson LJ held (the rest of the Court agreeing with him) was that if, by the time of the 'withholding notice', the conditions for the deduction of LADs from a payment certificate were satisfied, then the employer is entitled to deduct the specified amount of LADs, even if the certificate of non-completion is cancelled by the subsequent grant of an extension of time before the 'final date for payment' under the contract.

The relevant JCT clauses

The JCT contracts were of course amended to reflect the 1996 Act with clauses 30.1.1.3 and 30.1.1.4 introduced to reflect ss110 and 111. Hence the employer is required, before the final date for payment of an interim certificate, to give written notices to the contractor specifying what it is going to pay and any amount proposed to be withheld or deducted, together with the grounds justifying the withholding or deduction. Absent those notices the employer has to pay the full certified sum.

Clause 24 is where we find the successor provisions to those considered by Judge Newey in *A Bell & Son*. Clause 24.1 provides for the architect to issue a certificate that the contractor has failed to complete the works by the completion date. However, if an extension of time is granted after the issue of the non-completion certificate, the earlier certificate is considered to be cancelled. Furthermore, by clause 24.2.1, before the employer may deduct LADs, in addition

to the non-completion certificate, the employer must inform 'the contractor in writing… that he may require payment of, or may withhold or deduct, liquidated and ascertained damages…'.

Finally, the contractor is entitled to issue a default notice to the employer where the latter does not pay 'by the final date for payment the amount properly due to the contractor in respect of any' interim certificate. That led in this case to determination of the contract by the contractor.

The issues in *Reinwood*

The tension in this case arose as a result of the timing of the various notices. The chronology was as follows:

14 December 2005: Architect issues certificate of non-completion (clause 24.1).

11 January 2006: Architect issues interim certificate showing £187,988 as due.

17 January 2006: Employer issues clause 24.2 notice of intention to deduct liquidated damages for period from 14 December 2005.

17 January 2006: Employer gives notice under clause 30.1.1.4 (the withholding notice) of intention to pay only £126,359, £61,629 being deducted for LADs.

20 January 2006: Employer pays £126,359.

23 January 2006: Architect grants extension of time to 10 January 2006.

24 January 2006: Contractor complains that employer is now entitled to withhold no more than £12,326 in respect of LADs.

25 January 2006: Final date for payment of Interim Certificate no 29.

26 January 2006: Contractor serves notice of default under clause 28.2.1.1.

Thus by the 'final date for payment' (25 January 2006), was the employer in default?

The Court of Appeal thought not, the right to deduct LADs, it said, crystallising upon the giving of the withholding notice (17 January 2006). Whatever happened thereafter was irrelevant. Hence, in the Court's view, if the right to deduct has been fixed at that point in time then the deduction can be made, even if something happens later during the payment period that would otherwise undermine the facts justifying that deduction. Hence it was of no matter that the certificate of non-completion was cancelled before the final date for payment (25 January 2006).

Properly analysed, Reinwood *merely goes to determine the point in time where one assesses the existence of the factors necessary to found an employers' right to set off LADs.*

The House of Lords concurred with the Court of Appeal. Its reasoning was

based, it said, on commercial common sense. The parties had to know where they stood and the procedures in clause 24.2.1 were of crucial importance. That clause states as follows:

> Provided:
>
> (a) the architect has issued a certificate under clause 24.1 [the non-completion certificate]; and
>
> (b) the employer has informed the contractor in writing before the date of the final certificate that he may require payment of, or may withhold or deduct, [LADs], then the employer may, not later than five days before the final date for payment of the debt due under the final certificate,
>
> either:
>
> - 24.2.1.1 require in writing the contractor to pay to the employer [LADs]... or
> - 24.2.1.2 give notice pursuant to clause 30.1.1.4 [the withholding notice]... to the contractor that he will deduct from moneys due to the contractor [LADs]...

Comment

Some commentators have concluded that this case calls into question the *A Bell & Son* case, but that is not so. Properly analysed, this case merely goes to determine the point in time where one assesses the existence of the factors necessary to found an employers' right to set off LADs. The Court of Appeal thought that it was the date on which the withholding notice was given, and the House agreed.

The importance of notice

Steria v Sigma Wireless Communications [2008] is not a construction case but, concerning as it does the procurement of a computer system, there are distinct similarities; it was even procured on a form of process engineering contract. (Sigma was the main contractor, and Steria its specialist sub-contractor in this case.)

The judgment is important for several reasons that concern the question of giving notice of delay and the contract administrator then granting extension of time. One of the big cases of last year was *Multiplex Constructions v Honeywell* [2007], a case that saw Jackson J stressing the importance of giving notice of delay:

> Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent.

Notices are important. They are there for good commercial reasons. And now the courts are signaling that they will be enforced, particularly by finding that they are gate-keepers to claims for extensions of time.

In *Steria* the focus was whether the notice provision was a condition precedent to an extension of time being given. Clause 6.1 was fairly innocuous:

> ... If by reason of any circumstance which entitles the contractor to an extension of time... the sub-contractor shall be delayed in the execution of the sub-contract works, then in any such case *provided* the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay, the time for completion hereunder shall be extended by such period as may in all the circumstance be justified... (Emphasis supplied.)

It was contended by Sigma that this form of wording (particularly the word 'provided') meant that the notice was a condition precedent to the extension of time being granted. The judge agreed. The reasoning comes in two stages. First, the existing words are clear in their meaning. Secondly, the clause does not need some further express statement saying that unless written notice is given within a reasonable time the sub-contractor will not be entitled to an extension of time.

It must be said that this reasoning probably lowers the bar on what most lawyers would generally have perceived as condition precedent wording, but taken together with Jackson J's words it constitutes a resurgence of the contractual notice. Notices are important. They are there for good commercial reasons. And now the courts are signaling that they will be enforced, particularly by finding that they are gate-keepers to claims for extensions of time.

Another finding of the court in this case shows that there has to be a certain formality in the giving of the notice or at least that the information in the notice has to come from the contractor, for the court said:

> ... the written notice must emanate from [the sub-contractor]. Thus for example an entry in a minute of a meeting prepared by [the engineer] which recorded that there had been a delay... and that as a result the sub-contract works had been delayed, would not in my judgement by itself amount to a valid notice under clause 6.1.

That being said, the notice was not a full claim for the effects of the alleged delays. It did not have to spell out the consequences, as the judge said:

> I am unable however to accept [the contractor's] submission that the notice must go on to explain how and why the relevant circumstances have caused the delay. That would be to import a requirement for [the sub-contractor] to provide a level of detail in the notice which goes beyond the simple notification which is of the essence of the clause.

Overall, therefore, the overriding thing to take away from this case is the importance (both from a commercial and ultimately legal point of view) of the giving of notice of delay. ■

A Bell & Son (Paddington) v CBF Residential Care and Housing Association
(1989) 46 BLR 102

JF Finnegan v Community Housing Association
(1996) 77 BLR 22

Multiplex Constructions v Honeywell
[2007] 1 BLR 195

Reinwood Ltd v L Brown & Sons Ltd
[2008] UKHL 12

Steria v Sigma Wireless Communications
[2008] CILL 2544