CONSTRUCTION AND ENGINEERING

Construction case law update: Crystallisation of a Dispute in Adjudication

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In June 2020, the Technology and Construction Court in the UK provided further clarity on the circumstances in which a "dispute" has crystallised for the purposes of adjudication.

In MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd [2020] EWHC 1413 (TCC), the parties entered into a sub-contract for mechanical and electrical services. Delays occurred to the works and Balfour Beatty Kilpatrick Ltd (the "**Defendant**") served notice of delay and claimed extensions of time in five letters between March 2018 and February 2019. Under the sub-contract, MW High Tech Projects UK Ltd (the "**Applicant**") was required to respond as soon as was reasonably practicable and in any event within 16 weeks. The Applicant did not respond and the Defendant referred to adjudication its claim for extensions of time. The adjudicator awarded the extensions of time and ordered the Applicant to pay the adjudicator's fees.

The Applicant sought a declaration in Court that the adjudicator lacked jurisdiction and so the decision was invalid. The Applicant's case was that no dispute had crystallised when the Defendant referred its claim to adjudication: that the Defendant had served on the Applicant, eight days before the adjudication, a new and substantial delay report (the "**Report**") which introduced a new 'relevant event'. The Applicant argued that this eight day period fell short of the 16 week period it had in which to respond and that it was not obliged to reply to the claim until it received further particulars.

The Defendant contended that its notice of delay and claim for extension of time complied with the sub-contract, that the Applicant failed to respond in the permitted time or seek further information and that, when it provided the Report, which essentially particularised the claims previously submitted, it invited the Applicant to grant the extension of time within seven days – and that, again, the Applicant did not respond or request further information.

The question for the Court was whether a dispute had crystallised. Mrs Justice O'Farrell contextualised her decision in the robust approach taken by the courts to adjudication enforcement. Absent circumstances where an adjudicator decided a question not referred, or acted in an obviously unfair manner, decisions would be respected and enforced. O'Farrell J cited the leading authorities on the issue of whether a dispute has crystallised: Amec Civil Engineering Limited v The Secretary of State for Transport [2004] EWHC 2339 (TCC) and Cantillon Ltd v Urvasco Ltd [2008] EWHC 282.

To recap, the guidance in *Amec* was as follows:

- The word "dispute" should be given its normal meaning.
- The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. A dispute does not arise unless and until it emerges that the claim is not admitted.
- The circumstances from which it may emerge that a claim is not admitted are protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.
- The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.
- If the claimant imposes on the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.
- If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

The Court considered that the five letters were, in effect, five notices of delay and claims for extensions of time served upon the Applicant. Each letter set out the causes of delay, the material circumstances being relied upon, the material relevant event and the expected effect. The Applicant's argument that it was not obliged to reply until particulars were provided was misconceived – at no stage had it ever notified the Defendant that it was waiting for further information before determining the claim for extension of time. The Defendant's silence gave rise to an inference that the delay claim set out in the notices was not admitted. It followed that the dispute crystallised 16 weeks from the receipt of the fifth notice. The Report was not a fresh notification; it was evidence in support of, and materially the same as, the claims in the five notices. The adjudicator had the required jurisdiction to determine the dispute and the adjudication decision was upheld.

Comment: there are a variety of reasons that contract administrators may fail to respond to claim notices served under a construction contract. For example, they may consider that it is prudent to wait for further particulars or developments rather than to proceed to grant an extension of time, and that not providing a response is an appropriate way to manage this position. This judgment is a salient reminder that adopting that strategy can have unintended consequences: for example, the claim may be placed in the hands of an alternative dispute resolution body at the expense of the party who failed to reply to the claim, or request further information, as happened in this case.

Judgments of the Technology and Construction Court are not binding in Irish courts but may be persuasive in the resolution of disputes in the construction sector.

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