WHAT WORKS ARE 'ANY WORKS'? THE CASE OF SHEPHERD CONSTRUCTION V DRAX POWER

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"Given the UK government's drive to eliminate unabated coal-fired power generation, the case will be particularly pertinent to operators of UK power stations who may be in the process of converting those power stations to biomass or other alternative fuel sources."

In a case[1] which will be of significant interest to developers and operators of large energy and infrastructure projects both in the UK and internationally, the operator of a large UK-based power station has successfully argued before the English Technology and Construction Court ("TCC") that it was entitled to withhold from retention for latter phases of work sums in respect of remedial works to earlier phases of that work.

The TCC's decision reaffirms the principles to be applied in construction of English law contracts and serves as a practical illustration of how those principles apply to the interpretation of the FIDIC Yellow Book First Edition (1999).

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BACKGROUND

In March 2012, the defendant, which operates Drax Power Station in North Yorkshire, entered into an agreement with the claimant for the conversion of four of the six generating units at that power station to operate on biomass fuel. The contract largely followed the standard form of the FIDIC Plant and Design-Build Contract First Edition 1999.

The first phase of the project concerned the design, engineering, installation and commissioning of a facility, known as the Ecostore, which would be used to unload and store the biomass fuel ready for transportation to the boiler distribution system (the "Ecostore Works"). Taking over certificates for those works were issued in September 2014 and the last part of the retention money relating to those works was released in December of that year.

Meanwhile, in October 2012, the parties varied the contract to provide for the engagement of the claimant to carry out the second phase of the project, being the design, engineering, installation and commissioning of the boiler distribution system (the "BDS Works").

In February 2019, the claimant made an interim payment application seeking payment of the balance of the retention money in respect of the BDS Works. However, the defendant sought to make twelve deductions from that sum, four of which related to the cost of remedying defects in the Ecostore Works. The claimant disputed the defendant's right to make those four deductions.

THE ISSUE

In making the disputed deductions from the retention money, the defendant relied upon the words "any work" in clause 14.9.6 of the contract, which was derived (in amended form) from the FIDIC standard form:

"*14.9.6 However, if **any work** remains to be executed under Clause 11 (Defects Liability) or Clause 12 (Tests after Completion) the Employer shall be entitled to withhold the estimated cost of this work until it has been executed and to deduct the same from amounts otherwise due to the Contractor until such time as the work is completed*." (emphasis added)

The claimant argued that sub-clause 14.9.6 did not entitle the defendant to withhold sums relating to the remedying of defects in the Ecostore Works from the BDS retention money. The claimant pointed (among other matters) to a preamble part-way through clause 14.9 which read "*[i]n relation to the Works comprised and relating to Sections 3, 4 and 5*" (being the BDS Works), arguing that those words qualified the phrase "*any work*" in clause 14.9.6 such that it was limited to the BDS Works only.

On the defendant's case, there was no such restriction under the contract and the phrase "*any works*" should be construed broadly as any unexecuted works arising under the contract's defects liability provisions, whether they related to the BDS Works or the Ecostore Works.

THE DECISION

The TCC reaffirmed the general principles applicable for the purposes of construction of contracts in English law, and following the approach laid down by the UK Supreme Court in *Wood v Capita Insurance Services*[2], *Rainy Sky v Kookmin Bank*[3] and *Arnold v Britton*[4], it considered "*the language used in the context of the Contract as a whole and the surrounding circumstances*".

Starting with the wording of sub-clause 14.9.6 itself, the TCC noted that the phrase "*any work*" was not a defined term, and was qualified only by the references to clauses 11 and 12. It would have been possible for clause 14.9.6 to have been qualified by reference to the preamble or to the BDS Works but, without such qualification, it would be necessary to read the phrase "*any work*" as "*any such work*" or "*any of the said Works*" in order to reach the claimant's reading of the clause.

> "The TCC also held that it did not make commercial sense for the claimant to be entitled to the full amount due in respect of the BDS Works at a time when it had received full payment for the Ecostore Works but remedial work in respect of those works remained to be executed. "

The TCC also noted that sub-clause 14.9.6 differed in key respects from sub-clauses 14.9.4 and 14.9.5, each of which expressly referred to sections 3, 4 and 5. Furthermore, sub-clause 14.9.5 used the defined term "*Works*", which the TCC interpreted as a clear reference to the BDS Works. Sub-clause 14.9.6 could also have used that defined term but did not. These differences in drafting militated strongly against the claimant's construction. While the claimant also pointed to a 'bifurcation' of clause 14.9 caused by the preamble (which appeared part-way through the clause), the TCC disagreed that this provided a complete answer to the interpretation exercise.

The TCC also held that it did not make commercial sense for the claimant to be entitled to the full amount due in respect of the BDS Works at a time when it had received full payment for the Ecostore Works but remedial work in respect of those works remained to be executed.

Finally, in the TCC's view it was significant that the parties decided to vary the contract to include the BDS Works, rather than entering into a separate contract for those works. Accordingly, the unqualified reference to "*any work*" was a reference made in a single contract in which the Ecostore Works and the BDS Works were phases or sections of the same project.

On the question of the construction of "*any work*", therefore, the TCC agreed with the defendant's broader interpretation of that term as including both the Ecostore Works and the BDS Works. The defendant, therefore, was entitled to withhold the relevant sums from the retention money.

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COMMENT

This case serves as a clear reminder of the approach which the English courts take in construing contractual provisions. Of particular note for the energy and infrastructure industry, it provides an illustration of the potential significance of a decision to incorporate subsequent phases of work into an existing contract rather than entering into a separate contract for those works.

Given the UK government's carbon-neutral aspirations, and in particular its recent consultation on bringing the deadline for the phase-out of unabated coal generation forward to October 2024, works to convert UK power stations are now a very familiar proposition across the industry. The TCC's decision will therefore be particularly instructive for parties contracting on the FIDIC Yellow Book standard form as to how the structure of the agreement for those works may affect the English courts' approach to the issue of withholding retention monies during subsequent phases of such works.

Watson Farley & Williams LLP has market leading experience working with FIDIC contract forms and regularly advises on some of the largest and most complex energy and infrastructure projects in the UK and internationally.

[1] [2021] EWHC 1478 (TCC)
[2] [2017] AC 1173
[3] [2011] 1 WLR 2900
[4] [2015] AC 1619

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