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construction

Hurry up or what?

Is there an implied term in a building contract that the contractor must proceed regularly and diligently? The contract can usually be terminated if he does not, but is that the same as a positive obligation to proceed in that way? This issue recently came before the court in *Leander* v *Mulalley*.

Leander was engaged to carry out ground works, drainage, concrete framework and associated works for the defendant and main contractor, Mulalley. According to Mulalley the sum of £131,078.12 was due to Leander but had not been paid due to two withholding notices. These notices were served on the basis that Leander was in breach of an implied term to proceed regularly and diligently with the works.

The subcontract contained no terms for interim performance, no milestone dates or sectional completion provisions; however, the subcontract did contain an express term which entitled Mulalley to terminate the subcontract in circumstances where Leander failed to proceed with the subcontract works regularly and diligently. Furthermore the contract also required the subcontractor constantly to use his best endeavours to prevent or minimise any delay in the progress of the whole or any part of the subcontract works.

The subcontract required the claiming party in any adjudication to bear all of the costs and expenses incurred by both parties. Leander, therefore, chose to resolve the contractual issue through court proceedings rather than adjudication and thus avoid the danger of paying the costs even if they won.

The alleged delays referred to in the withholding notices all arose before the subcontract completion date. Accordingly, the court was asked to determine whether Leander had an implied interim obligation to progress and performance in advance of the subcontract completion date. In his judgment Mr Justice Coulson referred to *BP Refinery* v *Shire and Hastings* as the most comprehensive statement on implied terms – for a term to be implied the following conditions must be satisfied:

- it must be reasonable and equitable;
- it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- it must be so obvious that it goes without saying;
- it must be capable of clear expression; and
- it must not contradict any express term of the contract.

The judge found that, in the absence of an express term, a contractor is entitled to plan and perform the work as he pleases provided he finishes it by the contract completion date. In such circumstances an implied term to proceed with the works regularly and diligently was not necessary to make the contract work. Put shortly, if the obligation is to complete by a certain date, it is unnecessary to impose interim obligations on the contractor.

It follows that if you require your contractor to progress his works regularly and diligently you should say so and include an express obligation to that effect. Likewise, if you require your contractor to comply with

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a programme you should include an express obligation to complete tasks by specified dates. However, beware; the contractor may have a claim under the contract where he is prevented from achieving the specified dates through no fault of his own.

The judgment has attracted much attention, given the express wording of the contract which allowed Mulalley to terminate if Leander failed to proceed with the subcontract works regularly and diligently. The judge had no problem with this since not all termination provisions anticipate a breach of contract, for example insolvency. Indeed this clause showed that the parties had decided that the consequences of failing to proceed regularly with the works was the right to terminate and not the right to recover damages.

This case offers helpful guidance on implied terms, the obligation to progress works prior to completion and how the court can provide a decision relatively quickly on a question which affects the parties' rights without the need for adjudication. ■

David Weare, Partner

Changed circumstances

If a piece of advice is correct when given, but later becomes obsolete due to a change in circumstances, is there a continuing duty to advise the recipient? This was the question the court had to consider when Shepherd Construction Ltd brought a claim against their solicitors, Pinsent Masons LLP, following the outcome of an earlier case, *William Hare Ltd* v *Shepherd Construction Ltd* [2010] EWCA.

In that case, the court found that a "pay when paid" clause in Shepherd's standard form of sub-contract did not relieve Shepherd of their obligation to pay their subcontractor, Hare, in a situation where the upstream payer (Trinity Walk Wakefield Limited) went into administration by passing a resolution of its board of directors. The wording of the sub-contract stated that Shepherd was not obliged to make payment where an administration order was made against Trinity under part II of the Insolvency Act 1986, but in this case there was no order: the directors had simply passed a resolution.

The fact that the directors were able to put the company into administration by passing a resolution was due to a change in the law which came into force in 2003 following the passing of the Enterprise Act 2002. Before that a court order was necessary.

The Housing Grants, Construction and Regeneration Act 1996 made "pay when paid" clauses unlawful, except where the upstream payer was insolvent, and section 113(2) stated that a company became insolvent (so far as administration is concerned) "on the making of an administration order against it under part II of the Insolvency Act 1986". In 1998 Pinsent Masons LLP's predecessor firm, Masons, drafted amendments to Shepherd's standard sub-contract in which the wording of section 113(2) was reproduced. However, that section was amended in 2003 by a statutory instrument to bring it into line with the Enterprise Act 2002: a company would now become insolvent "when it enters administration". This would include the passing of a resolution to go into administration.

Despite the change in the wording of section 113 (2), Shepherd continued to use the old wording as drafted by Masons in 1998, which was later shown by *William Hare* to be insufficient to provide full protection in the event of Trinity going into administration. Meanwhile, Masons (and from 2004 Pinsent Masons and from 2008 Pinsent Masons LLP) continued to advise Shepherd on a variety of matters. Although the advice given by Masons in 1998 was correct at the time, it had become obsolete as a result of the change in the legislation in 2003. Shepherd argued that, because of the continuing relationship, Pinsent Masons LLP and its predecessors were under a duty to advise that the drafting needed to be changed, and in failing to do so had been negligent.

However, Mr Justice Akenhead rejected that argument, commenting "There is something commercially and professionally worrying if professional people are to be held responsible for reviewing all previous advice or indeed services provided". A solicitor's functions and responsibilities must be determined by his or her retainer. There was no evidence of an express

agreement constituting a single contract comprising a range of specific instructions and commissions. Nor could any overarching general retainer be implied by which Pinsent Masons LLP was required to keep under constant review all advice and drafting previously done. A further complication which undermined the case for there being a single contract was that, although much the same personnel continued to be involved, three distinct firms acted for Shepherd at different stages, namely Masons, Pinsent Masons and Pinsent Masons LLP.

It is clear that any claimant seeking to establish that an adviser has a continuing duty to review previous advice will face an uphill struggle, unless there is clear evidence that such a duty was part of the agreement between the parties. This is not just relevant to legal advice, but could be applicable, for example, where a consultant provides a report, and something happens later on that changes the assumptions on which it is based. Unless it was a specific term of his appointment, the consultant will not be under any duty to advise that the report needs to be updated and that the contents should no longer be relied upon. ■

Alan Erwin, Partner

Fladgate strengthens construction team with partner appointment

We are delighted to announce the appointment of partner David Weare, who joined on 6 February. David was previously head of construction at Olswang LLP and at Davies Arnold Cooper.

David, who has a wealth of experience acting for clients from across the industry including contractors, sub-contractors, employers and professional consultants, is ranked as a leading lawyer in construction by the independent guides to the legal profession. His appointment is part of the firm's continuing strategy to identify senior individuals with the expertise to enhance our teams and his extensive expertise will complement our considerable capability in this area.

In addition, David's wide-ranging overseas contacts, particularly in the Middle East, will add to Fladgate's substantial international practice. Over 30% of the firm's annual income is derived from non-UK clients who are undertaking commercial activities in the UK. ■

Further information?

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