

Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Consequence of failure to provide possession of site - contract provided that “on the date for possession stated in the appendix to these conditions possession of the site shall be given to the Contractor who shall thereupon begin the works and regularly and diligently proceed with the same and who shall complete the same on or before the date for completion stated in the appendix subject nevertheless to the provisions for extension of time...” - contract required the Employer to give possession of at least 18 houses at any given time and the Contractor’s obligation to complete the works by the scheduled completion date is conditional on the Employer giving the Contractor possession of not less than 18 houses at any one time.**
- **Acceptance of payment in full and final satisfaction of all and any claims by the Contractor - bar to raise further claims - by agreeing to the final account and accepting the sum paid as the result of an agreement, the Contractor had accepted the sum in full discharge of all sums due to it under the contract and could not claim any more under the contract.**

[Whittal Builders Co. Ltd v. Chester-le-Street District Council - Queen’s Bench Division - 11 Con LR 40]



- Entitlement to terminate the contract - FIDIC Silver Book - Contractor claimed entitlement to terminate the contract upon failure of the Employer to determine the Contractor's claim for Extension of Time (EOT) and additional payment and to pay the amount due at Milestone 5 under the contract - whether principal Contractor's rejection of its claims for extension of time was a "material breach" - the rejection of the EOT claims by the principal Contractor was not final and binding and not a "material breach" - the law provides parties to construction contracts with a right to refer any dispute to adjudication at any time.
- Abandonment of work - party alleging must prove that other party had no intention to perform the contract by its purported termination, failed to progress the detailed design of the civil works and abandoned the physical works - locking of the site by the sub-Contractor, and refusal to give access to working area until further notice is sufficient to prove the intention to abandon.
- Site conditions - 'Unforeseeable difficulties' - contract clause provided "condition of the Site (including Sub-Surface Conditions) shall be the sole responsibility of the Contractor and the Contractor is deemed to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may affect the Works, the remedying of Defects and the selection of technology and (save where otherwise set out in this Contract) the Contractor accepts entire responsibility for investigating and ascertaining the conditions of the Site including, without limitation, ground, load-bearing and other structural parts, suitability of the utilities and incoming services, hydrological climatic, access, environmental, weather and other general conditions and the form and nature of the Site including both natural and man-made conditions" - event of Unforeseeable difficulties in the contract provided that by signing the contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the works - principal Contractor informed the Sub-Contractor in the kick-off meeting and subsequently of the final results from the soil analyses, including recordings of asbestos from the draft Geotechnics report, the Utilities Search, the Drainage Statement and the Geotechnics draft Ground Investigation Report - Sub-Contractor had no valid claim for an Extension of Time.
- Award of damages under Liquidated Damages clause - clause providing that "Delay Liquidated Damages shall...be the Employer's sole and exclusive remedy and the Contractor's sole and exclusive liability for such Contractor's delays...other than in the event of termination...prior to completion of the works" - payment of 10% of the contract sum under liquidated damages clause did not deal with the costs of delay i.e. principal Contractor's internal costs of delay, which did not form part of the contract sum.

[PBS Energo A.S v. Bester Generacion UK Ltd. - Queen's Bench Division (TCC) - Decided on 7.2.2020]



The Contractor was awarded the work for modernisation of 108 dwellings for the Employer. It was agreed that the Contractor would complete the works in 18 months provided the Employer gave them possession of at least 18 houses at any one time. The major part of the work was the building extension at the rear of the houses and in all but six cases the extension was a single building extending out to the rear two houses with an internal party wall, designed to be only building only and to be built as one. The appendix stipulated the date for possession of the site and the date for completion, but after that it was added that the Employer should give 18 dwellings to the Contractor to work in at any given time. The Court held that the obligations of the Employer, both express and implied, were to give the Contractor possession of at least 18 houses at any one time and that save in the case of the six singles possession of the houses was to be given in pairs. The Court observed that the quantity surveyor of the Contractor had agreed to the final account with the representative of the Employer. The Contractor's quantity surveyor had agreed to the amount due to it but subject to audit. Therefore, the Contractor's acceptance followed by payment of the agreed sum resulted in a concluded agreement, an accord and satisfaction, resolving all differences between the parties.



The principal Contractor and the Sub-Contractor entered into a contract for setting up a biomass energy plant at Kingmoor Park, Bryn Lane, Wrexham Industrial Estate, in North Wales. The plant was never built. Each party claimed to terminate the contract between them. The principal Contractor claimed to be entitled to terminate on the basis firstly of a failure to pay the fifth milestone payment instalment by the due date, and secondly on the basis of substantial failures by the main Contractor to fulfil its contractual obligations. The principal Contractor in turn claimed to be entitled to terminate the contract firstly by reason of a failure to comply with a Notice to Correct as regards delay to the project, caused by delay in the detailed design and suspensions of works and by reason of failure to provide necessary permits and assistance. Secondly the principal Contractor relied on abandonment of the works or an intention not to perform. The Employer in turn issued a notice of intention to terminate the contract with the principal Contractor. The question before the Court was which of the parties is correct that they were entitled to, and did, terminate the contract. Clause 20.1 of the Contract provided that "...if the Contractor fails to give notice of a claim within such period of twenty-eight (28) days, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim". The Court observed that the rejection of those claims by the principal Contractor was not final and binding and hence, was not a "material breach" because the law provides parties to construction contracts with a right to refer any dispute to adjudication at any time. The Sub-Contractor had no valid claim for an Extension of Time based on the event of "unforeseeable difficulty" in the site conditions. The first discovery of asbestos was not due to any error or incompleteness in the reports, which had only been intended as preliminary reports. Further, as noted no delay was caused to the critical path. The Sub-Contractor was not entitled to claim "unforeseen circumstances" since it failed to establish that it fell within the definition of "any and all difficulties and cost, which the Contractor acting with Good Industry Practice could not reasonably foresee, especially events of Force Majeure, occurrence of Employer's Risks and any other unforeseeable difficulties as expressly stated in the Contract." The Court was of the view that sub-Contractor struggled to actually identify any error in the Geotechnics report or any contamination on the site which was not broadly speaking to be expected in the light of what the report did say.



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