DIFC COURT RULES ON CONDITIONS PRECEDENT AND LIQUIDATED DAMAGES FOR EMPLOYER DELAY IN CONSTRUCTION CLAIMS

Date: 8 September 2023

UAE Litigation and Dispute Resolution Alert

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The recent judgment of the Dubai International Financial Centre (DIFC) Court of Appeal in *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* [2022] DIFC CA 016 provides guidance on common issues in construction disputes, namely: (i) the effect of failure to comply with a contractual condition precedent to notify a claim by a certain deadline; and (ii) the Employer's entitlement to liquidated damages where it is responsible for the delay, in disputes governed by DIFC law.

BACKGROUND

The dispute arose out of a contract for the construction of a residential block in Al Furjan, Dubai. The contract was an amended form of the FIDIC 1999 conditions, governed by DIFC law. Following delays, the Employer terminated the contract, liquidated security guarantees given by the Contractor, and issued a claim against the Contractor for liquidated delay damages, other delay damages, costs to complete, and lost profit due to its inability to sell apartments in the development on schedule. In turn, the Contractor argued that it was entitled to an extension of time (EOT), prolongation costs, the value of work done, and the cost of liquidation of the guarantees. In the course of the project, the Contractor had made four EOT applications, each of which was rejected by the Engineer.

The contract contained a number of typical notice requirements. It required the Contractor to give notice to the Engineer of a claim for an EOT within 28 days from when the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the claim, as a condition precedent for entitlement to an EOT. That notice had to be followed by a fully detailed claim with supporting particulars within 42 days of the notice. In the event of an adverse determination on an EOT claim by the Engineer, the Contractor was required to challenge that determination within 14 days.

FIRST INSTANCE JUDGMENT

At first instance, the judge found as a matter of fact that, of a total delay of 325 days, the Employer was responsible for 306 days, and the Contractor's failings caused only 19 days of delay. However, the Contractor's claim for an EOT failed for a number of reasons:

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- The 28-day notice requirement was a valid condition precedent to a claim for an EOT, and failure to comply precluded the Contractor's entitlement to an EOT. It followed that the subsequent 42-day time limit for submitting a fully detailed claim was likewise a condition precedent.
- The notice requirement ran from the date when the Contractor was or should have been aware of an event or circumstance that could give rise to an EOT, regardless of whether any delay had actually occurred by that time.
- The clause providing for a 14-day window for challenging an adverse Engineer's determination amounted to a promise not to challenge an adverse determination after the expiry of the 14-day limit.

COURT OF APPEAL

The Court of Appeal upheld the Court of First Instance's judgment. It held that the 28-day notice requirement was a clear condition precedent and that failure to give timely notice would deprive the Contractor of its entitlement, however strong its claim for an EOT might otherwise be. The Court of Appeal confirmed the first instance interpretation that the notice period began when the Contractor became or should have become aware of the event or circumstance, i.e., the notice period may commence before any delay.

The Court of Appeal differed from the Court of First Instance insofar as it did not interpret the 42-day time limit for providing full particulars as a condition precedent because the contractual wording expressly spelled out the consequences for failure to comply: “any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim.”

The Court of Appeal held that the 14-day time limit for challenging an Engineer's determination was binding and that failure to issue a challenge within this time period meant that the determination would stand and could not be re-litigated through the dispute resolution process.

The Contractor argued that, since the Employer was predominantly responsible for the delay to completion, it should not be entitled to liquidated damages for delay, notwithstanding a failure to comply with the strict notice requirements for an EOT claim. It referred to the common law 'prevention principle,' that a party should not benefit from its own wrongdoing, and to an Australian case, *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143, which considered delays by the employer to amount to “acts of prevention” precluding the employer from recovering liquidated damages in relation to its own delay. This did not find favour with the Court of Appeal, which considered that this would enable the Contractor to “pick and choose” whether or not to make an EOT claim, safe in the knowledge that if the Employer had caused delay, it would not be able to obtain liquidated damages, essentially obviating the carefully constructed contractual process.

The Contractor also mounted a good faith argument, based on Articles 57 and 58 of the DIFC Contract Law. Article 57 provides that implied obligations may arise from, inter alia, good faith, and fair dealing; and Article 58 requires parties to cooperate when such cooperation may reasonably be expected for the performance of the other's obligations. This too was rejected by the Court of Appeal: it held that the words and effect of the contractual provisions to which the parties agreed were clear and left no scope for reinterpretation via an implied term or obligation.

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The Contractor also raised a new argument at appeal, invoking Article 122 of the DIFC Contract Law, which allows a sum of liquidated damages to be “reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.” This was held not to apply: in the court's view, it rested on an assumption that the Contractor's breach was a failure to comply with the strict notice requirements, rather than a failure to complete on time, and there was no argument that the liquidated damages were disproportionate to the latter. The Court of Appeal in principle left open the possibility that the liquidated damages sum could be attacked with detailed evidence of the actual cost of the delay, but this had not been pursued.

CONCLUSION

This decision provides guidance on some common issues in construction disputes from a DIFC law perspective. The Court of Appeal's ruling on notice periods as conditions precedent is to be expected and is in line with English case law. Due to the Contractor's failure to comply with the contractual conditions precedent, the Employer was able to claim liquidated damages from the Claimant for a delay predominantly caused by the Employer. Some may see this as a result that is harsh on the Contractor; a different outcome might perhaps occur under certain civil law systems.

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