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Grain Communications Ltd v Shepherd Groundworks Ltd [2024] EWHC 3067 (TCC) (29 November 2024): Postpone First, Litigate Later—Why Sometimes a Delay is Exactly What You Bargained For

Grain Communications Ltd v Shepherd Groundworks Ltd [2024] EWHC 3067 (TCC)

Date: 29 November 2024

Judge: Her Honour Judge Kelly sitting as a Judge of the High Court

Key Words:

Framework Agreement, Work Order, Variation, Postponement of works, Adjudication, Part 8 Claim, Interpretation of contract, Implied Terms, Loss of profit, Mobilisation and demobilisation costs, Common law damages, Contractual mechanism for variations, Unfair Contract Terms Act 1977, Compensatory damages, Reasonable recipient test, Business efficacy, Express terms vs implied terms, Contract cancellation, Limitation of liability clauses

Summary

In this TCC judgment, Grain Communications Ltd (Claimant) and Shepherd Groundworks Ltd (Defendant) disputed the postponement of works under a framework agreement and specific Work Order [1, 8, 9]. The Defendant claimed breach of contract, seeking damages for loss of profit and mobilisation/demobilisation costs [4]. The Claimant sought declarations that the postponement was a contractual variation, not a breach, and that any such losses were excluded by contract [3, 4]. The court sided with the Claimant, holding the postponement was a valid variation and that, in any event, the contract excluded the Defendant's claimed losses [40].

Case Law/ Authorities:

1. *Keating on Construction Contracts (11th Edition), 3-070 to 3-078*
2. *The Unfair Contract Terms Act 1977*
3. *Construction Law – Julian Bailey (2020) Vol II at paragraph 7.23*
4. *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 742
5. *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20

6. *M Harrison & Co (Leeds) Ltd v Leeds City Council* (1980) 14 BLR 118
7. *Norwest Holst Construction Ltd v Co-Operative Wholesale Society Ltd* [1998] EWHC (TCC) 339
8. *Mannai Investments Company Limited v Eagle Star Life Assurance Company Limited* [1997] AC 749
9. *North Midland v Cyden* [2018] EWCA Civ 1744
10. *Omak Maritime Ltd v Mamola Challenger* [2010] EWHC 2026 (Comm)

Background

Grain Communications Ltd (Claimant), operating in telecommunications, and Shepherd Groundworks Ltd (Defendant), in construction, contracted under a framework agreement dated 20 January 2022 [8]. Under this, the Claimant could issue work orders; the Defendant could not begin work without one, and the Claimant retained absolute discretion over issuing such orders [10(3.3)]. Clause 3.3 excluded liability for loss of profits or opportunity [10(3.3)].

The dispute related to Work Order 11500, issued 7 September 2023, for Blyth Phase 3 [1, 11]. After preparation steps, including permit applications [12], a planned start on 24 October 2023 was halted following a call on 23 October 2023 [14]. An email on 24 October confirmed the postponement until 2024, with work orders remaining in place [16]. The Claimant cancelled permits [16].

The Defendant responded with a Notice of Suspension in February 2024; the Claimant terminated the Work Order shortly after [17]. The Defendant claimed damages in adjudication in April 2024 [18]. The Adjudicator found the email was a cancellation, entitling the Defendant to losses [2, 23]. The Claimant issued a Part 8 claim, challenging that finding [3, 4].

Key Themes:

1. ***Contract Interpretation****: On variation clauses and exclusion of liability for losses [2, 3, 10, 25, 26, 29, 32, 37].*
2. ***Variation vs. Breach****: Whether the postponement email was a contractual variation or breach [2, 3, 22, 23].*
3. ***Implied Terms****: Whether a term preventing postponement should be implied [23, 28].*
4. ***Exclusion of Liability****: The impact of contractual exclusions on loss of profit/mobilisation claims [4, 9, 10, 23, 35-37].*
5. ***Appropriateness of Procedure****: Suitability of the Part 8 procedure [23(1), 24-25].*
6. ***Effect of Adjudication****: Review* of the Adjudicator's contractual interpretations [1, 2, 23-28].

Legal Issues and Analysis

1. Appropriateness of Part 8 proceedings
The Defendant argued the application was unsuitable for Part 8 due to conflicting factual evidence, specifically its claim of having undertaken planning and mobilisation works after permit receipt [5, 24]. The court acknowledged this was the only disputed fact but held it did not affect the declarations sought, which turned solely on contractual interpretation [25]. Therefore, Part 8 was appropriate [25].

2. Variation or breach?
The Defendant relied on the Adjudicator's finding that the 24 October 2023 email was a cancellation, not a variation [26]. The Adjudicator reasoned that while the contract's definition of "Variation" included omissions and changes to the works period, the email lacked the clarity required to be understood as a variation, nor did it reference the variation clause [27-28(86)].
The court disagreed [29], holding that the contract expressly allowed variations to the works period

[10(Sch.B1), 29]. The email confirmed the works would continue but not before 2024, fulfilling the contract's definition of variation [16, 29-30]. The court found the prior phone call, coupled with the email, satisfied clause 11.2's requirement for confirmation in writing of oral instructions to vary [10(11.2), 30-31].

3. Implied terms?
The Defendant argued for an implied term preventing the Claimant from postponing works commencement [26-28]. The court rejected this, finding such a term inconsistent with the contract's express terms permitting postponement through the variation procedure in clauses 8 and 11 [10(Sch.D8,11), 32]. The court applied the principles from Marks and Spencer plc v BNP Paribas [2016] AC 742 and BP Refinery (1977) 52 ALJR 20, finding the proposed term failed the "so obvious it goes without saying" and business efficacy tests [22(1,2), 31-33]. The parties had contemplated delays, including local authority permits, and provided mechanisms for time variations [34].

4. Loss of profit and mobilisation/demobilisation costs
While the court found no breach, it addressed the Defendant's claims in the alternative [35]. The court rejected the claim for loss of profit and mobilisation/demobilisation costs, holding the agreed unit pricing mechanism was inclusive of such costs [36-37]. Even at common law, damages could not place the Defendant in a better position than performance of the contract would have [37]. Clause 18 explicitly excluded liability for costs, loss of profits, or indirect/consequential losses, limiting claims to sums properly due for works done [37-38].
The Defendant argued Clause 3.3 did not exclude actually incurred losses and, if it did, was unreasonable under the Unfair Contract Terms Act 1977 [10(3.3), 38]. The court rejected this, finding the clause reasonable given the parties' commercial status, equal bargaining position, and the Defendant's experience, having entered into 68 similar work orders [38-39]. The Defendant was never obliged to accept any order, and the framework provided protections, including time extensions and payment for work done on termination [39-40].

Conclusion

The court granted the Claimant's declarations [35-37, 40]:

- That the Claimant was not in breach by postponing works via the 24 October 2023 email [40a].
- That even if it were a breach, the Claimant was not liable for the claimed losses [40b].

Key Takeaway:

Clear contractual provisions permitting variations and excluding losses such as profit and mobilisation costs will be upheld, particularly between experienced commercial parties [29-31, 38-40]. Postponements communicated via the agreed variation mechanism are not breaches, and exclusion clauses will likely prevent recovery of such losses even if a breach were found [29, 30-31, 37, 40].

Parting Thoughts

In the end, the Defendant's protestations amounted to little more than contractual wishful thinking wrapped in the faint scent of indignation. The court, with surgical precision, dismantled the notion that Shepherd Groundworks could alchemise a postponement into a lucrative claim for lost profits and mobilisation costs. The reality—laid bare by the unflinching wording of the framework agreement—was that Grain Communications had every right to kick the proverbial can down the road, provided they did so within the variation machinery they themselves had installed (and which, to Shepherd's apparent surprise, worked exactly as advertised).

Her Honour Judge Kelly reminded the parties, and indeed the wider construction world, of an

inconvenient truth: you can't sidestep clear contractual exclusions with emotive arguments about fairness, nor will the courts entertain creative reinterpretations of emails simply because one side prefers breach over variation. In this case, the email in question—while devoid of dramatic contractual fanfare or the word "Variation" in bold caps—did exactly what the contract allowed: it moved the works into the misty lands of "next year, maybe".

As for the Defendant's flirtation with the Unfair Contract Terms Act 1977, it was an uphill charge into the legal equivalent of a brick wall. The court was unimpressed. The parties were seasoned commercial entities; this wasn't a tale of David and Goliath, but of two Goliaths haggling over the fine print of a framework agreement they'd both danced to 68 times before. One might say that Shepherd Groundworks brought a wheelbarrow of grievances to a fight that was always going to be won with the sharp-edged shovel of contractual certainty.

And if there is a moral to this tale? Perhaps it is that in the art of commercial contracting, sometimes the only thing more predictable than a postponed start date is the predictable outcome of trying to wish away clear exclusion clauses. As the court gently reminded all would-be litigants: read the contract. Then read it again. And if you're still thinking about implying a term, lie down until the feeling passes.

#TCC #ConstructionLaw #ContractLaw #ContractInterpretation #ContractVariation #BreachOfContract #ExclusionClauses #UCTA1977 #ImpliedTerms #Adjudication #LossOfProfit #MobilisationCosts #Postponement #Part8 #EmployerContractor #DDAlegal #LegalUpdate #ConstructionLaw #LegalJudgment

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