

No point in cracking the whip. There's no implied obligation to proceed regularly & diligently

Leander Construction Ltd v Mulalley & Company Ltd [2011] EWHC 3449 (TCC)

A decision was issued by the Technology and Construction Court (TCC) in England on 21 December 2011 in the case of *Leander Construction Ltd v Mulalley & Company Ltd [2011] EWHC 3449 (TCC)*. It held that, in contracts where a completion date is expressly stated, there will be no implied term requiring a contractor/sub-contractor to proceed regularly and diligently with its works.

The facts:

- This case involved a bespoke sub-contract which placed a duty on the sub-contractor to carry out the works by a specified completion date.
- The contract included a Schedule of Works but it was a matter of agreement between the parties that the timescales stated in the Schedule of Works were not contractually binding between the parties.
- The sub-contract works were not carried out in accordance with the Schedule of Works, with both parties blaming the other for the delays.
- The contractor alleged that the sub-contractor's delay had caused it loss and issued withholding notices to withhold the relevant sum from 2 interim payments.
- The alleged delays arose prior to the completion date stated in the sub-contract.
- Although the contractor accepted that the Activity Schedule did not set out contractually binding dates, it considered that the sub-contractor had an implied obligation to proceed regularly and diligently with the works and the fact that the dates in the Activity Schedule had not been met was evidence of the sub-contractor's failure to meet that obligation.
- The sub-contract also contained a clause which allowed the contractor to terminate the contract if the sub-contractor failed to proceed with the Sub-Contract Works regularly and diligently.



The Decision:

The Court held that there was no implied obligation on the sub-contractor to proceed regularly and diligently on the basis that:

- (i) The contractor had failed to show that the implied term was necessary to give the contract business efficacy;
- (ii) The contractor sought the term to be implied to solely to allow it to claim damages for interim delay. There was no authority to imply such a term when there was already a contractual completion date. Indeed, all the authorities suggested that the courts are reluctant to imply such a term *“as to the timing or regularity of the contractor’s performance prior to the contract completion date.”*; and
- (iii) To imply such a term would be contrary to the proper construction of the sub-contract. The fact that failure to proceed regularly and diligently could trigger the termination provisions did not suggest that there was an additional implied term to proceed regularly and diligently. Indeed, the parties had already made specific provision for the consequences of the sub-contractor’s failure to proceed regularly and diligently and accordingly, the court considered that the parties *“must be taken to have considered this eventuality and instead decided to deal with the potential problem in an entirely different way.”*

Comment:

- This is an English decision but there is no reason to believe that the Scottish courts would come to a different conclusion.
- Unless a contract expressly requires a party to perform its works regularly and diligently or makes the adherence to a programme a contractual requirement, this case is authority for the proposition that a contractor (or sub-contractor) may be as indolent as it chooses so long as it completes its works by the contractually agreed completion date.

Standard Form Contracts:

This situation arose because no express provision had been made for this matter in the sub-contract and the Schedule of Works was not contractually binding. Had the parties used one of the standard forms of contract, such as JCT or NEC3, the results would have been quite different.

(i) JCT/SBCC

All of the main contracts in the JCT suite specifically impose an obligation on the contractor to proceed regularly and diligently with the works, in addition to any obligation to complete the works by the completion date. Accordingly, had the parties been using a JCT/SBCC main contract, the contractor would have had the right to withhold sums if losses arose due to the failure to meet that obligation.

The JCT sub-contracts do not specifically impose an obligation to proceed regularly and diligently but the sub-contractor is required to:

- Carry out and complete the works in a “proper and workmanlike manner, in compliance with the Sub-Contract Documents...” ;
- Comply with all reasonable requirements of the Contractor regulating the carrying out of the works in the main contract.; and

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- Carry out and complete the works in accordance with the programme **and** reasonably in accordance with the progress of the main contract works (although this clause is subject to the contractor having fulfilled certain of its own related obligations).

(ii) NEC3

Neither the main NEC3 contract, nor the NEC3 sub-contract, expressly states that the contractor/sub-contractor has a duty to proceed regularly and diligently with the works. However, the programme is central to the both the main contract and the sub-contract and the contractor/sub-contractor is required to do the work so that the condition stated for each key date is met by the key date.

The contractor/sub-contractor is also required to revise the programme at various stages throughout the works. If either the contractor/sub-contractor or the project manager becomes aware of any matter which could delay completion or delay meeting a key date, he must immediately notify the other. In terms of the main contract and the sub-contract, if the contractor/sub-contractor does not notify a compensation event within either eight weeks or seven weeks, respectively, of becoming aware of the event, he is not entitled to a change in: the prices; the completion date; or a key date unless the project manager/contractor should have notified the event to the contractor/sub-contractor but did not. Accordingly, potential delays require to be intimated in a timely manner to prevent parties from losing the right to additional time or additional payment.

In addition, it should be noted that NEC3 has an “entire agreement clause” i.e. it states that the contract is the entire agreement between the parties. Accordingly, the courts’ ability to decide that any term should be implied into the contract is greatly curtailed by the wording of this particular contract.



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