

Neutral Citation Number: [2014] EWCA Civ 150

Case No: A1/2013/1320

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
TECHNOLOGY & CONSTRUCTION COURT
Mr. Justice Akenhead
[2013] EWHC (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 19th February 2014

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE TOMLINSON
and
LORD JUSTICE McCOMBE

- - - - - - - - - - - - - - - - - - - -

Between :

RWE NPOWER RENEWABLES LTD	**Claimant/ Respondent**
- and -	
J N BENTLEY LTD	**Defendant/ Appellant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Miss Marion Smith (instructed by **Freeth Cartwright LLP**) for the **appellant**
Miss Fiona Parkin Q.C. and Mr. Ronan Hanna (instructed by **Renew Legal**) for the **respondent**

Judgment
As Approved by the Court

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Lord Justice Moore-Bick :

1. This is an appeal from the order of Akenhead J. giving judgment for the respondent, RWE Npower Renewables Ltd ("RWE"), against the appellant, J N Bentley Ltd ("Bentley"), on its claim for declaratory relief.

2. The dispute between the parties arises out of a contract for civil engineering works in connection with the construction of a hydro-electricity generating plant in Scotland. By an Agreement dated 22nd March 2010 Bentley agreed to carry out the works as defined in, and on the terms of, the documents referred to in clause 2, all of which were agreed to form part of it and were to be read and construed accordingly. Clause 2 also provides that the documents to which it refers should be read and construed in a prescribed order of precedence.

3. The Agreement as a whole is based on standard terms derived from the NEC3 Engineering and Construction Contract, June 2005 edition (with amendments June 2006). It is lengthy and complex, but for present purposes it is necessary to refer to only a few of its provisions. Before doing so, however, it may be helpful to say a little more about the nature of the project and the structure of the Agreement. In simple terms the project comprised the following four elements: (i) a power house, in which the plant and machinery were located; (ii) the turbines and switchgear; (iii) a pipeline through which water from the upper reaches of the river was led into the turbines (known as the "penstock pipeline"); and (iv) a pipeline by which the water was led back to the lower reaches of the river after passing through the turbines (known as the "tailrace"). Bentley was employed to construct the powerhouse and the pipelines, including the "intake" through which water from the river entered the penstock pipeline. The amount of pipework involved was substantial: the penstock alone was about 3.5 kilometres in length.

4. The primary document referred to in the Agreement is entitled 'Contract Data', Part 1 of which contains the primary terms of the contract. It includes in clause 1 a general description of the works to be undertaken in the following terms:

> " . . . the construction of the civil works associated with the Black Rock hydro scheme as more comprehensively set out in Part 2 Works Information."

5. Clause 3 deals with time. It includes the following provision:

> "The key dates and conditions to be met are:
> . . .
> 3. Completion of pipeline testing 24 November 2010
> . . .
> 5. Completion of intake 22 November 2010."

6. There then follow a number of optional clauses, of which only Options X5 and X7 are of importance for present purposes. They provide as follows:

> "**Option X5**
>
> - The completion date for each section of the works is

section	description	completion date
1	Completion of powerhouse, including installation of the overhead crane, sufficient to allow installation of the SSE switchgear. . . .	14 February 2011
2	Completion, including testing, of the intake, penstock pipeline and tailrace and the powerhouse (including building services) to allow Hydro Plant to be installed.	27 May 2011
3	Completion of all work not included in sections 1 and 2.	4 October 2011

Option X7

- Delay damages for each section of the works are

section	description	Amount per day
1	Completion of powerhouse, including installation of the overhead crane, sufficient to allow installation of the SSE switchgear. . . .	£1,000.00
2	Completion, including testing, of the intake, penstock pipeline and tailrace and the powerhouse (including building services) to allow Hydro Plant to be installed.	£2,544.00
3	Completion of all work not included in sections 1 and 2.	£600.00"

(Since the wording of Options X5 and X7 are for all material purposes identical, I shall not refer separately to Option X7 save where it is necessary to do so.)

7. In the course of negotiations RWE put a number of questions to Bentley using a form of Tender Questionnaire ("TQ"). By TQ16 dated 5th March 2010 it asked Bentley to provide an updated programme for the work taking into account specified dates for the provision of detailed design drawings and certain key dates for the completion of sections of the work. One was the revised date for the transport of turbine components to the site (31st May 2011); another was the date for commissioning and testing the plant (28th July 2011). In response to that request Bentley produced Programme Revision 'B', which showed the penstock pipeline and intake being completed by the end of November 2010. In due course a subsequent revision, Programme Revision 'C' became a contractual document. It also showed the penstock pipeline and intake being completed by the end of November 2010.

8. Part 2 of the Contract Data contains the Works Information, which is divided into two parts, one general and one technical. Clause 6.2 of the general part provides as follows:

> "6.2 Completion
>
> . . .
>
> Section 2 Completion, including testing, of the intakes, penstock pipelines and tailrace, and the powerhouse (including building services) to be completed to allow the hydro plant to be tested and commissioned.
>
> Completion of section 2 is defined as completion of the following items of the works:
>
> - all of the intakes and associated facilities;
> - all of the penstock pipelines and associated facilities, except for surface reinstatement;
> - all of the tailrace;
>
> . . . "

9. In the latter part of 2012 a dispute arose between RWE and Bentley over the date for completion of section 2 of the works. At the root of the dispute lay the question whether Bentley's obligation was governed by clause 6.2 of the Works Information or Option X5 in Part 1 of the Contract Data, and if the latter, what was the extent of its obligation. The dispute was referred to adjudication. RWE sought a number of declarations to the effect that Bentley's obligation was governed by clause 6.2 and that all the work described by that clause as forming part of section 2 had to be completed by the prescribed date. Bentley sought a declaration that the terms providing for sectional completion were inoperable and that its obligation was to complete the whole of the works in a reasonable time.

10. It is now common ground (as the adjudicator found) that the penstock pipeline was not completed until 25th October 2012. The adjudicator held, however, that section 2 of the works as defined in Options X5 had been completed on 21st February 2012. He held that there was an inconsistency between Part 1 of the Contract Data and clause 6.2 of the Works Information and that the former took precedence. On the true construction of Option X5 the provisions defining the scope of section 2 were in his view to be construed as requiring completion of the penstock pipeline only to the extent necessary to enable the hydro plant to be installed. It is common ground that in order to achieve that limited purpose only a short length of pipeline upstream and downstream of the powerhouse was required.

11. RWE was dissatisfied with the adjudicator's decision and began proceedings under Part 8 of the CPR seeking a declaration that Bentley's obligation was defined by clause 6.2 of the Works Information and that all the work described as forming part of section 2 had to be finished before the section as a whole could be regarded as

complete. If correct, that meant that the intake, penstock pipeline and tailrace all had to have been completed and tested.

12. The claim was heard by Akenhead J. He held that the Agreement should be read as a whole and construed so far as possible to avoid inconsistencies between different parts on the assumption that the parties had intended to express their intentions in a consistent and coherent way. In his view there was no significant inconsistency between Option X5 and clause 6.2, which, at least in relation to the completion of the pipelines, were capable of being read together without undue difficulty. There were, as he saw it, several reasons why on the true construction of the contract the penstock pipeline had to be completed by 24th November 2010. A particularly strong one was that that was the 'key date' in clause 3 of Part 1 of the Contract Data for the completion and testing of all the pipelines. (He also regarded it as significant that the 'key date' for completion of the intake was 22nd November 2010 and that Programme Revision 'C' was consistent with both.) The judge accepted that there might be discrepancies between the provisions relating to the completion of section 1, but he did not think that that provided any assistance in relation to the construction of the provisions relating to section 2. As to those, he recognised that there was an apparent discrepancy as to the extent to which work on the hydro plant had to be completed, but since that was not part of Bentley's work in any event, he regarded it as "a relatively immaterial verbal alteration."

13. On behalf of Bentley Miss Smith submitted that the judge had gone wrong in his approach to the documents. It was clear, she submitted, that there was a discrepancy between Option X5 and clause 6.2. In particular, the former called only for the *installation* of the hydro plant as part of section 2, whereas the latter required its *testing and commissioning*. The existence of that discrepancy, she said, obliged the judge to jettison the whole of clause 6.2, or (if that be thought too extreme), at least the whole of the provisions in clause 6.2 defining section 2 in favour of the corresponding provisions of Option X5. When construing Option X5, she submitted, it was essential to bear in mind that it was closely linked to the liquidated damages provisions in Option X7, the essential purpose of which was to ensure that Bentley completed its work in time to enable the other major contractors, Scottish and Southern Electricity Plc, which was providing the switchgear, and Andritz Hydro GmbH ("Andritz"), which was providing the hydro plant, to start their work on time. It did not make sense to construe Option X7 as imposing on Bentley a significant liability for delay in completing the pipelines, since completion of the pipelines was not necessary to enable Andritz to begin installing the hydro plant.

14. Miss Parkin Q.C. for RWE submitted that it was necessary to gather the parties' intentions from the contract as a whole. There were many indications, as the judge had noted, that the pipelines were to be completed and tested by the end of November 2010, even though the hydro plant would not be delivered until the end of May 2011. The meaning of Option X5 was, she submitted, clear, but in so far as they might be open to different interpretations they should be read in a way that best gave effect to the parties' intentions as collected from the other provisions of the contract.

15. I start, as did the judge, from the position that the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. I also note, as he did, that Option X5 is worded in more general terms than clause 6.2, which identifies in rather greater

detail the work comprised in each section. That is reflected in clause 1 of Part 1 of the Contract Data, which expressly recognises that the works "are more comprehensively set out in Part 2, Works Information." Despite differences in detail, however, one would expect the two provisions to complement each other and that only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it.

16. In the present case both clauses purport to define the content of section 2. Both refer to the completion *and testing* of the penstock pipeline, which strongly suggests completion of the whole run, a conclusion reinforced by the more specific language used in the second bullet point in the part of clause 6.2 which deals with section 2. Although it can be said that the description in Option X5 does not require the hydro plant to have been installed, whereas that in clause 6.2 does, installation, commissioning and testing of the hydro plant were all part of Andritz's work. Once the powerhouse and pipelines had been completed Bentley's work was largely confined to attending on Andritz. These two parts of the contract are capable of being read sensibly together on the basis that section 2 is intended to comprise substantially the whole of Bentley's work other than the part which falls within section 1. Approached in that way it does not matter for the purposes of the Agreement whether the reference is to "installing" the hydro plant (X5) or to "testing and commissioning" it (clause 6.2), because none of that formed part of Bentley's work. Moreover, insofar as there is any uncertainty in Option X5 about the scope of section 2, the right way to resolve it, in my view, is by obtaining such assistance as one can from other parts of the contract. For that purpose clause 6.2 with its more detailed provisions is the obvious place at which to start. I agree with the judge, therefore, that the two clauses can and should be read in harmony with each other. The result is that Bentley's obligation was to complete the pipelines by 27th May 2011.

17. However, if I am wrong about that and there is a genuine discrepancy between Option X5 and clause 6.2, the provision for precedence among the contract documents comes into play and one is left with the task of construing the language of the Options without regard to clause 6.2. The judge approached the question of construction on the basis that it was intended to resolve discrepancies relating to individual obligations rather than forcing on the reader a choice between one entire clause and another. In principle I think he was right to do so. A contract is a bundle of related obligations, each of which can be separately identified. I see no reason why in this case the parties should have intended to adopt the rather undiscriminating approach suggested by Miss Smith, which involves abandoning the whole of any complex provision if it can be shown to be inconsistent in any respect with another. Only to the extent that different provisions on their true construction impose different obligations in relation to the same subject matter is it necessary to decide which takes precedence.

18. Option X5 defines the scope of section 2 for the purpose of imposing an obligation to pay liquidated damages for delay, whereas the purpose of clause 6.2 (assuming that it is not intended to flesh out Option X5) is rather less clear. In each case, however, there is a single obligation, namely, to carry out the whole of the prescribed work in order to complete section 2. Accordingly, if there is a discrepancy between Option X5 and clause 6.2, I do not think it is possible to extract the part which relates to the pipelines and treat it as a free-standing obligation.

19. Miss Smith submitted that the obligation to pay liquidated damages is the driving force behind the description of each section and that the description of section 2 (and for that matter sections 1 and 3) should be approached with that in mind. In particular, she submitted, it makes little commercial sense to require the payment of a substantial sum by way of liquidated damages for breach of an obligation (completion and testing of the penstock pipeline and tailrace), which did not need to be performed in order to enable Andritz as the following contractor to carry out its work, or to do so by a date (27th May 2011) which was so far in advance of the date for final completion (4th October 2011).

20. There is evidence that the provisions for the payment of liquidated damages were negotiated at the last minute, but there is nothing in the admissible background that helps one understand exactly what the parties intended to achieve by them. For example, one might have expected the weight of any liquidated damages clause to be put on final completion (section 3), since that would normally be the point at which RWE would expect the project to start generating revenue, but the liquidated damages for delay in completing section 3 (£600 a day) is considerably less than that agreed in relation to either section 1 (£1,000 a day) or section 2 (£2,544 a day). These differences cannot have arisen by chance and must have been agreed advisedly. They presumably reflected the losses which the parties thought RWE was likely to incur if the relevant section of the works was not completed by the stipulated date, but there is nothing in the materials before us to indicate the basis on which the particular figures were calculated. I do not think, therefore, that one can obtain very much help towards the construction of Option X5 from them. All one can say with confidence is that, since the date for completion of section 2 was the same as the date for delivery of the hydro plant to the site, Option X7 was intended to ensure that RWE was properly compensated in respect of any loss flowing from delay caused to Andritz by Bentley's failure to complete its work on time.

21. As the judge observed, taken in isolation the description in Option X5 of the work comprised in section 2 could be construed as requiring the completion of the pipelines in order to allow the hydro plant to be installed (the assumption being that that part of the work would be completed before the next began) or as requiring completion of only so much of it as might be necessary to allow the hydro plant to be installed. In seeking to identify the parties' intention one obvious course is to examine the rest of the Agreement (leaving aside clause 6.2 for this purpose) to see what they had in mind and there, in my view, one finds clear pointers to the conclusion that at the time they entered into the Agreement they contemplated that the pipelines would be completed and tested before the work of installing the hydro plant began.

22. There are in my view three particularly strong indications to that effect. The first is clause 3 of Part 1 of the Contract Data, to which I have already referred. Clause 3 as a whole contains the primary terms identifying the period within which the contract work is to be performed. Since Bentley's work was limited to the civil engineering elements of the project (construction of the power house, penstock pipelines and tailrace) it is not surprising that the timetable deals only with those aspects. Clause 3 identifies five key dates, the earliest being the date for the provision of detailed design drawings, the latest being the date for making the powerhouse wind and weather tight. Completion of the intake was due by 22nd November 2010 and completion of pipeline testing by 24th November 2010. This is a clear indication that the parties intended that

the pipelines should be completed and tested by the end of November 2010, even before the powerhouse was weathertight. Option X5, by contrast, calls for the powerhouse to be weathertight by 14th February 2011, and the pipelines to completed (to whatever degree necessary) by 27th May 2011. These dates reflect the fact that by the time the Agreement was signed it had become necessary to put back the date of delivery of the hydro plant. Nonetheless, it is clear that the parties' original intention had been for the pipelines to be completed before the hydro plant was installed and there is no reason to think that their intention is that respect changed.

23. Miss Smith pointed out, correctly, that by virtue of clause 25.3 of the NEC3 conditions of contract a failure to meet a key date gives the employer the right to carry out the work to a satisfactory standard, or to employ others to do so, and recover the cost from the contractor. She submitted that the key dates form part of a regime quite separate from that established by the liquidated damages provisions and shed no light on the meaning of Option X5. I accept that under the standard conditions of contract the key dates perform a specific function, but that does not in my view deprive them of all significance when one is considering the parties' intention in relation to the order in which different parts of the works are to be carried out. Clause 3 and the key dates set out in it are of relevance because they tend to support the conclusion that the parties contemplated that the whole of the work on the pipelines would be completed before the hydro plant was delivered.

24. The second indication is to be found in Bentley's response dated 12th March 2010 to TQ16 (described on the Agreement as a Post-tender clarification) and its production of a revised programme for the works. It is true that like other programmes Programme Revision 'B' was subject to amendment from time to time as circumstances changed, but both it and Programme Revision 'C' provide a good indication of what the parties had in mind at the time they entered into the contract. They both showed the pipelines being completed by the end of November 2010. The programmes therefore all tend to reinforce the conclusion that when entering into the Agreement the parties contemplated completion of the pipelines well before the hydro plant was due to be delivered.

25. The third is the language of Option X5 itself. Miss Smith's case was that the description of the work comprising section 2 should be read as requiring completion of the pipelines only so far as necessary to enable the hydro plant to be installed. However, it is clear from the description of section 1 that the parties were well aware of the distinction between full and partial completion and knew how to describe the latter where it was sufficient for the immediate purpose ("Completion of powerhouse . . . sufficient to allow installation of the SSE switchgear"). Moreover, since only a very short length of each pipeline adjacent to the powerhouse had to be in place to enable the hydro plant to be installed, the construction for which Miss Smith contended would effectively move the work on the pipelines from section 2 into section 3, which is not at all what the parties appear to have intended. I accept, of course, that in a contract of this kind linguistic differences provide a notoriously unreliable basis for preferring one construction to another, but in this case the particular words the parties have chosen are consistent with indications to be found elsewhere in the contract and to that extent lend them additional support.

26. For all these reasons I think that the judge was right to hold that section 2 of the works had not been completed until the whole of the penstock pipeline had been completed and tested. I would therefore dismiss the appeal.

Lord Justice Tomlinson :

27. I agree.

Lord Justice McCombe :

28. I also agree.