What happens when an employer's prevention is concurrent with the contractor's delay; why many companies are now bypassing statutory demands and heading straight to petition; and what your rights are regarding verbal contract disputes

Concurrency, prevention and responsibility

DELAY CASES
JANE FENDER-ALLISON

The courts dealt with numerous delay and concurrent delay cases in 2011. One of those looked at what happens when the employer's prevention is concurrent with the contractor's delay. The answer? The employer has not prevented completion and the contractor takes responsibility for the delays.

In this case (Jerrram Falkus v Fenice) the contractor was carrying out development works in Camden. The contract was a design and build (JCT 2005, 2007 revision) with bespoke amendments which deleted some categories of relevant events. The works were delayed by about three months and there were several adjudications. The contractor and employer ended up in court.

The contractor claimed that delays by statutory undertakers and the employer's delays in approving a solution to a design issue amounted to an act of prevention – i.e. the employer cannot hold a contractor to a completion date where it has prevented the contractor from completing by that date. Plus, the deletion of some relevant events in the contract amendments meant that these events were no longer covered by the contract.

Therefore the contractor claimed time was at large and it had a "reasonable time" to complete the works. The employer argued there were no delays by the statutory undertakers or itself, and even if there was, there we∏re concurrent delays which the contractor was responsible for, so the prevention principle should not apply. Therefore it was entitled to liquidated damages.

The court said that for the contractor's arguments to be successful it had to show that acts or omissions by the employer prevented it from achieving an earlier completion date than it did. In this case, the contractor failed to show that. However, even if it had, the court said that the prevention principle would not have been triggered because the contractor was in delay anyway. The employer was awarded its liquidated damages.

In short, concurrent delay in these circumstances may mean the prevention principle does not apply.

The court also considered the definition of "statutory undertakers" under the contract. The unamended JCT 2005 says that delays by statutory undertakers or employer's persons are relevant events entitling the contractor, in principle, to additional time. In this case the court said British Gas and EDF were statutory undertakers; even although they were not doing works solely in connection with their statutory powers. It considered they were unlikely to be "Employer's Persons", especially where all contact and liaison was carried out by the contractor.

The court commented that given the extensive privatisation of the electricity and gas industries in the past 30 years, the test for who is a statutory undertaker might need to be re-visited.

Jane Fender-Allison is a solicitor at Dundas & Wilson

Companies fast forward straight to petition

INSOLVENCY
BILL BARTON

This article deals with an increasingly common problem of insolvency proceedings being used for debt collection purposes. This is a substantive area of law, so this is just a brief guidance on one common question.

Question: Can it properly be argued that the use of a petition without first issuing a statutory demand is a threat and might amount to duress?

Section 123 of the Insolvency Act is the relevant provision and note that Section 123(1)(e) does not require the service of a statutory demand.

Section 123(1)(e) is often relied on since the inability to pay can be proved by correspondence and means a petitioner can avoid the need for a three-week delay between service of a statutory demand and presentation of the petition.

The Court of Appeal has made clear that there is no need to serve a statutory demand.

As well as a clear demand, there is a need for suitable and credible evidence as to a company's failure to pay its debts within a reasonable time of them becoming due. It is an integral part of this that the company has no bona fide basis on which to dispute any debt whose non-payment is invoked by way of example by the petitioner. Otherwise, the petitioner will be unable to satisfy the court that the company is unable to pay its debts.

"The Court of Appeal has made clear that there is no need to serve a statutory demand"

Injunctions and other remedies

There is no mechanism set out in the Insolvency Act for a company to apply to set aside a statutory demand. Furthermore, there is no requirement for a statutory demand to be served. The usual course of action is to seek an injunction or to seek to have the petition struck out or dismissed.

There are four main options open to a company:

- The company can apply to restrain presentation (and strike out) of the petition;
- The company can apply to restrain advertisement (and strike out the petition);
- The company can still apply to strike out the petition as an abuse of process prior to the hearing of the petition;
- The petition can be defended at the hearing of the petition.

Rule of practice, not law

The principle that the presentation of a petition will be restrained or dismissed where there is a bona fide and substantial dispute has been classified as a rule of practice and not a rule of law.

A company may have a claim for damages against a petitioner if the petition was presented maliciously and without reasonable or probable cause.

It is well established that even where there is a genuine and substantial dispute as to a significant portion of the debt that is the subject of a petition, as long as the undisputed amount exceeds £750, in the absence of any abuse of process, the petitioner is entitled to proceed with the petition.

Where a creditor has already obtained a judgement and a judgement debt exists, a defendant company will not normally be permitted to succeed in an argument that it genuinely disputes that the debt is due. On a winding-up petition, the Court will not usually look behind the judgement which gave rise to the judgement debt.

However, if an appeal is pending and if the defendant company can furnish security for the amount of the debt and costs pending the outcome of the appeal, on a winding-up petition the court may dismiss or stay the petition.

Bill Barton is a partner at Barton Legal

Oral construction contracts – what are your rights?

CONTRACT DISPUTES
RICHARD CRAVEN AND TAMSIN TRAVERS

The age of oral Construction Act contracts has dawned. No more worrying about whether all the terms were in writing. But when, inevitably, arguments surface as to whether there was an oral agreement, how will an adjudicator or court deal with them?

A telephone call one Friday afternoon in September, MD to MD, and a court appointment in October conveniently provide a curtain raiser to the Construction Act oral contract arguments that may be just around the corner.

The MDs were, as you might guess, trying to resolve their companies' dispute, on the last day for acceptance of an offer. But by the following Monday they were disagreeing as to whether a deal had been done. There were no other witnesses to the call, so how did the court approach the issue?

The judge looked at the evidence objectively, applying the conventional analysis of offer and acceptance. But on what evidence? Where there is a disputed oral agreement, especially one not made face-to-face but in a telephone call, the court also looks at what was said and done after the discussion, to see whether it is consistent with there being an agreement.

An email was sent by one of the MDs minutes after the phone call, confirming an agreement – acceptance of the offer on the table plus a procedure to deal with a possible increase. That email, sent so soon after the conversation, was, said the judge, consistent with the need to confirm a settlement agreement and "inherently more likely to record what happened". And, after reviewing all the subsequent correspondence, the judge decided that agreement had indeed been reached.

Confirmatory emails can be very helpful.

Of course, the problem would never have arisen if the parties had put their agreement in writing – or would it?

Even with a reassuring written document there can be problems. What if the parties do the hard part and sign a contract, only to discover later that what was written down is not, in fact, what was agreed. Is it game over?

Not necessarily. Another case a few days earlier reminded us that a court can fix the problem. It can rectify the contract where there is common or unilateral mistake.

Common mistake, on which the case was decided, requires a common intention on an issue in the contract, again looking at the facts objectively, that continues until the document is executed, but is wrongly recorded. The potentially tricky part, however, is working out just what, objectively,

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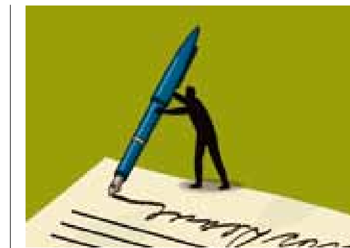

that common intention was.

The case involved a decision on the rather important question of the parties' common intention as to who was to make good a £2.4 million pension fund deficit. The Court of Appeal split 2 to 1 on the question, which was complicated by unusual facts, including the "disreputable" conduct of one party's agent, who wrongly permitted both parties to be misled.

All of which reminds us of the boring old virtues of recording your contracts carefully and making sure that written contract documents reflect what both parties really did understand to have been agreed. And if you want to pre-empt the possibility of a premature oral contract, there's always the magic label, 'subject to contract', which is designed to postpone a binding contractual relationship until a formal contract is signed (although the magic isn't always effective).

The refurbished Construction Act may no longer require the terms of 'construction contracts' (other than the adjudication provisions) to be put in writing, but that doesn't mean that it's not a seriously good idea.

Richard Craven is a professional support lawyer and Tamsin Travers is an associate with the Construction & Engineering Group at Mayer Brown International LLP