

## Construction Law Update

### No time to lose! The implied obligation as to time for completion and the perils of failing to progress works expeditiously

In the recent case of *Barkby Real Estate Developments Limited v Cornerstone Telecommunications Infrastructure Limited* [2022] the Technology and Construction Court (TCC) held a contractor liable to its employer for failing to complete its works within a “reasonable time” pursuant to section 14 of the Supply of Goods and Services Act 1982.

#### Background

The Claimant (“BREDL”) engaged the Defendant (“Cornerstone”) to assist with the removal, replacement and relocation of a mobile telephone mast at a development at Bexhill Road, Hastings (the “Development”). No formal written contract was entered into between the parties.

The purpose of moving the existing mast was to improve the sight line of vehicles leaving the Development, which would otherwise be obstructed.

Cornerstone finalised its original foundation design for the mast relocation at end of March 2019 but in the event a re-design was required as a result of inadequate ground conditions discovered only after works had commenced on site.

The ground conditions issue resulted in a delay to completion of Cornerstone’s Works of some five months. Cornerstone eventually completed its works on 7 August 2020 and practical completion of the Development took place on the same date.

Crucially, BREDL claimed that but for Cornerstone’s delay in completing its Works, the completed Development would have been handed over to its purchaser, Hastings Borough Council, not later than 30 June 2020. BREDL sought recovery of finance costs and other losses said to have resulted from the delay in handover of the Development.

#### Held

Cornerstone was responsible for the five-month delay to completion of its Works and this in turn had impacted critically upon the date for handover of the Development. BREDL was awarded most of its additional project finance costs and all of its additional management costs, which were not too remote.

#### What were the terms of Cornerstone’s contract with BREDL?

Although there was no formal written contract between the parties, the Court nevertheless found that a binding agreement existed and had been formed on 5 September 2019 when Cornerstone acknowledged receipt of BREDL’s payment following its acceptance of a quote.

In the absence of any express terms as to the time for performance, the Court also found that there was to be implied into the contract, by operation of section 14 of the Supply of Goods and Services Act 1982, a term that the “supplier will carry out the service within a reasonable time”.

#### What was a “reasonable time” for completion of Cornerstone’s works?

The Court analysed events that occurred during the build phase of the works and concluded that but for the five-month delay which was attributable to unsatisfactory ground conditions, Cornerstone would have completed its work by the end of March 2020 as initially envisaged, rather than on 7 August 2020.

As to responsibility for the ground conditions issue, the Court held that Cornerstone’s original design of the foundations was inadequate. Having heard expert opinion evidence, it agreed with BREDL that a competent designer would have arranged for a geotechnical survey to be carried out *before* finalising its design. Cornerstone did not do this and, as a result,

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it had to re-design the foundations which delayed the works.

In support of its finding that Cornerstone had failed to carry out its works within a reasonable time, the Court also drew on the following:-

- No explanation was given by Cornerstone as to why it took an additional five-months to resolve the problems identified with its initial foundation design.
- Other complications attributable to Cornerstone compounded the delays. Cornerstone ordered a replacement mast, for example, and then allowed this to be used on another site which prevented the site from being connected to power. Cornerstone had also allowed a contract for the supply of fibre to lapse which created further delay.
- Cornerstone was busy, had 50 different contracts on the go at the time of contract and had failed to give appropriate priority to this project.

In short, the Court was satisfied Cornerstone had failed to complete its Works within a reasonable time.

#### Was BREDL entitled to damages, and, if so, in what amount and are these too remote?

The TCC was also satisfied that Cornerstone's delay in completing its Works meant that the sale of the Development was in turn delayed. Cornerstone had been made aware by BREDL that completion of its works was needed to enable BREDL to achieve its objectives and that the "build contract" (i.e. the main Development) programme was only scheduled to last 8 months. The Court also wasted little time dismissing Cornerstone's contention that the main works to the Development had themselves been incomplete such

that any delay attributable to Cornerstone's Works had not in fact occasioned BREDL any loss.

BREDL claimed the delayed sale of the Development meant it was unable to redeem a loan within the timeframe envisaged which had resulted in it incurring additional fees and interest. BREDL also claimed to have incurred additional project management costs.

The Court found that BREDL was entitled to recover most of its additional financing costs and all of its additional management costs. These losses would not have been incurred had Cornerstone completed its works on time. (On the facts, BREDL's claim for additional financing costs succeeded only in part because had practical completion been certified on time it would still have taken approximately 21 days for the transaction to complete).

The Court rejected Cornerstone's submission that these losses were too remote, holding that knowledge on the part of Cornerstone of the precise details of BREDL's financial arrangements was not necessary. It was enough that there was a serious possibility that BREDL's ability to pay off its financing was tied to practical completion and sale of the project.

#### Analysis

This case serves as a reminder to contractors that in the absence of a formal contract, they are still likely to be under an implied obligation to complete their works within a reasonable time. The case also illustrates the importance of progressing works expeditiously, so as to meet the employer's stated objectives. In this case the Court was unable to reconcile the contractor's expected total time on site of 11 working days with the five-month delay to completion of its Works. Even once the problem with inadequate ground conditions had been identified, Cornerstone had not acted with reasonable expedition to resolve the issue, which delay ultimately proved to be its undoing.

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