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Construction Law Update

Hitting pause: Indefinite postponement of works is a valid variation, court rules

Can works be postponed indefinitely?

In *Grain Communications Limited v Shepherd Groundworks Ltd [2024] EWHC 3067 (TCC)*, the Technology and Construction Court ("**TCC**") considered whether an employer's email instruction to postpone works without specifying a new commencement date was a valid exercise of its contractual right to instruct a variation, rather than a breach of contract.

The decision turned on the wording of the email which showed a clear intention for the works to be carried out in the future.

Key takeaways:

- **The Courts will interpret an employer's variation rights broadly and are willing to permit wide-ranging variations, provided they are clearly laid out in the contract.**
- **Here, the contractual language did not explicitly prevent the employer from postponing commencement of works, therefore it was deemed a valid exercise of its variation rights.**
- **Precise contract drafting is key, particularly regarding variation and postponement clauses. Courts will not imply terms just to make the contract work better if the parties could have included those express terms themselves.**

Factual Background

Grain Communications Limited ("**Grain**"), the employer, and Shepherd Groundworks Ltd ("**Shepherd**"), the contractor, entered into a bespoke framework agreement for the provision of underground telecoms ducts and other specialist construction works.

Clause 11 of the framework agreement permitted (but did not oblige) Grain to call off individual work packages through a work order. The parties had entered into 68 work orders before a dispute arose in relation to work order number 11500 (the "**Work Order**").

The day before the works were due to commence, on 24 October 2023, Grain telephoned and then emailed Shepherd, instructing that the works would not be starting the next day. The email stated (paraphrased):

"… it remains our current intention to continue with all Works Orders signed … However … it currently does not look like we will be able to commence Works on Site in relation to the following Work Orders before the end of 2023... We will continue to keep in touch with you regarding our programme for the Works under these Works Orders and will let you know when anything changes."

The work orders listed in the email included the Work Order in dispute, number 11500.

Adjudication

Shepherd contended that Grain's email was not a variation but a cancellation of the whole Work Order and referred the dispute to adjudication. The Adjudicator's decision was issued on 29 May 2024.

Finding in Shepherd's favour, the Adjudicator ruled that the email of 24 October terminated the Work Order, putting Grain in breach of contract. Shepherd thus had a common law right to recover damages

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk

for loss of profit and its mobilisation / demobilisation costs. In reaching his decision, the Adjudicator reasoned that:

- The 24 October 2023 email did not explicitly state it was a variation, and
- Without clear variation language, a reasonable recipient would interpret the email as cancelling the Work Order.

Grain issued Part 8 proceedings seeking, among other things, a declaration that it was not in breach of the Work Order or the framework agreement by instructing Shepherd of the postponement.

Part 8 is a more streamlined process for use where there is a single issue in dispute; here, interpretation of the variation provisions. For its part, Shepherd questioned whether the matter was suitable for Part 8 due to disputed facts.

Held

Her Honour Judge Kelly disagreed with the Adjudicator's interpretation of the variation provisions. Although the email of October 2023 did not specify it was a variation, it satisfied the requirements of the variation clause – which allowed the employer to make "*omissions from*" the works and vary the "*period*" in which works were performed – and was therefore a valid variation.

The Judge gave the following reasons for her decision:

The variation provisions entitled Grain to postpone the works.

The Work Order entitled Grain to make "*...any addition to, omission from or other change in the Works* ***or the period*** *or order in which they are to be carried out*" (emphasis added). This wording gave Grain the right to delay the work start date, an express variation right which, in the Court's view, the Adjudicator had failed to recognise.

Variation instructions are "*not to be read strictly or pedantically"* but according to the substance of the instruction.

Grain intended to postpone, not cancel, the work by the content of its email, which stated that Grain intended to continue with the Work Order and would keep in touch with Shepherd concerning the programme of works. Grain's original phone call and follow up email were "*all that was required*" to instruct a variation.

The Court will not imply terms restricting an express contractual right.

The Judge rejected Shepherd's argument that an implied term prevented Grain from postponing the works. Such a term would contradict the express terms of the Work Order which plainly permitted a postponement, she said. The Judge noted that the parties could have included specific drafting to restrict Grain's postponement rights, but had chosen not to do so.

As an aside, the judge confirmed that Part 8 proceedings were appropriate in this instance. There was only a single non-agreed fact between the parties and this did not go to the matter at issue, which was contract interpretation.

Commentary

While arising from a particular set of facts, this case highlights once again the importance of complete and precise contract wording. While the Courts are willing to take a broad and pragmatic approach when interpreting variation instructions, they will respect what is actually written in the contract and won't try to "re-write" a contract by adding terms that the parties could have included themselves.

Ultimately, if you want to place constraints on allowable variations, you need to include express wording. The Court will not come to your rescue if your drafting falls short.