J Murphy & Sons Ltd v Beckton Energy Ltd
[2016] EWHC 607 (TCC); TCC; Carr J

On 14 March 2013, Beckton Energy Ltd (Beckton) entered into a contract with J Murphy & Sons Ltd (Murphy) to design, procure, construct, start-up, test and commission a power plant in Beckton, East London (the Works). The contract was based on the FIDIC Yellow Book with amendments (the Contract).

Clause 4.2 of the Contract, which was unamended, required Murphy to obtain an on-demand bond, which it did.

The FIDIC Yellow Book requires the employer to follow the contractual claims procedure outlined in cl 2.5. The employer must (amongst other things) give notice of any claim for payment that the employer considers itself entitled to under the contract as soon as practicable after becoming aware of an event which may give rise to such a claim. The engineer then agrees or determines the employer's entitlement under cl 3.5.

In the contract, reference to cl 2.5 was deleted from cl 4.2 (performance security) and cl 8.7 (delay damages), and the payment provisions at cl 14.6 were amended to remove any involvement by the engineer. Clauses 2.5 and 3.5 were not amended.

The Works were delayed, and between December 2014 and January 2015 Beckton notified Murphy of its entitlement to liquidated damages (LDs). In January 2016 Beckton requested payment of the LDs. Murphy disputed Beckton's entitlement to LDs claiming that the engineer had failed to grant various extensions of time.

On 25 February 2016, Beckton gave notice that it intended to make a demand under the bond. In response Murphy commenced proceedings against Beckton seeking a decision that the engineer’s agreement or determination under cl 2.5 or 3.5 was a prerequisite to Beckton's entitlement to LDs. Beckton denied its entitlement was subject to prior agreement or engineer's determination as the reference to cl 2.5 had been deleted from cl 8.7.

Decision
Carr J found that Beckton was entitled to recover LDs from Murphy under the Contract without agreement or engineer's determination. Carr J commented that cl 2.5 had not been properly thought out in the context of the Contract. Whilst the reference to cl 2.5 had been deleted from cl 8.7, the wording of cl 2.5 was wide enough to cover claims under cl 8.7. Nevertheless the court concluded that the inconsistency could be resolved by construing cl 8.7 as an independent regime which was not subject to cl 2.5 as this was, in his view, the parties' intention.

Significance
This case highlights the problems that can arise when standard contracts are amended without considering the implications for the contract as a whole. Therefore, it is important that the effect of any amendments to a standard contract are carefully considered. This also demonstrates how amendments to a FIDIC standard form can undermine the structure of the contract, limit the role of the engineer and change the balance of risk.

Jawaby Property Investment Ltd v Interiors Group
[2016] EWHC 557 (TCC); TCC; Carr J

Jawaby Property Investment Ltd (JPIL) entered into an amended JCT Design and Build contract with the Interiors Group (IG) for the refurbishment of offices in London (the Contract). The parties also entered into a £1m escrow agreement as security for failure by JPIL to pay sums due (the Escrow Agreement).

Reference to communication by email had been deleted from cl 1.7 of the Contract.

IG submitted six interim applications to JPIL by email, valuing the works up to the due date. Upon receipt of each application, JPIL would check the
works and issue a payment certificate; this being a typical approach to payment. IG submitted its seventh interim application (Application 7) to JPIL by email. Unlike previous applications, Application 7 was marked ‘initial’ assessment. Additionally, the valuation was mistakenly marked ‘valuation 6’ and the works were not valued up to the due date. JPIL accepted the application. However after checking the works, JPIL issued a payment certificate with a valuation of ‘£-124,604.00’.

Fearing a demand for payment under the Escrow Agreement, JPIL commenced proceedings seeking a declaration that Application 7 was invalid because the Contract did not permit electronic communications and IG’s valuation was insufficient to be an interim application. IG claimed Application 7 was valid and was payable under the Escrow Agreement as no pay less notice had been given.

Decision
Carr J concluded that IG did not make a valid interim application and no sum was payable under the Escrow Agreement. Although the court recognised a course of dealings between the parties establishing that JPIL’s agent would accept interim applications by email, Application 7 departed from the parties’ usual course of dealings. Whilst Application 7 was submitted in a similar way to previous interim applications, the fact that it was entitled ‘initial’ assessment, together with the other departures from previous interim applications, persuaded the court that ‘the reasonable recipient of the Valuation would not have regarded it as unambiguously informing it that this was an Interim Application’.

Significance
This case highlights the importance of payment notices and applications being clear and unambiguous. Whilst parties may depart from a contractual payment mechanism and adopt a more appropriate course of dealings, in doing so they must act consistently with the adopted procedure. To reduce the risk of uncertainty as to the applicable procedure the contractual payment process should be followed if possible.

Sainsbury’s Supermarkets Ltd v Bristol Rovers [2016] EWCA Civ 160; CA; Floyd LJ

In 2011 Bristol Rovers (the Club) entered into a conditional contract (the Contract) with Sainsbury’s Supermarkets Ltd (Sainsbury’s) for the sale of Memorial Stadium in Bristol (the Stadium).

The Stadium was to be demolished and a mixed use development, including a superstore, built. It was a condition of the Contract that Sainsbury’s obtained planning permission permitting 24 hour deliveries. Pursuant to the Contract, Sainsbury’s must have acted in good faith and use ‘reasonable endeavours’ to obtain this planning permission.

Planning permission was granted but this did not permit 24 hour deliveries. Following a failed appeal, Sainsbury’s terminated the Contract for non-satisfaction of a condition precedent. The Club disputed Sainsbury’s right to terminate, arguing that the Contract was valid as Sainsbury’s had failed to use ‘reasonable endeavours’ to obtain the planning permission as it had not exhausted the planning appeal process.

The Club commenced proceedings against Sainsbury’s claiming that it had unlawfully terminated the Contract. Sainsbury’s claimed its termination was valid as the condition precedent had not been satisfied. The court of first instance found in Sainsbury’s favour. The Club appealed. One of the issues on appeal was whether Sainsbury’s refusal to allow the Club to make a further appeal was a breach of Sainsbury’s obligations to act in good faith and use ‘reasonable endeavours’ to obtain planning permission.

Decision
Floyd LJ dismissed the appeal, concluding that Sainsbury’s was not in breach of its obligation to act in good faith and to use ‘reasonable endeavours’ to obtain planning permission by refusing to allow the Club to make a further appeal. Floyd LJ noted that the Contract included detailed drafting regarding planning. If the parties had intended to include specific planning obligations the court would have expected them to be included in the detailed drafting. The general obligations to use ‘reasonable endeavours’ and act in ‘good faith’ were insufficient to require Sainsbury’s to allow the Club a further appeal before terminating.

Significance
This decision shows the limitations of general obligations to use reasonable endeavours and act in good faith – in order to place specific obligations on a party, they should be detailed in the contract. This is particularly important if specific obligations are being included alongside such general ones. CL