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CASE NOTE ON PBS ENERGO A.S V BESTER GENERACION UK LTD [2020] EWHC 223 (TCC)

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SUMMARY

The recent case of *PBS Energo A.S v Bester Generacion UK Ltd* [2020] EWHC 223 (TCC) provides a reminder of the care parties need to take when deciding to terminate a contract. It also provides some interesting commentary on the operation of the FIDIC Silver Book 1999 termination provisions.

WHAT HAPPENED?

The case concerned a biomass fired energy generating plant in Wales. Equitix, the employer, engaged Bester as contractor to design, construct and install the Biomass Plant under an amended form of the FIDIC Silver Book 1999. Bester, in turn, engaged PBS as subcontractor, under a subcontract which was meant to be back to back with the main contract but was not.

Work started but disputes quickly arose and culminated in both PBS and Bester claiming to have terminated the subcontract. PBS issued proceedings.

In the court proceedings, both parties claimed that they had each validly terminated the subcontract. Both advanced various grounds for valid termination.

For PBS, these included that Bester had substantially failed to fulfil a number of its contractual obligations including a failure to pay a milestone payment instalment by the due date and a failure to determine a number of PBS's claims for extensions of time (EOT) and additional payment. For Bester, these included an entitlement to terminate because of PBS's failure to comply with a notice to correct as regards a project delay and also that PBS had abandoned the works.

JUDGMENT

The Court ruled in favour of Bester confirming that it was entitled to terminate the subcontract. Key points of interest from the judgment included:

- ***Employer's mere rejection of EOT claims by contractor is not a material breach and does not trigger a right to terminate***
  Bester's rejection of PBS's EOT claims was not final and binding because PBS had the option of referring the claims to adjudication but did not do so. This meant that the rejection was not a "material breach" by Bester and did not give PBS the right to terminate the subcontract.

- ***Employer's non-payment of a milestone instalment does not trigger a right to terminate***
  The milestone in dispute was not achieved by PBS nor did PBS issue any milestone payment application and/or a statement as contractually required. The time for payment after accrual had not expired by the date of PBS's purported termination. Therefore late payment by itself should not be seen as triggering a right to terminate under sub-clause 16.2(b) of the subcontract.

- ***Contractor's abandonment of the works triggers a right to terminate***
  The court found that PBS had abandoned the physical works, failed to progress the detailed design of the civil works and evinced an intention not to perform the subcontract by its purported termination. Therefore, Bester was contractually entitled to terminate under sub-clause 15.2(c) (abandonment of the works) of the subcontract.

- ***Prevention – narrow application***
  The court reiterated that a key requirement of the prevention principle is: prevention. The prevention principle is not some broad and overarching principle or a general backstop to an existing extension of time regime. Rather, it is a focused principle of narrow application. For actual causation to be established, there is a need to show prevention in fact, not prevention on some hypothetical basis.

- ***Liquidated damages?***
  The court confirmed that the application of the liquidated damages clause would turn on the wording of the particular clause in each case. It noted that this aligned with the approach of *Triple Point Technology Inc v PTT Public Company Ltd* [2019] EWCA Civ 230.

FINAL THOUGHTS

A timely case, given the current circumstances, underlining overall the care which needs to be taken when terminating. While the judgment focused on the FIDIC Silver Book, undoubtedly the issues discussed as outlined above will be of wider application.

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