

A.G. Falkland Islands v Gordon Forbes Construction (Falklands) Ltd (No2) [2003] F.I.S.Ct.

Falkland Islands Supreme Court Sanders, Acting Judge, 12, 14 March 2003

Arbitration - Determination on a preliminary point of law- Arbitration Act 1996, s45 FIDIC Conditions of Contract for Works of Civil Engineering Construction, 4th Edition : true meaning of contemporary records in Clause 53- whether witness statements can be used to supplement contemporary records

The Applicant, A, represented the Government of the Falkland Islands. The Respondent, G, was a company who had contracted with A to complete building works in the Islands in 1997. The contract was governed by the FIDIC Conditions of Contract for Works of Civil Engineering Construction, 4th Edition. A dispute arose between the parties which was referred to arbitration. Clause 53.4 of the FIDIC Conditions limits the claim a contractor can make to those matters verified by contemporary records. The contractor wished to introduce witness statements covering those parts of the claim where no such record existed. In the course of arbitration, A applied to the arbitrator to make a ruling on the meaning of contemporary records in Clause 53.4 of the FIDIC Conditions and the extent to which witness statements could be used, which he refused to make. A applied to the Supreme Court under s45 Arbitration Act 1996 for a determination of a preliminary point of law on the true meaning of Clause 53 and whether witness statements could be introduced in evidence to supplement the extant contemporary records.

Held - On the true construction of Clause 53

- (1) 'Contemporary records' in Clause 53 of the FIDIC Conditions, 4th Edition, means original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the Contractor or Employer.
- (2) 'Contemporary records' does not mean witness statements produced after the time giving rise to the claim where such statements cannot be considered to be original or primary documents prepared at or about the time giving rise to the claim.
- (3) Where there is no contemporary record to support a claim, that claim fails.
- (4) Where there are contemporary records to support part of a claim although not its entirety, the claim may succeed on that part of the claim which is supported by contemporary records but not the balance unless
 - (i) inferences can be properly drawn from the extant contemporary records to show that the otherwise unsupported part of the claim is made out and
 - (ii) those inferences allow the Engineer or arbitrator to be satisfied to the civil standard of proof that the extant contemporary records substantiate the otherwise unsupported part of the claim.
- (5) In drawing such inferences the Engineer or arbitrator may rely on witness statements only to identify or to clarify extant contemporary records. A witness statement cannot supplement, or be a substitute for, incomplete contemporary records.

Cases referred to in judgment

H v Schering Chemicals [1983] 1 WLR 143 Application

Attorney General of the Falkland Islands applied to the Court under s 45 Arbitration Act 1996 for the determination of a preliminary point of law in arbitration proceedings in which the respondent Gordon Forbes Construction (Falklands) Limited was the claimant. The facts are set out in the judgment.

Paul Stafford instructed by the Attorney General of the Falkland Islands.

Hugh Ferguson (legal practitioner of Ledingham Chalmers, Stanley) for Gordon Forbes Construction (Falklands) Limited.

Cur adv vul

14 March 2003. The following judgment was delivered., SANDERS, Acting Judge

1. In this matter, I am asked to determine a question of law which has arisen in arbitration proceedings. The case is brought by way of a determination of a preliminary point of law under Section 45 Arbitration Act 1996.
2. The issue is set out at paragraph 1 of the application, which reads:
The Applicant seeks a determination of the following question of law:
Whether, on a true construction of Sub-Clause 53.4 of the FIDIC Conditions
 - (1) *'Contemporary records' in Clause 53 means records produced or prepared at the time of the event giving rise to the claim, whether by or for the Contractor or the Employer.*
 - (2) *Contemporary records does not mean witness statements produced after the event giving rise to the claim.*
 - (3) *Where there are no contemporary records to support a claim, the claim fails.*
 - (4) *Where there are contemporary records to support part of a claim though not in its entirety, the claim may succeed on that part but not the balance unless inferences which can properly be drawn from the extant contemporary records show that the otherwise unsupported part of the claim is made out.*
 - (5) *In drawing such inferences the tribunal may not rely on witness statements to supplement or be substitute for what contemporary records do not show; but it may rely on them to identify and clarify any points in contemporary records which are either ambiguous or unclear.*Or whether the clause bears any other and if so what meaning.
3. I have received and read the skeleton arguments prepared in this case in accordance with the directions of the Court by both parties, and have heard helpful oral submissions from Mr Stafford of Counsel on behalf of the Attorney General of the Falkland Islands and Mr Ferguson on behalf of the Respondent, Gordon Forbes Construction (Falklands) Limited.
4. The factual basis for this claim has rightly not been put before the Court in detail. However, it is common ground that some years ago the two parties entered into a contract for the construction of the infrastructure of the East Stanley Housing Development in the Falkland Islands. This contract was subject to the Federation Internationale des Ingenieurs-Conseils (FIDIC) Conditions of Contract for Works of Civil Engineering Construction, 4th Edition. The Falkland Islands Government, represented in these proceedings by the Attorney General, was the Employer under this agreement and Gordon Forbes Construction (Falklands) Limited was the Contractor.
5. A dispute has subsequently arisen between the parties, and they have sought to resolve that dispute through arbitration, as Clause 67 of the FIDIC contract requires. Mr C R Ford has been appointed as the arbitrator and has been hearing various aspects of the dispute for some months.
6. During the course of arbitration, an issue has arisen over Clause 53 of the FIDIC conditions, and it is over this Clause, and in particular Clause 53.4, that a determination of a point of law is sought.
7. On 18th October 2002, the applicants sought a ruling from the arbitrator over this issue arguing, if I may summarise, that witness statements should not be introduced into evidence by the claimants in the arbitration to 'fill in the gaps' in those areas where contemporary records might be lacking. They argued that to leave the issue outstanding at that stage of proceedings would put them to the considerable expense of preparing witness statements in rebuttal of those submitted by the claimant, not knowing if the arbitrator would accept them as evidence or not.
8. The arbitrator heard arguments, but refused to give a ruling in this issue stating
"Whereas I concur with the Parties' agreement that Witness Statements produced during the course of the arbitration cannot, in themselves, be construed as contemporary records I cannot accept any other of the Respondent's propositions, because they are, as I concur with the Claimants, a matter of proof. To accept the motion would in my view possibly restrict what I might find acceptable without the advantage of proof. I therefore repel this motion."
9. The Respondent subsequently applied for permission to make an application to this Court under Section 45 of the Arbitration Act 1996, and the arbitrator gave that permission on 6 December 2002.

10. At the heart of this application lies the proper interpretation of Clause 53 of the FIDIC conditions. This reads:

Procedure for Claims

53.1 *Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.*

53.2 *Upon the happening of the event referred to in Sub-Clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of a notice under Sub-Clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the engineer so instructs.*

53.3 *Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. [This Sub-Clause continues, but is not of relevance to the present question]*

53.4 *If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under SubClauses 53.2 and 53.3).*

11. It is argued by the Applicant that the intention of Clause 53 is to provide a disciplined way of dealing with claims for additional payment. Such is the overall clarity of Clause 53 that it would be hard not to agree with this proposition. Sub Clauses 53.1 to 53.3 set out a clear and ordered way of dealing with any claim for an additional payment: claims have to be notified at the time they arise, contemporary records have to be kept and regular accounts rendered. The whole contractual system is aimed at the early resolution of any queries at the time the claim arises, and with the strong likelihood that plant, manpower, experts and witnesses are still on site. It is designed to avoid prolonged disputes.
12. Sub-Clause 53.4 is in contrast with the equivalent section of the FIDIC Conditions, 3rd Edition, which has also been produced to me. The relevant section in that edition is Clause 52(5). It is manifestly clear that the subsequent edition is a great improvement. What the earlier edition lacked in clarity and direction is now amended in the 4th Edition; Clause 53 in the newer edition is legally and commercially both more logical and indeed more prescriptive.
13. It has to be noted that the obligations in Clause 53 fall almost exclusively upon the Contractor. The Contractor is to give notice to the Engineer, to keep records (which the Engineer shall then inspect), to permit inspection of those records and to render accounts. The wording in the FIDIC contract is mandatory - the Contractor 'shall' do these things.
14. Clause 53.4 is the default clause. It comes into play only if the Contractor fails to comply with his obligations under the previous three Sub-Clauses. It states that, even if he be in default, the Contractor may still make a claim for additional payment. However, he can only claim those sums which (in this case) the arbitrator considers verified by contemporary records.
15. The applicant argues that if there is no contemporary record to support a claim, then the claim fails. The respondent agrees with this position.
16. One might in normal course think that the matter would rest there, so clear is the agreement of the parties. However, the respondent goes on to say that he wants to be able, if the need arises, to use witness statements, prepared for the purposes of the arbitration litigation, to 'fill in any gaps' that might exist where there is a shortfall in the contemporary records. On behalf of the respondent, Mr Ferguson was at pains to stress that no such gaps exist in the respondent's record keeping, but that he

wished to preserve his client's position in case any shortfall arose during the course of proceedings. It is this aspect of the case, the 'filling in of any gaps' by witness statements, that gives rise to the present application.

17. Before turning to this question in detail, it is proper and I hope helpful to look at the question of what is a contemporary record. It is not defined in the FIDIC Conditions and I am told that - to the best of the parties' knowledge - it has not been the subject of judicial consideration to date.
18. It is not my intention to seek to tie the hands of the arbitrator. What is and what is not a contemporary record is clearly a matter of fact upon which he has to decide. However, some guidance would be appropriate in the context of this application.
19. There are two elements to the determination of what can amount to a 'contemporary record'. Without wishing to state the blindingly obvious, it has to be both a record, and it has to be contemporary.
20. In this respect, the applicant has drawn my attention to Section 4(1) Civil Evidence Act 1968 and to the case of **H v Schering Chemicals** [1983] 1 WLR 143.
21. Section 4(1) Civil Evidence Act deals with the admissibility of statements contained in a document and allows it to be admitted if 'the document is, or forms part of, a record ...'
22. Bingham J (at page 146E) considers the issue of what is a record:
"The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts."
23. This seems to me to be a perfectly suitable definition for the purposes of Clause 53 of the FIDIC Conditions. To give a hypothetical example of the application of this, if there was to be a dispute about whether labour was employed on site on a certain date it would be acceptable to produce the timesheets of the labourers, or the invoice of the labourers to a main contractor showing hours worked for that week, or perhaps even a statement from a contractor made of the time to say that they worked that week. What would not be a record within this definition would be a witness statement made at a much later date to say that the labour was provided that week. It would therefore be highly unusual if a document prepared for the purposes of litigation could be regarded as a record.
24. Contemporary (meaning, in my opinion, the same in this context as contemporaneous) should be given its normal English meaning, both in the FIDIC conditions, and in Bingham J's learned definition in of **H v Schering Chemicals**. What is required is a sufficient nexus between that which is to be recorded and the act of recording. It clearly does not have to be instant, and whether or not a record is contemporary would depend on the facts surrounding the making of that record - that is a matter of fact to be assessed by the arbitrator. However, the requirement that a record be contemporary is an important one, and it would in my opinion be exceptional if any record could be regarded as contemporary if made more than a few weeks after the event it records. That is not to be regarded as a bench-mark, however: an arbitrator may well find as fact that a record produced two weeks after an event might not be contemporary or that one produced four months later was contemporary. It would be necessary to look, inter alia, at the custom and practice of the industry and at the circumstances in which the record came into being in making that finding. In seeking to clarify that record and the circumstances in which it come into being it would be perfectly permissible for the arbitrator to take into account a subsequent witness statement which addressed those issues.
25. The question arises how far, as a matter of law, the arbitrator would be entitled to go in receiving and relying upon evidence which is not in the form of a contemporary record when assessing a claim for additional payment made under Sub-Clause 53.4. What if, for example, the Contractor wishes to claim 4 weeks work by labourers but that the available contemporary records only support a claim for weeks 1, 2 and 4? Can the arbitrator infer from these records that the Contractor provided work for all 4 weeks or can he only claim the 3?
26. Much will depend upon the facts of the matter. If the arbitrator can reasonably infer from other contemporary records that exist in evidence that this part of claim is proved, then there would seem

no reason why, as a matter of fact, the arbitrator could not make that finding in respect of that part of the claim. However, as a matter of law, the burden of proof in this matter rests with the Contractor. It is for the Contractor to satisfy the arbitrator to the civil standard of proof that the extant records support that part of the claim for which there is no contemporary record. By way of observation, it would, in my judgement, be unusual for the arbitrator to make such a finding extensively during the course of arbitration, given the burden of proof.

27. Taking matters a step further and using the same example as before, where the evidence cannot be drawn from extant contemporary records, could the arbitrator receive a witness statement from the Contractor or his agent, prepared for the arbitration litigation, to confirm that the work continued on week 3? In other words, can the arbitrator receive in evidence a witness statement as a substitute for a contemporary record? I believe the answer to this question must be that he cannot.
28. Taking Clause 53 as a whole, it is clear that contemporary recording is the basic requirement for the assessment of a claim. Even where notice is given in accordance with Sub-Clause 53.1, the requirement is that the Contractor keeps such records as are reasonably required to support his claim and the Engineer has the opportunity to inspect these and to request further records. The Employer or Engineer could, of course, also conduct further investigations at the time so as to satisfy himself of the accuracy and adequacy of such records.
29. It would be perverse, I believe, if a Contractor who fails to comply with the terms of the contract, should then be allowed to introduce non-contemporary records (this is to say a document which is neither a record nor a contemporary document) to support a claim, particularly as this cannot be properly investigated by the Employer. It is almost certainly the case that, when a Contractor makes a claim under Sub-Clause 53.4, there will have been a greater passage of time than that which one would expect with a claim made in accordance with Sub-Clauses 53.1 to 53.3. The rights of the Employer to inspect the records *at the time the claim arises*, to conduct his own investigation as to the veracity of the claim with others on site, and to challenge the extent of the claim at the time the claim arises are fundamental to the FIDIC procedure. A Contractor who fails to meet his contractual obligations cannot put himself in a better position by so doing, and must accept the consequential detriment as a result if he fails to keep comprehensive contemporary records.
30. A witness statement cannot be a substitute for contemporary records, therefore, but the arbitrator could take account of a witness statement which seeks to show when and how a contemporary record came into being.
31. It may also be the case that a contemporary record might in some way be ambiguous, or unclear. For example, a Contractor may be working on two separate contracts for the same Employer but the timesheets which the Contractor produces as contemporary records may not be specific as to which of the two contracts the sheets relate. In those circumstances, it would be acceptable in my judgement for the arbitrator to take into account witness statements which seek to address the ambiguity or lack of clarity.
32. The weight which the arbitrator gives to such statements, if any, is of course a matter for him, remembering throughout that the burden of proof rests with the Contractor to prove his entitlement to the claim. In that respect, the arbitrator must always bear in mind that, if he is considering the claim months, or even years, after the additional work giving rise to the claim, the opportunity for the Employer to challenge the records produced by the Contractor will become increasingly limited and therefore there will be greater inequity the longer the passage of time. It would be hoped, therefore, that witness statements would be used sparingly for this limited purpose.
33. In dealing with the application therefore, it is my determination that the true construction of Sub-Clause 53.4 of the FIDIC Conditions is as follows:

(6) 'Contemporary records' in Clause 53 of the FIDIC Conditions, 4th Edition, means original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the Contractor or Employer.

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(7) *'Contemporary records' does not mean witness statements produced after the time giving rise to the claim where such statements cannot be considered to be original or primary documents prepared at or about the time giving rise to the claim.*

(8) *Where there is no contemporary record to support a claim, that claim fails.*

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(10) *In drawing such inferences the Engineer or arbitrator may rely on witness statements only to identify or to clarify extant contemporary records. A witness statement cannot supplement, or be a substitute for, incomplete contemporary records.*

Declaration made