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Construction and Engineering

Autumn 2012 In Site

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Welcome to the Autumn 2012 edition of In Site. This edition covers the following topics:

- the decision in *Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd* on the liability of project managers;
- the incorporation of standard terms and the decision in *Allen Fabrications Limited v ASD Limited* on the incorporation of limitation and exclusion clauses;
- case update: adjudicators' decisions – severability and set-off;
- London 2012: CDM health check;
- the decision in *Ampurius NU Homes Holdings Ltd v Telford Homes (Creekside) Ltd* on due diligence and reasonable endeavours;
- recent corporate manslaughter convictions; and
- publication of new RIBA appointments;

For more information on any of these articles, or on any other issue relating to construction and engineering law, please contact any of the authors or your usual K&L Gates' contact.

Claims against project managers: *Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd*

In the recent case of *Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd [2012] EWHC 2137 (TCC)* the court ordered that the project manager was liable to pay damages to its client for losses on a project carried out under letters of intent and found that a clause in its appointment limiting liability was unreasonable.

8 letters of intent but no contract

The Trustees of Ampleforth Abbey Trust (the "Trustees") engaged Turner and Townsend ("T&T") on a project to build a new boarding house at Ampleforth College. The Trustees wanted the project completed so that the boarding house could be marketed for the next academic year, and to gets things moving, building work started under a letter of intent.

Although not an uncommon way to start off, ultimately 8 different letters of intent were issued but the building contract was never completed. Completion was significantly delayed and the Trustees claimed liquidated damages from the building contractor. The problem however was that although the draft building contract contained provision for liquidated damages ("LDs") (at £50,000 per week), they were not mentioned in the letters of intent (which said the draft building contract was not binding until executed). The building contractor claimed for an extension of time and additional payment. A settlement was reached for substantially less than the Trustees had claimed.

The Trustees then claimed against T&T for breach of T&T's duty to exercise reasonable skill and care to procure execution of the building contract. The Trustees argued that T&T's negligence meant that it could not claim LDs from the contractor. T&T denied negligence but argued that to the extent it was found to be negligent (i) the LDs point made no difference, as they were implied into the letters of intent and (ii) that T&T's appointment contained a provision capping its liability

at the level of its professional indemnity insurance but in no event to exceed the lesser of the fees (approximately £111,000) or £1million.

Duty to exercise reasonable skill and care to finalise contract documents

The judge held that T&T owed a common law duty of care to exercise reasonable skill and care to procure an executed building contract. T&T had been engaged to provide the usual range of project management services. Assistance in procuring the building contract was included in the list of services it was to provide. This was not an absolute obligation to ensure the building contract was entered into, and the absence of an executed building contract would not automatically suggest negligence but it did indicate that something on the project had gone wrong.

This duty had been breached and caused a loss to the Trustees. T&T had not exercised reasonable skill and care as it (i) had taken inadequate steps to resolve the outstanding issues on the building contract; (ii) failed to advise the Trustees of the importance of executing the building contract; and (iii) did not apply the appropriate pressure on the building contractor or on the situation generally.

T&T could not claim that it had misunderstood the effect of the letters of intent, thinking that they incorporated LDs as T&T had been responsible for preparing the contract documents and letters of intent, and should have advised the Trustees if it was not competent to do so. The court agreed with expert evidence that few projects reached completion under a letter of intent, and rejected T&T's arguments that liquidated damages were implied. The Trustees would have settled the claim against the building contractor more favourably had the building contract been in place.

Unenforceable cap on liability

The court also found that the cap on liability was unenforceable on the grounds that it was unreasonable under the Unfair Contract Terms Act 1977. The central factor in this decision was that it was unreasonable for T&T to maintain professional indemnity cover of £10 million, the cost of which is passed to the Trustees through T&T's fees, when the Trustees could not benefit from the full extent of such cover as there was a lower cap on liability in place The judge also acknowledged that the contract was made freely but that T&T had introduced the cap after working with the Trustees on two previous projects and specific notice should have been drawn to the new clause.

Points arising

This case raises a number of issues on the role of, and duty of care owed by, project managers, the risks of using letters of intent and the reasonableness of clauses limiting liability.

The court's view of the project manager's role appears from this case to be one more of common sense and commercial judgment and as "*co-ordinator and guardian of the client's interests*".

Although this case provides guidance on the reasonableness test of limitation and exclusion clauses, the decision was based on the availability of insurance. It is possible that the limitation may have been upheld if no insurance obligation was included. Other commonly enforced caps on liability may relate to the value of the work or perhaps be ten times the fee, but the cap (if it is to be accepted) must usually be considered in the context of the work being carried out and the potential losses that could result from any breach or negligence.

Finally, where parties have previously worked together on a certain set of terms, any changes, particularly those limiting liability, should be brought to the attention of the other party, otherwise, as in this case, they may not be enforceable.

Incorporating standard terms: limitation and exclusion clauses

In the recent case of *Allen Fabrications Limited v ASD Limited [2012] EWHC 2213 (TCC)*, the High Court considered whether the standard terms of a party were incorporated and when a clause should be treated as being so onerous that it should be brought to the attention of the other party.

Allen Fabrications Limited ("Allen") had been engaged to supply parts required to construct a platform to lift boats in order to carry out maintenance and repairs. Allen subcontracted the supply of certain grating and fixtures to ASD.

When a section of the grating gave way, the employer sought a contribution from Allen in respect of the subsequent personal injury claim, and Allen sought an indemnity from ASD. Allen said ASD was negligent in failing to provide a sufficient number of fixings and to advise that additional fixings were required. ASD said that its standard terms of business were incorporated into the subcontract, and these limited its liability to the price of the goods it supplied. Allen disputed the incorporation of these terms.

The judge found that the standard terms had been incorporated as, on the evidence, Allen must have signed a credit facility application which required acknowledgement of and agreement to ASD's standard terms (although the relevant document could not be located). Consideration was then given (although no decision was made on the point) as to whether the terms were incorporated via a course of dealing and whether the relevant exclusion clauses were onerous or unusual enough to require that they be brought to the attention of the other party. The judge observed that:

- it is not always clear what amounts to an "onerous" clause and it depends on the context, such as whether a term is in common use between two commercial parties;
- the mere fact that it is a limitation or exclusion clause does not render it "onerous" (*Circle Freight v Mideast Gulf Exports Ltd [1988] 2 Lloyd's Rep 427)*; and
- drawing particular notice to the onerous clause is not required where the other party knows that the document contains or is likely to contain terms of the type complained of even though they have not read the actual clause.

In this case, the terms were not unusual or onerous and, as both parties were substantial commercial entities who had dealt with each other over 250 times, Allen would have seen the standard terms many times previously and the terms were therefore held to be incorporated.

This case highlights the reluctance of the courts to treat limitation and exclusions clauses as onerous where they are commonly used terms between commercial entities. It is, therefore, important to be aware of all standard terms and conditions which may be incorporated into a contract and to ensure that any contractual document, including invoices, refer to the correct and agreed terms.

Case update

Severability of decisions: Part 2

We reported on Justice Akenhead's decision in *Working Environments Ltd v Greencoat Construction Ltd [2012] EWHC 1039* in the Summer edition of In Site. In that case he decided that not all of the issues before the adjudicator had crystallised into a dispute at the time of the notice of adjudication, and that the parts of the adjudicator's decision dealing with those items could be severed from the remainder.

Akenhead J reached the same conclusion in his subsequent decision in the July 2012 case of *Beck Interiors Ltd v UK Flooring Contractors Ltd [2012] EWHC 1808*. An issue arose between the parties as to whether UK Flooring (as subcontractor to Beck Interiors) was in repudiatory breach of contract. Carpetting works were meant to have been completed in early February but due to apparent problems with Beck's preferred supplier, UK Flooring withdrew from the contract, and Beck then arranged for other contractors to come in and the work was completed approximately 10 days after the contractual completion date.

At around 5pm on the Thursday before the start of the Easter long weekend, Beck emailed UK Flooring claiming liquidated damages at the contractual rate of £20,000 per week from the designated completion date (some 8 weeks earlier) to the date of the email, and continuing thereafter until other contractors had completed the work. On the first working day after the long weekend, Beck then issued a notice of adjudication claiming LDs of £36,000 (i.e considerably less than the amount referred to in the email and calculated by reference to the fact that other contractors had in fact completed the work by mid-February) and increased costs of completion.

The adjudicator awarded both to Beck, but the issue on enforcement was whether the adjudicator had jurisdiction to decide Beck's claim for LDs (it being common ground that a dispute regarding the additional costs had crystallised).

Akenhead J held that the claim for LDs in the adjudication was not the same as the claim mentioned in the email as they were calculated on very different bases. Although during the course of a normal week, a period of 5 days may be long enough to give rise to an inference (from a failure to respond) that a dispute had crystallised in relation to the contents of the email, Akenhead J said that in this case, the fact that 4 of those 5 days were holidays meant that the period of time was not sufficient to give rise to such an inference. He said that this was reinforced by the fact that there had been no real hint before the email that, against a contract sum of little more than £10,000, there would be a delay claim running to over £160,000. He also approved of the comments made by HHJ Thornton QC in *Fastrack Contractors Ltd v Morrison Construction Ltd [2000] EWHC Technology 177* that a party cannot "*unilaterally tag onto*" the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute.

Accordingly, Akenhead J held that the adjudicator did not have jurisdiction in relation to the LDs claim included in the notice of adjudication.

Turning to the issue of severability, he held (unsurprisingly given his position in previous cases) that this is a case in which the court can, and should, sever the decision. Giving helpful guidance on the circumstances in which it may be appropriate to sever a decision, he noted that the two elements of the notice (LDs and additional costs) were separately calculated and argued with separate evidence supporting each (even though the losses flow from the same event). Furthermore, the adjudicator had dealt with the two issues separately in his decision and there was no difficulty in clearly identifying what he had decided in relation to each.

Set-off of adjudicators' decisions

Two recent cases confirm the courts' general approach that enforcement of an adjudicator's decision should not be resisted by seeking to set-off the sums awarded.

In *Squibb Group Ltd v Vertase FLI Ltd [2012] EWHC 1958,* the asbestos removal sub-contract between the parties incorporated the ICE main contract terms, meaning that payments were due within 28 days and any withholding notice had to be served not less than one day before the final date for payment. It provided for liquidated damages to be levied against Squibb (the sub-contractor), and gave Vertase (the contractor) a contractual right of set-off against payments certified as due.

A failure to agree who was responsible for delayed completion resulted in the dispute being referred to adjudication. The adjudicator decided that Squibb was entitled to an extension of time and loss and expense and awarded it £167,000. Vertase had not served a withholding notice in respect of its claim for liquidated damages. In resisting enforcement, it claimed instead that it was entitled to rely on a withholding notice which it served after the adjudicator's decision.

In holding that Vertase could not set-off its claim for liquidated damages so as to defeat Squibb's claim for summary judgment, Coulson J summarised the key principles on this issue:

- In general, an unsuccessful party to an adjudication cannot seek to avoid the result of that adjudication by relying on the right to set-off any other claims (*William Verry Ltd v London Borough of Camden [2006] EWCH 761)* as this would be contrary to the spirit and intent of the Housing Grants, Construction and Regeneration Act 1996;
- A possible exception to the general rule is the existence of a clear contractual right to set-off but such cases are relatively rare (*Ferson Contractors v Levolux [2003] EWCA Civ 11)*;
- A second and more useful exception turns on the nature of the adjudicator's decision. If the nature of the adjudicator's decision is a declaration as to the proper operation of the contractual payment machinery, and he identifies a sum which he says should be subject to that machinery then, if a withholding notice can legitimately be served in accordance with those payment provisions, set-off may give rise to an arguable defence.

As well as being the approach taken in *Shimizu Europe Ltd v LBJ Fabrications [2003] EWCH 1229 (TCC)* set-off was allowed in the May 2012 case of *R&C Electrical Engineers Ltd v Shaylor Construction Ltd [2012] EWCH 1254 (TCC)* (where it was held that an adjudicator's decision that a sum was payable expressly in accordance with a particular clause permitted the unsuccessful party to rely on that clause and other related provisions and to raise a withholding notice).

This was not however the same as the position Vertase found itself in. Coulson J found that the adjudicator's decision had not identified a sum which he intended to "*plug in*" to the contract machinery. Instead, his decision made plain that he intended the sum of £167,531.05 to be paid by no later than 14 days after his decision. By not giving Verstase the contractual 28 days to pay, the adjudicator did not intend that there was to be any set-off or cross-claim in respect of that award.

As far as the first possible exception was concerned, Coulson J saw nothing in the contractual provision (allowing for deductions from sums otherwise certified a due) to allow set-off from a one-off payment which was not a certified sum.

Coulson J followed *Squibb v Vertase* with his decision (a few days later) in *Beck Interiors Ltd v Classic Decorative Finishing Ltd [2012] EWHC 1956* in which he reached a similar decision, and underlined the difficulties facing an unsuccessful party wanting to rely on set-off to resist enforcement. The adjudicator in that case had decided that Beck (as employer) was entitled to approximately £36,000 from CDF (as contractor). CDF refused to pay, arguing that the sum was not due because Beck owed it a greater amount under the final account. The contract did not include a set-off provision.

Building on the grounds set out in *Squibb*, Coulson J referred to the rarity of set-off against an adjudicator's decision and the limits of the two main exceptions to that general position, concluding that neither applied. The adjudicator plainly ordered the immediate payment of the sum awarded and his decision was in no sense a declaration as to how the contract should be interpreted (and there was no contractual right of set off). On any proper reading of his decision, he wanted the sum paid by CDF to Beck without further ado.

London 2012: CDM health check

The Health and Safety Executive (HSE) has published a report titled "Dutyholder roles and impact" on the extent to which the Construction (Design and Management) Regulations 2007 ("CDM 2007") helped or hindered the construction of the London 2012 Olympic and Paralympic venues. The conclusions – that CDM 2007 was a "*major factor*" in the success of the construction programme in terms of health and safety - will be incorporated into the HSE's ongoing review of CDM 2007. In stating that "*millions of hours of work can be undertaken and a project delivered in a tight timescale without compromising health and safety*", the report drew particular attention to the role played by the ODA (the "Client" for CDM purposes) in setting the tone for health and safety from day one, and stated that early and on-going planning, coordination and Contractor involvement were crucial. By appointing CDM Co-ordinators and Contractors early, advantages were gained from identifying risks early and using the experience of the Contractors in conjunction with that of Designers to improve buildability, reduce cost and time as well as improve health and safety.

The report will be used by the HSE to explore how the positive experiences of CDM 2007 in the London 2012 context can benefit the broader construction community.

Due diligence and reasonable endeavours

The obligation to use "reasonable endeavours" is generally understood to a less onerous obligation than one to use "best" or "all reasonable" endeavours. What needs to be done to discharge that obligation is a question of fact in each case, and the judge in *Ampurius NU Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2012] EWHC 1280* commented on whether efforts to obtain funding to complete a project can discharge an obligation to use reasonable endeavours to procure completion of the works by a certain time.

Under the terms of a bespoke contract, Telford Homes (as builder) agreed to carry out the construction of a mixed use residential and commercial development with "due diligence" and to use its reasonable endeavours to procure completion of the works by a defined target date (or as soon as possible thereafter). When, during the credit crunch, it subsequently had difficulties securing funding for the second phase of the development, it put the work on hold. Over a year later, Ampurius (the intended lessees) said Telford Homes had repudiated the contract.

Although the decision in the case centred on the finding that the builder was in repudiatory breach of contract by failing to use due diligence to complete, Roth J also addressed the question of whether the builder was in breach of its reasonable endeavours obligation. The builder argued that if it could not complete on time because of its funding problems, it would not be in breach of its "reasonable endeavours" obligation so long as it had made reasonable endeavours to procure finance. Although it did seem to be doing all that could reasonably be done in that regard, Roth J said that he did not think that using reasonable endeavours to secure funding to perform the contract discharged the builder's reasonable endeavours obligation regarding time for completion of the works. He said that such a qualification "*…is designed to cover matters that directly relate to the physical conduct of the works, thereby providing an excuse for delay in such circumstances as inclement weather or a shortage of materials for which the Defendant was not responsible. The clause does not, in my view, extend to matters antecedent or extraneous to the carrying out of the work, such as having the financial resources to do the work at all.*" Accordingly, he said he would have found (had he been required to do so) that Telford Homes were in breach of their reasonable endeavours obligation.

Corporate manslaughter convictions

The first – and until recently, only - prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act") happened in 2009 (*Cotswold Geotechnical (Holdings) Ltd*).

2012 has seen two further convictions. The first conviction under the Act in Northern Ireland occurred in May 2012 (with JMW Farm Limited pleading guilty and being fined £187,500 for safety failures which lead to the death of an employee).

A second conviction in England followed in July. Lion Steel Ltd entered a plea of guilty to a corporate manslaughter charge and was fined £480,000 plus costs. The charges followed the death of an employee who had fallen through a roof. Charges had also initially been brought against three directors but those charges were dropped in return for the company's guilty plea. In accordance with the sentencing guidelines for the Act (published by the Sentencing Council in 2010), the appropriate fine for the offence of corporate manslaughter will, because it requires gross breach at a senior level, "*seldom be less than £500,000 and may be measured in millions of pounds*". The court imposed a slightly lower fine in this case however in light of Lion Steel's guilty plea and the relatively small size of its business and the concern that a larger fine may put that business at risk.

New RIBA Appointments

RIBA have recently announced that updates to its suite of professional appointments (to be known as the RIBA Agreements 2010 (2012 revision)) are to be released during October. The revised appointments reflect the amended payment provisions introduced by the Local Democracy, Economic Development and Construction Act 2009 and, according to RIBA, contain "a raft of changes to make life easier". The 2012 revisions will supercede the 2010 versions, which will subsequently be withdrawn from sale.

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