Fenwick Elliott
The construction & energy law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Collateral warranties and limitation

Bloomberg LP v Sandberg and Others

[2015] EWHC 2858 (TCC)

Bloomberg and Standard Life entered into a lease dated 19 September 2000 whereby Bloomberg agreed to become the tenant at 50 Finsbury Square. That lease was preceded by an agreement for a lease between the same parties dated 14 June 2000, pursuant to which Standard Life agreed to perform certain works at 50 Finsbury Square. Practical Completion of those works was achieved on 29 August 2000. Malling performed cladding works for Standard Life as part of those wider works.

The trade contract required Malling to provide warranties, and on 20 December 2000 Malling entered into a warranty with Bloomberg. Clause 6 stated under the heading "Limitation":

> *"Notwithstanding the date hereof no proceedings shall be commenced against the Contractor after the expiry of twelve years from the date of issue of the last written statement by the Client that practical completion of the Project has been achieved under the Contract."*

In 2001, two cladding tiles fell from the building. Investigative works were carried out, a condition survey was produced and Malling carried out remedial works to the cladding. On 8 July 2013 a soffit cladding tile fell to the pavement from the seventh floor of 50 Finsbury Square. Temporary works to make the building safe were carried out at a cost of £470k. It was estimated that further costs would be in the region of £2 million.

Although Bloomberg brought a claim against Malling, that claim could not proceed because of clause 6 of the Warranty. However, Bloomberg also raised a claim against the two other parties who had carried out certain investigative works and provided the condition survey during 2001 and 2002. Those two parties sought to join Malling to the claim as a result of the role Malling themselves had played in these remedial works.

In particular, Sandberg claimed a contribution from Malling pursuant to the Civil Liability (Contribution) Act 1978 ("the Act"). Sandberg said that in addition to carrying out the cladding work prior to practical completion, Malling was also asked to review it later. Sandberg argued that Malling's fixings were defective in both design and workmanship, Malling's review was inadequate with the consequence that Malling was in breach of its obligations under the collateral warranty, and if, contrary to Sandberg's defence, Bloomberg established liability against Sandberg, Malling was liable to Bloomberg for the same damage. Clause 1 of the Act provides:

> *"(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*
>
> . . .
>
> *(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based."*

Malling sought to rely again on clause 6 of the Warranty, saying that the words "*no proceedings shall be commenced against the Contractor*" should be taken to include proceedings brought by any other party, not just Bloomberg, including the contribution proceedings brought by Sandberg against Malling. Malling argued that applying the relevant process of construction to clause 6, "no proceedings" must mean — indeed, in commercial common sense terms "*can only be taken to mean*" — proceedings by any other party, not simply proceedings by Bloomberg. For example, this matched the obligation upon Malling to insure for the like period. The purpose of the provision was that there would come a point in time at which Malling would know it was no longer liable to proceedings arising from the works performed on the building.

Mr Justice Fraser noted that the words used in the clause were clear. There was no ambiguity. "*No proceedings*" in this contractual context, in what was a warranty between Bloomberg and Malling, could only mean proceedings by Bloomberg. Malling originally performed the cladding works, was involved in the review in 2001 and 2002, and performed the remedial works undertaken at that time. Malling potentially fell within the terms of the Act as being "any other person liable" for the damage which caused the cladding to fall.

Finally the Judge noted that the overall effect of Malling's arguments would be that parties could effectively "*contract out*" of the operation of the Contribution Act, an Act that had been put in place by Parliament to benefit other third parties, those third parties not being parties to the contract between (here) Bloomberg and Malling. Even if that could be achieved and the point was not argued, clear words would be required. They were not present here.

Adjudication: paying the adjudicator's fees

Science and Technology Facilities Council v MW High Tech Projects UK Ltd

[2015] EWHC 2889 (TCC)

If you have reserved your position as to jurisdiction, does the fact that you have paid the adjudicator's fees mean that you are treating the adjudicator's decision as binding and have waived or lost the right to maintain that objection? In the case here, the adjudicator's terms and conditions said this:

"1. Each party to the reference shall be liable for my fees on a joint and several basis save that if, in my sole discretion, I consider that I have no jurisdiction to proceed with the reference my fees shall be payable solely by the Referring Party

. . .
3. My fees will be payable notwithstanding that my decision is subsequently found by a court to be unenforceable by reason of lack of jurisdiction."

The Claimant here said that neither party had expressly accepted the adjudicator's terms during the adjudication. Silence cannot amount to acceptance and so the terms and conditions were not agreed. Mr Justice Fraser noted that the agreement of the Defendant to the adjudicator was done following a full reservation of right. Further, it is possible to signify acceptance of proposed contract terms by conduct and this is what the Defendant did.

Whilst there are cases where, by paying the adjudicator's fees, a party has lost the right to object to a decision, this was not the case here. Taken together, the express terms of the letter reserving the Defendant's rights and clause 3 of the adjudicator's terms and conditions were "compelling" evidence to allow the Defendant to challenge jurisdiction on enforcement, regardless of the payment by the Defendant of the adjudicator's fees.

Adjudication: contracts for construction operations

Husband and Brown Ltd v Mitch Developments Ltd

[2015] EWHC 2900 (TCC)

Under the contract, Mitch was engaged in commercial property development and intended to purchase a site in order to construct a care home which would be operated by its operational arm. Mitch identified a suitable site. H&B were engaged in the business of land acquisition planning and development and were able to achieve a significant saving for Mitch on the purchase price. A dispute arose over the incentive fee that was payable to H&B.

One of the heads of claim was adjudication costs. For a contract to be covered by the adjudication provisions of the Housing Grants Act, it must be an agreement to carry out construction operations or to arrange for the carrying out of construction operations. Here HHJ Moulder had to consider whether an oral contract fell within this test. She decided that it clearly did not as it involved negotiation of a price for land and negotiations subject to contract. It did not involve anything to do with building or works on the land.

This meant the adjudicator who had earlier decided the parties' dispute lacked jurisdiction and H&B could not recover those costs as part of the court proceedings.

Adjudication: payless notices and insolvency

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd

[2015] EWCA Civ 1030

Here four interim certificates had been issued totalling £1.2 million. Wilson, the Employer, only paid one. Further, it had not issued payless notices for the outstanding ones. Harbour suspended its work and both parties served notices of termination. Harbour then issued a winding-up petition and Wilson sought an injunction to restrain presentation of the petition claiming that it was disputed on substantial grounds and that Wilson had serious and genuine cross-claims that exceeded the sums allegedly due. It is not known why Harbour did not seek to use adjudication. Before the first hearing, Harbour gave notice that a meeting of creditors was to be held for the purposes of appointing a liquidator.

The contract was the JCT Intermediate Building Contract with Contractor's Design 2011. Clause 8.5.3 of that contract noted that as from the date a contractor becomes insolvent, whether or not the employer has given notice of termination, clause 8.7.3 would apply as if such notice had been given. Clause 8.7.3 noted that an employer need not pay any sum that has already become due if the contractor, after the last date upon which a payless notice could have been given, has become insolvent.

The CA agreed that this meant that the proposed petition debt, based on the sums set out in the interim payment certificates, was genuinely disputed as, given the provisions of clause 8.7.3 mentioned above, such sums were no longer payable after the respondent entered into the creditor's voluntary liquidation.

Lady Justice Gloster also noted that an employer who accepts that interim payments have become due because of a failure to serve a payless notice, is not prejudiced by this when it seeks to raise a serious and genuine cross-claim. The fact that interim payments had fallen due under the HGCRA, because of the failure to issue a payless notice, did not prevent Wilson from challenging the valuation at a later date or raising a cross-claim in response to a winding-up petition, provided that it could demonstrate that its cross-claims were reasonably arguable and sufficiently strong to be tested in court proceedings.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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