Reports from the courts

Our latest round up of court cases of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP**. One judgment reinforces the view that the courts will support 'the natural and ordinary meaning of the words used' in commercial agreements; and in a Scottish case the judgment warns against 'contrived or technical defences' which the courts will 'examine with a degree of scepticism'.

Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd

[2021] EWHC 2207 (TCC); O'Farrell J

Eco World – Ballymore Embassy Gardens Company Ltd (EWB), a property developer, engaged Dobler UK Ltd (Dobler) for the design, supply and installation of façade and glazing works for a development in Nine Elms, London (the Works) pursuant to an amended JCT 2011 Construction Management Trade Contract dated 11 July 2016 (the Contract).

Clause 2.32.1 of the Contract provided that, where Dobler failed 'to complete the Works or work in a Section by the relevant Date for Completion of a Section or the Works', EWB was entitled to withhold or deduct liquidated damages 'at the rate stated in the Trade Contract Particulars, or lesser rate stated in the notice'. The Contract provided for liquidated damages 'at the rate of £25,000 per week […] up to an aggregate maximum of 7% of the final Trade Contract Sum'.

Dobler commenced the Works on 8 August 2016.

EWB took over Blocks B and C by 15 June 2018. The Works were certified as achieving practical completion on 20 December 2018.

Disputes arose between the parties as to the final account valuation, including variations, extensions of time and liquidated damages. A series of adjudications took place between the parties, following which EWB issued Part 8 proceedings seeking declarations as to:

(1) the validity and enforceability of clause 2.32.1; and
(2) EWB's entitlement to general damages for delay.

EWB argued that, where an employer under a construction contract exercises a contractual right to take early possession, but the liquidated damages provisions do not contain a mechanism for reducing the level of liquidated damages to reflect such a situation, the provisions are void and/or unenforceable and the employer is entitled to recover general damages for delay.

Dobler argued that its obligation to carry out and complete the Works continued pending the issue of a practical completion certificate in respect of the whole of the Works. Dobler further noted that EWB had discretion to deduct liquidated damages at a lesser rate – the liquidated damages provision could therefore not be deemed a penalty in the event that part of the Works were taken over such that it was valid and enforceable.

Decision

O'Farrell J held that the liquidated damages provision in clause 2.32.1 was valid and enforceable.

Whilst it did not provide for any reduction in liquidation damages on sectional completion, O'Farrell J observed that the provisions were 'reasonably clear and certain' both as to the completion dates and the amounts payable – liquidated damages were payable for each week of delay regardless of EWB taking partial possession.

O'Farrell J considered whether the liquidated damages provision was a penalty. Applying the test set out in ***Cavendish Square Holding BV v Makdessi [2015] UKSC 67***, O'Farrell J held that it 'is not unconscionable or extravagant so as to amount to a penalty':

- the clause was negotiated by commercial parties and their lawyers and '[t]he court should be cautious about any interference in the freedom of the parties to agree commercial terms and allocation of risk in their business dealings';
- EWB had an interest in ensuring completion of the whole of the Works by the completion date so as to avoid further delay and potential liability for liquidated damages to the local authority;
- quantifying the amount of damages would be difficult if part but not all of the Works were completed on time such that, by agreeing the liquidated damages payable for late completion of the whole of the Works, the parties avoided the

difficulty of calculating and proving such loss; and
- the level of the liquidated damages in the Contract was not disputed by either EWB or Dobler as being unreasonable or disproportionate to the likely losses in the event of late completion of the Works.

Comment

The judgment reinforces that the courts will look to give effect to 'the natural and ordinary meaning of the words used' where such provisions have been agreed between commercial parties. It also demonstrates that arguing that a liquidated damages provision is unenforceable with a view to recovering general damages is likely to be difficult without clear justification. Parties should also consider whether their contracts should contain a mechanism for reducing the level of liquidated damages in circumstances where an employer takes partial possession.

Michael Duthie Wilson v Graeme W Cheyne (Builders) Ltd

[2021] SAC (Civ) 24; A Y Anwar

In March 2016, Graham W Cheyne (Builders) Ltd (Cheyne) contracted to build a dwelling for Michael Duthie Wilson (Wilson) in Aberdeen pursuant to a standard form Scottish Building Contracts Committee: Minor Works Building Contract with Contractor's Design for use in Scotland (the Contract).

The Contract provided that Cheyne could make interim applications for payment through the 'Architect/Contract Administrator' as defined in the Contract, which was WCP Architects Ltd (WCP).

In July 2019, WCP terminated its appointment in writing to Wilson. Wilson did not notify Cheyne that WCP had ceased acting and Wilson did not nominate another Architect/Contract Administrator.

On 21 February 2020, Cheyne issued interim application for payment number 14 in the sum of £26,357.53 (Interim Application 14) to WCP.

Wilson contended that, as WCP had resigned from office, Interim Application 14 was not validly served. Wilson refused to make payment.

The dispute was referred to adjudication. Wilson argued that Interim Application 14 was: (a) invalid as it had been served upon WCP who had resigned; and (b) invalid in terms of its content and substance as it failed to set out the basis upon which Cheyne had calculated the sums claimed. Cheyne argued that Wilson was barred from asserting that Interim Application 14 was improperly served when it was aware that WCP had resigned and had failed to appoint a replacement. The adjudicator held that Interim Application 14 was valid in terms of service, content and substance and awarded Cheyne the sum of £26,357.53 plus interest.

Wilson failed to make payment. Cheyne commenced enforcement proceedings in the Sheriff Court which were decided in its favour – the Commercial Sheriff found that Interim Application 14 was submitted in accordance with the terms of the Contract.

Wilson appealed to the Sheriff Appeal Court arguing, inter alia, that it had no obligation to advise Cheyne that WCP had ceased to act and that Cheyne could have demanded the appointment of a new Architect/Contract Administrator upon learning that WCP was no longer acting.

Decision

The Sheriff Appeal Court refused Wilson's appeal.

It was held that the reference to the need for a notice to be issued to someone with authority to act corresponded 'to the need for service upon the correct party as specified in the contractual notice provisions and should not be construed as extending to the question of whether that party had authority to act at any particular time'. It was 'illogical' to suggest that Cheyne could have demanded a new Architect/Contract Administrator be appointed when it was unaware that WCP had ceased to act. The onus was on Wilson to nominate a replacement.

Absent a variation of the Contract or the nomination of a replacement Architect/Contract Administrator, the party upon whom service was required was WCP – Wilson was not entitled to take advantage of its conscious and deliberate decision to take no steps to ensure that the contractual payment mechanism was operable.

Comment

This judgment emphasises 'the pivotal role performed by the Architect/Contract Administrator in the contractual arrangements between the parties', for example issuing instructions, granting extensions of time and awarding practical completion. In circumstances where an architect/contract administrator ceases to act, the onus is on the employer to nominate a replacement. It also warns against 'contrived or technical defences' which the courts will 'examine with a degree of scepticism'. **CL**