Reports from the courts

Our regular round-up of the court decisions of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who examine a case that demonstrates the courts' reluctance to find that liquidated damages provisions are unenforceable for reasons of uncertainty where an alternative interpretation can be found; and a Court of Appeal ruling that provides clarification to beneficiaries of collateral warranties.

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd

[2022] EWHC 1842 (TCC); Nissen QC

Peel L&P Investments and Property Ltd (Peel), a property development company, engaged Buckingham Group Contracting Ltd (Buckingham) to design and construct a new plant in Merseyside (the Works) pursuant to an amended JCT Design and Build Contract 2016 dated 29 January 2018 (the Contract).

Clause 2.29A.1 provided that, where Buckingham failed to reach a Milestone Date, Peel would be entitled to liquidated damages (LADs) at the rate stated in Schedule 10 or at such lesser stated rate.

Schedule 10 set out dates for the completion of certain milestones and two columns with rates for LADs which were headed 'LADs as Per Tender Schedule 10' and '[Buckingham] LADs Proposal ref BAFO Ltr 13.9.17' respectively.

The Works became delayed. On 14 November 2018, Peel issued a pay less notice notifying Buckingham of its intention to deduct LADs of £1,928,253.77 pursuant to clause 2.29A.1.

Buckingham commenced proceedings against Peel seeking declarations, inter alia, that the LADs provisions were void for uncertainty/were unenforceable as: (i) the Contract Particulars specified a Date for Completion of 1 October 2018, whereas Schedule 10 referred to a Milestone Date for practical completion date of 30 November 2018 such that it was unclear when LADs would accrue; (ii) Schedule 10 contained two sets of rates for LADs and it was unclear which should apply; and (iii) the Contract Sum was £26,164,049.28 whereas the proposed Contract Sum Analysis (CSA) in Schedule 10 was £25,710,50.28 such that "it was unclear whether [LADs] should be based on the % rates in the daily column applied to the actual Contract Sum or based on the lump sums contained in the weekly rate column, even though they had been calculated on a CSA that was different from the one ultimately agreed".

Peel argued that the Court should strive to reconcile the "modest inconsistency within the documents […] by a process of construction". Peel contended: (i) if Buckingham failed to achieve the Milestone Date for practical completion, it would be liable for LADs in accordance with Schedule 10 and, whilst "Buckingham had an obligation to complete the Works by 1 October 2018, no [LADs] attached to such breach"; (ii) the parties' agreement was reflected by the column headed "[Buckingham] LADs Proposal ref BAFO Ltr 13.9.17"; and (iii) the parties had agreed the weekly lump sums within Schedule 10.

Decision

Nissen QC held that the LADs provisions were certain and enforceable.

Nissen QC noted the courts are "reluctant to hold a provision in a contract is void for uncertainty and, if it is open to the court to find an interpretation which gives effect to the parties' intentions, then it will do so". Against that background, Nissen QC found that: (i) "[t]he bespoke regime prevails" – the parties chose to include within clause 2.29A a comprehensive and bespoke Milestone Date regime which included a date for practical completion and LADs in respect thereof such that the parties must have intended for that clause to operate as the sole regime in this respect; (ii) the applicable rates were those under the heading "[Buckingham] LADs Proposal ref BAFO Ltr 13.9.17" – Buckingham's BAFO or 'Best and Final Offer' was the basis on which the contract was formed; and (iii) "[i]f the parties had intended the lump sums to change, to reflect the new CSA, they would doubtless have done so".

Comment

This judgment demonstrates the courts' reluctance to find that LADs provisions are unenforceable for reasons of uncertainty where an alternative

interpretation can be found. Parties should therefore ensure consistency between standard and bespoke clauses in their contracts and take care when appending correspondence or pre-contractual documentation. We are seeking increasingly complex LADs provisions and it is important these are properly understood before the contract is entered into.

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP

[2022] EWCA Civ 823; Coulson LJ

In June 2015, Sapphire Building Services Limited (Sapphire) engaged Simply Construct (UK) LLP (Simply) to construct a care home in North London pursuant to an amended JCT Design and Build Contract 2011 (the Contract).

Clause 7.1.3 provided that Sapphire could novate the Contract to the freeholder, Toppan Holdings Limited (Toppan). Clause 7C provided that Sapphire could require that Toppan "enter into with such Purchaser or Tenant a Collateral Warranty".

The works commenced in May 2015. On 15 October 2015, Simply entered into a collateral warranty with Toppan (the Toppan Collateral Warranty).

On 14 June 2017, Sapphire novated the Contract to Toppan. On 12 August 2017, Toppan leased the care home to Abbey Healthcare (Mill Hill) Ltd (Abbey).

In August 2018, Toppan discovered fire safety defects in the care home. Abbey paid for some or all of the remedial works.

In June 2020, Toppan requested that Simply enter into a collateral warranty with Abbey, which was executed in October 2020 (the Abbey Collateral Warranty).

Toppan and Abbey commenced adjudication proceedings in respect of the remedial works costs on 17 August 2020 and 5 November 2020 respectively. The adjudicator awarded £1,067,247.14 to Toppan and £908,495.98 to Abbey (the Awards). Simply resisted enforcement, arguing that the Abbey Collateral Warranty was not a construction contract as defined by s104 of the *Construction Act 1996* (the Act) such that "the adjudication machinery was not implied into it" and the adjudicator had no jurisdiction.

Abbey applied for summary judgment to enforce the Awards. The TCC concluded that, because the Abbey Collateral Warranty was executed years after completion of the construction operations, it was not a construction contract in accordance with s104(1) of the *Construction Act*. Abbey appealed the TCC's decision.

Decision

The Court of Appeal allowed the appeal and entered summary judgment in favour of Abbey.

Coulson LJ concluded that the words in s104(1) of the Act, i.e. "an agreement […] for […] the carrying out of construction operations", should be construed broadly following Akenhead J's decision in ***Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd [2013] EWHC 2665 (TCC)***. There was no need to limit the words to refer only to the primary building contract – a collateral warranty could be capable of being a construction contract under s104(1) of the Act.

In respect of whether the date on which the Abbey Collateral Warranty was executed made a difference, Coulson LJ rejected the TCC's reasoning that "because there were no future works to be carried out at the time the Abbey Collateral Warranty was signed, this was a warranty of a state of affairs akin to a manufacturer's product warranty" and not a construction contract. Coulson LJ noted the retrospective effect of the Abbey Collateral Warranty – it was indistinguishable from the position in ***Swansea Stadium Management Limited v City & County of Swansea*** in which the collateral warranty made a promise both as to the standard of past work and future work.

Coulson LJ observed that, had a claim been brought pursuant to the Toppan Collateral Warranty, the timing point would not have been open to Simply such that it would be a construction contract within the meaning of s104(1) of the Act. The Abbey Collateral Warranty was in exactly the same terms. Therefore, to suggest that it was not a construction contract simply because it was entered into later "would make for commercial absurdity".

Comment

This judgment will provide welcome clarification to beneficiaries of collateral warranties, especially given the current issues regarding fire safety. Parties should however take care over the wording of collateral warranties and any future-facing obligations. It also reinforces the courts' desire for construction disputes to be dealt with via adjudication where possible, which will be a relief to those who cannot afford the time and expense of litigation proceedings. **CL**