

Reports from the courts

Our round up of the key court decisions affecting construction from **Andrew Croft** and **Simii Sivapalan** of Beale & Company, includes a case highlighting that a limitation clause does not remove liabilities to all parties on a contract; and another where a court considered the late payment provisions of the 'Construction Act' where insolvency was a risk.

Bloomberg LP v Malling Pre-Cast Ltd

[2015] EWHC 2858 (TCC); TCC; Fraser J

Standard Life Assurance Company Ltd (Standard Life), the owner of a building in London EC2 (the Building), entered into a lease (the Lease) with Bloomberg LP (Bloomberg). Standard Life retained Malling Pre-Cast Ltd (Malling) to design, fabricate and install stone cladding to the Building (the Works) pursuant to a contract dated 20 December 1999 (the Contract).

As required under the Contract, on 20 December 2000, Malling provided a collateral warranty in favour of Bloomberg (the Warranty). Clause 6 of the Warranty provided that 'no proceedings shall be commenced against [Malling] after the expiry of twelve years from the date ... that practical completion of the Project has been achieved'.

Cladding tiles fell from the Building which Bloomberg repaired. Standard Life later appointed Sandberg and Buro Happold Ltd (BH) to provide engineering consultancy services including advising on the required remedial works to the Building. Sandberg and BH also provided collateral warranties in favour of Bloomberg.

Practical completion was achieved on 29 August 2000.

In July 2013, a sizeable cladding tile fell from the Building. Bloomberg performed temporary works to secure the Building. Bloomberg submitted that further repair works were required in the region of £2 million.

Bloomberg subsequently issued separate proceedings against Sandberg, BH, and Malling.

Bloomberg's action against Malling did not proceed; Malling relied upon cl 6 of the Warranty (as stated above) which it argued was a 'complete contractual defence to any claim against it'.

Sandberg subsequently issued Pt 20 proceedings against Malling, seeking a contribution under the

Civil Liability (Contribution) Act 1978 (the Act) for both breach of duty and breach of the terms of the Warranty, on the basis that Malling was 'liable in respect of the same damage' as set out in the Act.

Malling applied to strike out the Pt 20 proceedings and, in the alternative, sought summary judgment on the basis that cl 6 of the Warranty gave Malling a complete defence to any contribution proceedings by any other party. Sandberg submitted that the wording of cl 6 of the Warranty was limited to proceedings brought by Bloomberg.

Decision

Fraser J refused Malling's application.

The court held that cl 6 of the Warranty acted as a procedural bar to any claim or remedy that Bloomberg had; this did not extinguish the underlying substantive right under the Act which allowed a claim to be brought against any third party that may be liable for the 'same damage'.

Fraser J concluded that the 'clear' and unambiguous wording of cl 6 of the Warranty which stated that 'no proceedings shall be commenced against [Malling]' after the expiry of the period stated therein could only mean proceedings brought by Bloomberg (and not other parties).

The court also held that if Malling's submissions were correct, parties would be able to effectively 'contract out' of the Act. As the Act was put in place by Parliament to benefit third parties, Fraser J thought that very clear words would be required to accomplish this, if it was at all possible.

Significance

This case is an important reminder that a limitation clause with one party will not absolve parties of liability to all other parties on a project. As construction projects often involve a number of different parties, this case demonstrates the importance for those involved of considering all

potential liabilities that may arise, particularly when working closely with other parties.

This case also highlights the importance of ensuring collateral warranties include provisions which state that the party providing the warranty will have no greater or longer lasting liability under the collateral warranty than it would have under the main contract.

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd

[2015] EWCA Civ 1030; CA; Gloster LJ

Wilson and Sharp Investments Ltd (WSI) entered into two building contracts with Harbour View Developments Ltd (HVD), for HVD to carry out works on two sites in Bournemouth (the Contracts). Both Contracts were subject to the conditions of the JCT Intermediate Building Contract with Contractors' Design 2011.

The Contracts provided for interim monthly payments. Pursuant to the Contracts, WSI could issue a pay less notice in respect of HVD's applications for payment not later than five days before the final date for payment (cl 4.11.5) (Pay Less Notice).

Pursuant to cl 8.7.3 of the Contracts, if HVD's employment was terminated under cll 8.4, 8.5 or 8.6, WSI 'need not pay any sum that has already become due' to HVD if WSI had issued a Pay Less Notice or HVD had become insolvent.

Two interim certificates for the total sum of circa £1m (the Certificates) remained outstanding. Pay Less Notices were not issued by WSI in respect of the Certificates.

WSI subsequently sought a re-valuation of HVD's works which purportedly showed that the Certificates had been overvalued (in excess of the £1m outstanding under the Certificates). The Contracts were terminated in January 2014.

In April 2014, WSI sent HVD details of its cross-claims which included the allegedly overvalued sums under the Certificates claimed by HVD. Soon after, HVD notified WSI that it would present a petition for the winding-up of WSI. WSI subsequently applied to court for an injunction restraining the presentation of the winding-up petition.

The judge at first instance refused to grant the injunction on the basis that, as WSI had not issued Pay Less Notices, the sums outstanding remained payable as the Contracts terminated before a relevant insolvency event. The judge also held that WSI's cross-claims were a 'put-up job' designed to

prevent HVD from presenting a winding-up petition for sums that were previously acknowledged by WSI to be due.

Following the hearing, HVD entered voluntary liquidation.

WSI appealed the first instance decision contending that the debt was disputed on substantial grounds, namely that the interim certificates overvalued HVD's works and, relying on cl 8.7.3, that HVD was now insolvent and therefore no payments had to be made. HVD maintained that WSI had simply found a contract administrator to support its cross-claim.

Decision

The Court of Appeal granted the injunction in favour of WSI.

On the facts, Gloster LJ held that WSI had a 'serious and genuine' cross-claim as HVD was insolvent within the meaning of the JCT provisions and given the wording of cl 8.7.3, WSI had no obligation to pay the sums due when HVD entered liquidation. The fact that the Contracts had been terminated for other reasons prior to its insolvency was irrelevant.

Although WSI had previously acknowledged the Certificates were due and had not issued Pay Less Notices, the court held that this did not preclude WSI from later raising cross-claims in response to winding-up proceedings or other proceedings, if WSI could demonstrate that its cross-claims were 'reasonably arguable and were sufficiently strong to be tested in court proceedings'.

Significance

This case is a further example of late payment and the *Housing Grants, Construction and Regeneration Act 1996* being considered by the courts. It also shows the typical issues which may arise when substantial fees are due and insolvency is a risk.

Whilst insolvency proceedings can be a valid option for the unpaid party, this case suggests that adjudication may be more appropriate to swiftly recover unpaid fees where no pay less notice has been issued (assuming that the adjudicator would have found in favour of HVD in relation to their claim for payment).

Finally, this case suggests that if a party who is owed money can demonstrate a 'genuine and serious-cross claim' – even in circumstances where no pay less notice has been issued – the petition is unlikely to succeed. **CL**