Reports from the courts

In our regular round up of the court decisions of most significance to construction Andrew Croft and Simii Sivapalan of Beale & Company Solicitors LLP examine a case concerning exemption clauses that went to the appeal court; and another highlighting that contractors need to act quickly to submit extension of time claims.

**Persimmon Homes Ltd v Ove Arup & Partners Ltd**  
[2017] EWCA Civ 373; CA; Jackson, Beatson and Moylan LJJ

Persimmon Homes Ltd and others formed a consortium (the Consortium) to purchase and develop a site in Wales (the Site).

By an exchange of emails in 2007, the Consortium engaged Ove Arup & Partners Ltd (Arup) to provide engineering services for the Consortium’s bid for the Site. After purchasing the Site, the Consortium engaged Arup in 2009 for the provision of further professional services including investigating and advising upon contamination (the Contract). Under the Contract, Arup entered collateral warranties with each of the members of the Consortium (the Warranties).

Clause 6.3 of the Contract and cl 4.3 of the Warranties provided that Arup’s liability in ‘contract, tort (including negligence), breach of statutory duty or otherwise … for pollution and contamination’ was limited to £5 million in the aggregate and excluded ‘liability for any claim in relation to asbestos’ (the Exemption Clauses).

Groundworks commenced in May 2012 and asbestos was discovered at the Site. The Consortium maintained that the quantity of asbestos was substantially more than they had expected based on Arup’s advice. The Consortium alleged that Arup had been negligent in failing to identify and report upon the asbestos at an early stage and commenced court proceedings. Arup argued that liability in respect of asbestos (if any) was excluded under the Exemption Clauses.

In a trial of preliminary issues, the TCC held that the Exemption Clauses excluded all liability relating to asbestos on the basis that the words were ‘clear’ and ‘apt’ to limit/exclude liability whatever the cause. (For our Reports from the Courts summary of the TCC decision, see (2016) 2 Construction Law).

The Consortium appealed to the Court of Appeal, arguing that the exclusion of ‘liability for any claim in relation to asbestos’ in the Exemption Clauses only concerned liability ‘for causing’ the presence of asbestos. The Consortium also argued that the exclusion wording regarding asbestos liability in the Exclusion Clauses did not extend to negligence by Arup, as it did not expressly refer to ‘negligence’ whereas the pollution and contamination drafting did. The Consortium argued that the Exemption Clauses were therefore ambiguous and relied on the contra proferentem principle which provides that any ambiguity in an exemption clause will be resolved against the party who relies upon it.

Arup argued that the Consortium’s interpretation did not make sense as Arup was engaged to investigate and advise upon contamination so this was clearly intended to be covered by the Exemption Clauses. There was therefore no ambiguity.

**Decision**

The Court of Appeal upheld the TCC decision. The court held that the Consortium’s interpretation of the Exemption Clauses was ‘bizarre’ and did not accord with the language used or ‘business common sense’. The court rejected the Consortium’s restrictive interpretation of the Exemption Clauses.

The court highlighted that in a commercial contract negotiated between parties of equal bargaining power, the contra proferentem rule has a very limited role. The court concluded that in major construction contracts, ‘exemption clauses are part of the contractual apparatus for distributing risk’ so ‘there is no need to approach such clauses with horror or with a mindset determined to cut them down’.

**Significance**

This decision is the latest in a number of judgments which show the court’s willingness to enforce
exclusion clauses between parties of equal bargaining power and confirms that exclusions of liability in relation to asbestos may be enforced by the courts. This case also highlights the limited use which can be made of the contra proferentem rule when interpreting exclusion clauses in commercial contracts. It will also provide some assurance that the courts will not seek to hold that clearly drafted exclusion clauses are unenforceable. That said, this case demonstrates that clear and careful drafting is needed to terms that purport to limit/exclude liability.

**Mailbox (Birmingham) Ltd v Galliford Try Building Ltd**

[2017] EWHC 1405 (TCC); TCC; Coulson J

Mailbox (Birmingham) Ltd (Mailbox) entered into an amended JCT Design and Build Contract 2011 (the Contract) with Galliford Try Building Ltd (GTB) for construction works (Works) in Birmingham, which were split into sections.

Under the Contract, GTB was entitled to extensions of time (EoT) if GTB gave notice of a ‘Relevant Event’ (cl 2.25) and Mailbox was entitled to liquidated damages if GTB failed to complete any section by the Completion Date (cl 2.29). In addition, Mailbox could terminate the Contract if GTB failed to proceed ‘regularly and diligently’ with its obligations under the Contract (cl 8.4).

The Works were significantly delayed and GTB submitted a number of extension of time (EoT) claims between May and September 2015. Mailbox granted GTB EoT’s for some sections of the Works. However in November 2015 Mailbox issued the first of a number of notices seeking liquidated damages. Mailbox subsequently terminated the Contract under cl 8.4 and sought liquidated damages in excess of £5 million.

In August 2016 Mailbox commenced adjudication, seeking declarations as to its entitlement to payment of liquidated damages (the First Adjudication). In its response, GTB referred to three Relevant Events (which were limited to one section of the Works) to highlight Mailbox’s ‘wrongful approach’.

Subsequently, GTB served a full EoT claim on Mailbox outside of the First Adjudication but did not raise this full claim in the First Adjudication.

The adjudicator took into account the three Relevant Events which GTB relied on and held that Mailbox were entitled to liquidated damages in excess of £5 million; GTB was not entitled to any EoT. This decision was enforced in the TCC.

On 13 April 2017, GTB commenced a second adjudication (the Second Adjudication) regarding the lawfulness of Mailbox’s termination of the Contract. This involved considering whether GTB proceeded ‘regularly and diligently’, including whether EoTs should have been granted to GTB. On the same day, Mailbox commenced proceedings seeking declarations to prevent GTB bringing further EoT claims in the Second Adjudication. Mailbox argued that no subsequent adjudicator had jurisdiction to decide GTB’s entitlement to EoT, as this had already been decided in the First Adjudication.

**Decision**

Coulson J found in favour of Mailbox. The court held that it was ‘beyond argument’ that Mailbox were entitled to the entirety of the liquidated damages awarded in the First Adjudication unless and until the liquidated damages claim is challenged in court. A dispute referred to adjudication includes every allowable defence; a defendant cannot withdraw a defence to ‘fight another day’. The court highlighted that under the JCT standard forms a contractor’s claim for EoTs only acts as a defence to an employer’s claim for liquidated damages; where a claim for liquidated damages in the court is fixed, a claim for EoTs becomes redundant. The dispute in the First Adjudication concerned the whole of Mailbox’s entitlement to liquidated damages and all of GTB’s entitlement to EoTs, not just the three Relevant Events GTB raised. GTB could not therefore seek any further EoT claims in the Second Adjudication unless and until those are modified or altered by the court. However, the court concluded that as the dispute as to the lawfulness of the termination was not part of the First Adjudication dispute, GTB could rely on all relevant facts and matters, in the Second Adjudication even if these were the same as would have been raised in its EoT claim.

**Significance**

This decision highlights that contractors should avoid ‘saving for another day’, further EoT claims in response to an adjudication for liquidated damages. Contractors therefore need to ensure they act quickly to submit any substantive EoT claims. This case also confirms that a responding party is unlikely to be able to ‘cherry pick’ which defences are considered in an adjudication; all relevant defences should be raised. CL