

Reports from the courts

Our regular analysis of the court cases of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who look at one case that involved a post-Grenfell claim for fire safety defects in a building; and another that clarifies the extent to which liquidated damages are recoverable upon termination of a contract before completion of the works.

Aviva v Shepherd Construction Ltd

[2021] EWHC 1921 (TCC); Jefford J

Camstead Limited (Camstead) engaged Shepherd Construction Limited (Shepherd) to demolish an existing building and construct student apartments in Cambridge (the Property) pursuant to a JCT Design and Build Contract 2005 edition with bespoke amendments executed as a deed (the Contract).

The Contract provided at Clause 7.1.1:

[Camstead] shall be entitled upon giving [Shepherd] 14 days' written notice of its intention to do so, to assign the benefit of this contract by absolute assignment to any person (save any to whom [Shepherd] makes reasonable objection in writing before the expiry of the said period of 14 days) and in this contract the term "Employer" shall be construed accordingly.

Clause 7.2 of the Contract provided:

[...] in the event of transfer by [Camstead] of his freehold or leasehold interest in or of a grant by [Camstead] of a leasehold interest in the whole of the premises [...], [Camstead] may at any time after practical completion of the works or of the relevant Section grant or assign to any such transferee or lessee the right to bring proceedings in the name of [Camstead] [...] to enforce any of the terms of this Contract made for the benefit of [Camstead].

The works were completed in 2009.

On 20 November 2009, Camstead sold the freehold interest in the Property to Hotbed.

On 16 April 2021, Hotbed sold the freehold interest in the Property to Aviva.

Following the Grenfell Tower fire in 2017 and updated government guidance in January 2020 relating to fire-risk assessment of buildings, Aviva identified various fire safety and non-fire safety defects.

Aviva commenced proceedings against Shepherd on 24 September 2020.

On the same date, Aviva and Camstead entered into a Deed of Assignment which purported to assign to Aviva the full benefit of the Contract and the right to bring proceedings.

On 5 January 2021, Aviva applied to join Camstead as a claimant.

The Particulars of Claim were served on 19 January 2021. Aviva claimed damages from Shepherd in respect of the remedial works in excess of £4m.

On 10 February 2021, Shepherd applied to strike-out the claim on the basis that it disclosed no reasonable grounds for bringing the claim as there was no valid assignment and no basis to join Camstead. It was common ground that notice was not given to Shepherd such that assignment under clause 7.1 was not possible. Shepherd argued that clause 7.2 provided only for an assignment without consent by Camstead and that it only allowed proceedings to be commenced in Camstead's name and in respect of losses suffered by Camstead. Aviva argued that assignment was valid under clause 7.2 on the basis that it should be construed in accordance with business common sense.

Judgment

Jefford J granted Shepherd's strike-out application. Aviva's application to join Camstead therefore failed.

Jefford J held that there was no wording to encompass a subsequent transfer of the interest – clause 7.2 was expressly concerned with the transfer by Camstead only: "Since the transfer of the freehold to Aviva was not made by the Employer, no right to bring proceedings could be assigned pursuant to clause 7.2". Jefford J further noted that clause 7.2 expressly provided for the assignment of "the right to bring proceedings in the name of [Camstead] [...] to enforce any of the terms of this Contract made for the benefit of [Camstead]". It was therefore concerned expressly with an assignment of contractual rights and could not be relied upon as a basis for the assignment of rights in tort. Jefford

J observed: “There is no pleaded case that a duty of care was owed by Shepherd to future owners of the property and, accordingly [...] it does not seem to me that the issue arises”.

Comment

Clause 7.2 of the JCT Design and Build Contract has not previously been considered by the courts. The judgment demonstrates the importance of providing notice and/or seeking consent prior to assignment under clause 7.1. It is a reminder to consider the requirements of assignment provisions in a contract before seeking to assign the contract or remedies under it.

Triple Point Technology, Inc v PTT Public Company Ltd

[2021] UKSC 29; Lord Hodge, Lady Arden, Lord Sales, Lord Leggatt, and Lord Burrows

PTT Public Company Ltd (PTT) appointed Triple Point Technology, Inc (Triple Point) for the design, installation, maintenance, and licencing of software for its commodity trading business under a contract dated 8 February 2013 (the Contract). The works were divided into Phase 1 and Phase 2.

Article 5.3 of the Contract provided:

If [Triple Point] fails to deliver work within the time specified and the delay has not been introduced by PTT, [Triple Point] shall be liable to pay the penalty at the rate of 0.1% [...] of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work [...].

Article 12.3 of the Contract limited Triple Point’s liability ‘to the Contract Price received by [Triple Point]’, save for fraud, negligence, gross negligence, or wilful misconduct.

Stages 1 and 2 of Phase 1 were completed 149 days late. Triple Point did not complete any of the further seven Stages of Phase 1 nor any of the nine Stages of Phase 2. Triple Point was paid for Phase 1. However, PTT refused to make payment in respect of Phase 2 on the grounds that payment was linked to milestones for completion which were not met.

From May 2014, Triple Point refused to continue without payment of the additional sums demanded.

On 23 March 2015, PTT terminated the Contract.

Triple Point commenced proceedings on 12 February 2015 in respect of outstanding payments for software licence fees. PTT counterclaimed for

liquidated damages up to the date of termination, together with general damages on termination. Triple Point sought to rely on the cap in Article 12.3 as limiting the damages claimed by PTT.

Jefford J at first instance agreed with PTT and awarded liquidated damages in the sum of \$3.5m, together with c.\$1m in respect of general damages.

The Court of Appeal held however that PTT was entitled to liquidated damages in respect of the works that had been completed only and that PTT’s entitlement to liquidated damages was subject to the cap in Article 12.3. The Court of Appeal therefore awarded c.\$1m in respect of both liquidated damages and general damages on termination, being the amount paid by PTT under the Contract prior to termination.

PTT appealed to the Supreme Court.

Decision

The Supreme Court allowed PTT’s appeal on the question of interpretation of Article 5.3. It was held that liquidated damages were due to PTT up to the date of termination, together with general damages. It was noted that the true construction of Article 5.3 “provided for liquidated damages if Triple Point did not discharge its obligations within the time fixed by the contract irrespective of whether PTT accepted any works which were completed late”.

Lord Leggatt noted that, at the time of termination, where liquidated damages for delay have already accrued, “there is no reason in law or justice why termination of the contract should deprive the employer its right to recover such [liquidated] damages, unless the contract clearly provides for this”. Lord Leggatt further observed that the Court of Appeal’s decision could incentivise a contractor not to complete the work in order to avoid liability for liquidated damages for delay already caused.

Comment

This case clarifies the extent to which liquidated damages are recoverable upon termination of a contract before completion of the works – it confirms that liquidated damages accrue up to the date of termination and that general damages can be claimed thereafter.

Whilst it concerned a bespoke contract, the judgment reinforces the importance of clear contractual drafting and reminds parties to carefully consider the terms of their contracts prior to execution. **CL**