Reports from the courts

Our latest round up of the cases of most interest to construction from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** includes a judgment providing a rare example of the circumstances in which the courts may be minded to order a stay of execution; and another that provides a reminder of the importance of clear contractual drafting.

J&B Hopkins Limited v A&V Building Solution Limited

[2023] EWHC 1483 (TCC); Ter Haar KC

J&B Hopkins Limited (J&B), the M&E contractor for a project at the University of Sussex, engaged A&V Building Solution Limited (A&V) to undertake mechanical works pursuant to a subcontract dated 18 December 2019 (the Subcontract).

A&V's works were delayed. A&V alleged that this was due to J&B's various breaches of the Subcontract, including but not limited to failing to issue suspension notices and/or to extend the contract period.

On 22 March 2021, A&V submitted Application No. 14, in respect of which J&B concluded that no further sums were due to A&V.

On 17 November 2021, A&V commenced adjudication proceedings based on its Application No. 14. The adjudicator decided that a further Interim Payment was due from J&B to A&V in the sum of £138,010 excluding VAT (the First Decision). Whilst the adjudication was still ongoing, J&B issued Part 8 proceedings seeking declarations as to the invalidity of Application No. 14. On 12 April 2022, the TCC ordered that Application No. 14 was invalid because it was issued too late such that A&V was not entitled to payment in respect of Application No. 14.

A&V commenced a second set of adjudication proceedings requesting the adjudicator "to review and decide the matters pertaining to [A&V's] claim for the breaches and subsequent Final Account for outstanding monies/late payment" in the sum of £455,526.53 plus VAT. On 6 July 2022, the adjudicator decided that A&V had been overpaid and A&V were ordered to pay the sum of £82,956.88 to J&B (the Second Decision).

On 19 January 2023, J&B commenced enforcement proceedings in respect of the Second Decision. The Court granted summary judgment in J&B's favour in the sum of £96,918.88 on 15 February 2023 (the Enforcement Decision).

On 23 February 2023, A&V issued an application seeking a stay of execution of the Enforcement Decision on the basis that A&V was unable to pay the judgment sum and, if ordered to do so, would "be forced to stop trading and go into insolvency" (the Application). The TCC was required to "judge the probable availability of the funds by reference to the underlying realities of the company's financial position."

Decision

Ter Haar KC held that "it is just to permit A&V to submit further witness evidence" in relation to its financial position in order to determine the Application at a later date.

Ter Haar KC explained that the court has a discretion to order a stay of execution if it is satisfied that there are special circumstances which render it inexpedient to enforce the judgment or the applicant is unable to pay the judgment sum. Ter Haar KC referenced ***Andrew v Flywheel IT Services Ltd [2021] EWHC 3746 (Comm)*** which confirmed that the burden is on the applicant to evidence its inability to pay.

Ter Haar KC considered the various appendices to A&V's submissions, which demonstrated: (i) A&V was a small company; (ii) A&V no longer appeared to be actively trading; and (iii) A&V owed its bank and HMRC sums in excess of £300,000. Moreover, Ter Haar KC noted that J&B had previously used A&V's lack of resources when seeking to resist payment to A&V pursuant to the First Decision. Ter Haar KC ordered A&V to submit further evidence, including full bank statements in respect of all its bank accounts, an explanation as to its current position with tax authorities, and its accounts to 31 January 2023.

Comment

This judgment is a rare example of the circumstances in which the courts may be minded to order a stay of execution, which will be of interest to the construction industry given continuing financial difficulties. It is a reminder that parties applying for a stay of execution must ensure that sufficient evidence in support is provided to avoid their applications being refused in the first instance.

Drax Energy Solutions Limited v Wipro Limited

[2023] EWHC 1342 (TCC); Waksman J

Drax Energy Solutions Limited (Drax), an energy supplier, entered into a Master Services Agreement with Wipro Limited (Wipro) on 20 January 2017 in respect of the provision of software services by Wipro for Drax (the MSA).

The relevant clauses of the MSA were as follows:

> 33.2 Subject to clauses [...] 33.3 [...] the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months.
> 33.3. The Supplier's total aggregate liability arising out of or in relation to this Agreement for any and all claims related to breach of any provision of clause 21 [...] shall in no event exceed 200% of the Charges paid or payable in the preceding twelve months from the date the claim first arose or £20m (whichever is greater).

The total charges payable in the first 12 months were £7,671,118. However, the project was ultimately unsuccessful – milestones were missed and Drax alleged that it had to spend large sums to render acceptable the deliverables provided by Wipro. Drax terminated the MSA on 7 August 2019 on the grounds of repudiatory breaches on the part of Wipro.

On 2 September 2021, Drax issued proceedings against Wipro under 4 categories: (i) Misrepresentation Claim for £31m; (ii) Quality Claims for £9.8m; (iii) Delay Claims for £9.7m; and (iv) Termination Claims for £12m, although there was some overlap between the amounts claimed.

On 9 February 2023, the Court held a preliminary issues trial concerning the interpretation of clause 33.2. The main issue to be determined was whether clause 33.2 provided for a single aggregate cap which applied to Wipro's liability for Drax's claim or multiple caps with a separate financial limit applying to each of Drax's claims.

Drax submitted that, if the issue was determined in its favour, the cap would reduce Wipro's maximum possible liability down to c.£23m. Alternatively, if construed in Wipro's favour, liability would be limited to c.£11.5m, i.e. 150% of the total charges payable. Drax submitted that the sum of c.£11.5m was the limit which applies to each and every separate claim; it was not a single maximum applied to all claims.

Decision

Waksman J found that a single aggregate cap applied to Wipro's liability.

Waksman J considered the language of the clause, noting that the inclusion of the words "limited to" and "total liability" strongly suggested that this was a cap for all claims. This was contrasted with the absence of words such as "for each claim" and "aggregate", from which "it is at least not clear that a single cap for all claims is contemplated". Waksman J observed that clauses 33.2 and 33.3 were not "well-drafted" – it was noted that the parties, who were "large corporations which obviously had professional advice", could have used explicit language in respect of individual claims.

Comment

Whilst it is not construction-related, this judgment is relevant to construction contracts and is a further reminder of the importance of clear contractual drafting. This is particularly so in relation to limits of liability – here, the parties' differing interpretations led to a difference of c.£11.5m. It also emphasises that the courts will interpret the relevant ambiguous provision in line with the contract as a whole, which may not reflect the parties' initial intentions. Furthermore, the court may be reluctant to assist commercial parties. **CL**