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The construction & energy law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Adjudication: application for a stay

Pioneer Cladding Ltd v John Graham Construction Ltd

[2013] EWHC 2954 (TCC)

Graham instructed Pioneer to carry out the cladding and curtain walling sub-contract works at a site in South Shields. The sub-contract incorporated the following provisions in clause 21:

"*(iii) Notwithstanding clause 29 of MAP the Adjudicator's fees are to be borne by the Party which refers the dispute to adjudication…*

(v) In the event that the decision of the Adjudicator is the making of a monetary award ("Adjudicator's Award") in favour of the Sub-Contractor, the following provision shall apply:-

(a) Graham shall place on deposit the amount of the Adjudicator's award with Northern Bank Limited in the joint names of the solicitors acting for Graham and solicitors acting for the Sub-Contractor within seven days from the date of receipt by Graham of the Adjudicator's decision."

Pioneer referred two disputes to two separate adjudications. The net result was that there was a sum due to Pioneer of £193,005.53.

The Court stated that on the face of it, clause 21(v) would suggest that Pioneer are not entitled to be paid that sum and instead the money is to be paid into an escrow account. However, Pioneer argued that the provision was contrary to the HGCRA and contrary to the principles behind the entire adjudication process whereby the need for the "right" answer has been subordinated by the need to have an answer quickly.

In relation to this the Judge stated:

"*I am in no doubt that clause 21(v) is in breach of both the policy behind the 1996 Act and the Act itself. It is not in accordance with the Scheme for Construction Contracts introduced by the Act. Because it would deprive a claiming party of the money they had been awarded by the adjudicator, the clause is designed to discourage a party from exercising its right to take disputes to adjudication.*"

The Court reiterated the conventional view that:

"*If one part of the contract offends against the 1996 Act and/or the Scheme, the adjudication provisions in the contract fail in their totality, and are to be replaced by the Scheme.*"

The Court went on to state:

"*Even if that is wrong, and clause 21(iii) can survive, I consider that that clause too is contrary to the 1996 Act and the Scheme.*"

The Court found that although the provision was not as extreme as the provision in *Yuanda v Gear*, which made the referring party liable for the whole of the costs of the adjudication, it was still a provision which could discourage a claiming party from commencing adjudication and was therefore unlawful. Consequently, Graham could not rely on the provision. One practical effect of this was that each party was liable for half of the adjudicator's fees. As Graham had paid some of those fees on behalf of Pioneer, the parties agreed that the sum of £4,340.04 must be deducted from the £193,005.53 due to Pioneer, making a net sum due of £188,665.49.

The Court then turned to the issue of the stay of execution and put forward three questions:

"*(i) Is it probable that Pioneer would be unable to repay the £188,665.49 if that was the outcome of the ongoing arbitration?*

(ii) Is Pioneer's financial position the same or similar to the financial position of which Graham was aware at the time that the contract was made?

(iii) Is Pioneer's financial position due either wholly or in significant part to Graham's failure to pay the sums awarded by the Adjudicator?"

In response to the first question the Court was in no doubt that if the money was paid over to Pioneer, they would not be in a position to repay it if the arbitration subsequently went against them.

In response to the second question the Court found that Graham were right to conclude, as they did at the time, that they had "robustly vetted" Pioneer. In the absence of any proper accounts or independent financial information, they had done the best that they could. The judge also expressed that he was satisfied that Graham entered into that sub-contract on a false premise.

In relation to the third question the suggestion that Pioneer's financial difficulties were caused or substantially contributed to by Graham were rejected. On the contrary, the Court considered that those financial problems were inherent in Pioneer's business model and that Pioneer's cash flow difficulties stemmed back to a time before they had sub-contracted with Graham.

The Court therefore concluded that, notwithstanding the relatively high hurdles noted in *Wimbledon v Vago*, Graham had made out a good case for a stay of execution pending the outcome of the on going arbitration.

Insurance: avoiding cover

Genesis Housing Association Ltd v Liberty Syndicate Management Ltd and others

[2013] EWCA Civ 1173

Paddington Churches Housing Association was a charitable Industrial and Provident Society and part of the Genesis Housing Group which provided affordable or social housing. Liberty was a corporate Lloyd's syndicate which until 2011 underwrote policies known as a "Premier Guarantee for Social Housing" administered exclusively by a Reading-based company, MD Insurance Services Ltd ("MD").

In 2007, Genesis contracted with Time and Tide (Bedford) Ltd ("TT Bedford") to carry out the renovation to a large number of flats as part of a renovation and redevelopment project in Bedford. A term of the contract required TT Bedford to secure insurance cover for the benefit of Genesis and the future owners of the properties, which was to include cover for TT Bedford's insolvency. The contract sum was £4.6 million.

As such, TT Bedford approached MD seeking a policy. The proposal form was completed by an MD employee and signed by Graham Gamby (one of the two owners of TT Bedford) for and on behalf of Genesis (as agent) and TT Bedford. Time and Tide (Bedford) Ltd was incorrectly named as the builder on the proposal form as Time and Tide Construction Ltd. Whereas Time and Tide Construction Ltd was an experienced builder that had been trading for several years with a reasonable credit rating, TT Bedford was a special purpose vehicle company with no established credit rating. In addition to this mistake, the contract sum was stated to be £3.7 million (for reasons unknown). Further the Housing Association was incorrectly named as "Genesis Housing Association" rather than Paddington.

The proposal form contained a declaration which included a "basis of contract" clause which provided that the statements made therein shall form the basis of the contract between the insured and the insurer.

Following severe delays to the build, on 15 May 2010, TT Bedford was dissolved. Genesis sought to enforce the insolvency provision in the policy but was unsuccessful. Consequently proceedings were issued against the insurers. At first instance, Mr Justice Akenhead concluded that whilst provisions contained in a policy could negate the effect of a basis of contract clause contained in a proposal form, the wording included in the policy was not sufficient to negate the effect of that clause. However, Genesis appealed the decision to the CA.

The CA considered three main issues. Firstly, whether the warranties in the proposal form became contractual warranties. Secondly, did Genesis warrant that TT Construction was to be the builder and thirdly, did the policy restrict the insurers' right to avoid for misstatement in circumstances where there was intent to defraud?

In relation to the first issue the Court found that:

"*If the parties intend to deprive of contractual effect a proposal form which purports to be the basis of their contract, they must do so by clear and unequivocal language. The policy in the present case contains no such express words.*"

As such, the statements in the proposal form had contractual effect and were deemed warranties forming the basis of the policy.

In response to the second issue, LJ Jackson found that inaccurate statements about the identity of the builder, in the proposal form completed by the claimant's agent, had become warranties forming the basis of the policy. He confirmed that earlier authorities established the principle that, where a proposal form contains a "basis of contract" clause, the proposal form has contractual effect (even if the policy contains no reference to it), and all statements in the form constitute warranties on which the insurance contract is based.

In regard to the third issue, condition 7 of the policy provided:

"*Misrepresentation: This Policy will be voidable in the event of misrepresentation, misdescription, error, omission or non-disclosure by the Policyholder with intention to defraud.*"

Genesis argued that the effect of condition 7 was to limit the insurers' right of avoidance to cases where the policyholder intended to defraud the insurer. LJ Jackson disagreed noting that it was not expressed to be a limiting provision. If such a result was intended, it should have been stated expressly. LJ Jackson stated:

"*In my view condition 7 of the Policy can only be read as a provision conferring additional express rights on the insurers, regardless of whether or not those express rights serve any useful purpose. It cannot be read as cutting down the insurers' general right to avoid for misrepresentation.*"

Even though Genesis had not actually been involved directly in completion of the proposal form, it was bound by the acts of its agent (TT Bedford). LJ Jackson therefore concluded that the policy was void due to the misstatement, concerning the builder, in the proposal form. As such, Genesis had no right of claim under the insurance because it was, albeit innocently, in breach of warranty because the statement made in the proposal form, that the builder was or was to be TT Construction, was to its knowledge and belief incorrect and because that warranty was not displaced or modified materially by any other terms of the insurance contract.

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