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

Dispatch

Bonds: insolvency and termination

Ziggurat (Claremont Place) LLP v HCC International Insurance Company Plc

[2017] EWHC 3286 (TCC)

Ziggurat employed County Contractors (UK) Ltd ("County") to build blocks of student studios in Newcastle. The contract incorporated the JCT 2011 standard form. County's performance was the subject of a Performance Guarantee Bond. The Bond was in standard ABI Model Form with one important exception: clause 2 was, as described by Mr Justice Coulson, "an entirely homemade addition" which "must... be taken to have been added by the parties to meet their particular requirements". The first two terms of the Bond were:

"(1) The Guarantor [the defendant] guarantees to the Employer [the claimant] that in the event of a breach of Contract by the Contractor [County] the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the losses and damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provision of or by reference to the Contract and taking into account all sums due or to become due to the Contractor.
(2) The damages payable under this Guarantee Bond shall include (without limitation) any debt or other sum payable to the Employer under the Contract following the insolvency (as defined in the Schedule) of the Contractor."

In February 2016, County stopped work apparently because of financial difficulties. The contract administrator served a notice giving 14 days to remedy the specified defaults. County failed to respond to the notice or return to site. Ziggurat duly served notice of termination making plain that Ziggurat would employ and pay others to complete the works and would seek to recover the costs which were incurred. On 8 April 2016, County became subject to a Company Voluntary Arrangement and were therefore insolvent. The cost of others completing the work amounted to £621,798.38. On 17 March 2017, Ziggurat made a demand under the Bond, limiting the claim to the maximum permitted, namely £382,519.06.

On 12 April 2017, County's solicitors complained about the termination saying that it was invalid due to a miscalculation of the length of the relevant notice period. As to quantum, the sums claimed were "disputed". Further particulars were promised, but not provided. As for the claim on the Bond, County said that as the Bond was a default Bond and not a demand instrument, Ziggurat had to prove that a breach of contract had taken place and that losses had been incurred as a result of that breach before a claim could be made upon it. Without a formal decision about breach and a formal ruling upon the extent of the losses arising, no payment was due."

The Judge said that the right approach was to identify what was necessary for a successful claim against County under clauses 1 and 2 of the Bond, in circumstances where County were insolvent and had not paid the debt which had been ascertained in accordance with the building contract and was therefore due.

Mr Justice Coulson said that under clause 2 of the Bond, the damages payable by County included "*any debt or other sum payable to the Employer under the Contract following the insolvency*". Here, there was a debt payable by County under the building contract, namely the £621,798.38. That debt "followed" the insolvency in that it was ascertained and had been demanded after the CVA of April 2016. The purpose and intent of clauses 1 and 2 of the Bond was to mirror the two principal termination routes provided for in the building contract. Clause 2 of the Bond made it as clear as possible that County was liable for sums payable by County under the building contract, but which had not been paid as a result of, or following, County's insolvency. Clause 2 could have had no purpose whatsoever other than to make it clear that the Bond was to protect Ziggurat from the non-payment by County of the debt following the insolvency. Whilst there were a number of "minor points" that could be argued against this overall position:

"*these were simply the consequence of the parties adding the homemade amendment at clause 2 to cover insolvency, and then failing to amend the other ABI Model Form provisions at the same time. These matters cannot affect the proper interpretation of this Bond.*"

In relation to the "termination" issue, namely the assertion that Ziggurat had repudiated the contract by serving a notice two days early, before the insolvency event, all of which meant that the contract had come to an end, the Judge considered that this argument was contrary to the scheme provided for under the JCT Standard Form. This provided that no matter what could be argued about prior events, the insolvency of the contractor gave rise to a clear, certain process which culminated in the notification of a debt. This was designed to prevent a contractor in the position of County from avoiding the consequences of their insolvency by seeking to argue, long after the event, that the contract had come to an end prior to their insolvency and that, in consequence, these clauses no longer applied. As from the date that County became insolvent, whether or not Ziggurat had given notice of termination, and regardless of any belated arguments as to repudiation, County were in breach because they failed to pay the notified debt. Therefore payment was due under the Bond.

County also argued that they could challenge the quantum. Ziggurat said that all that was required was the ascertainment of the figure in accordance with the contract. County said that the surety could defend himself against the claim by advancing any of the arguments as to the quantum of the debt which would have been available to County. The Judge agreed with County. There was nothing in the contract to say that they could not challenge the figure, and there were no provisions which indicated that, as soon as the figure was asserted, it was due and payable in the amount asserted, without any ability to challenge. And if County could have made that challenge, then so too could HCC. Perhaps unsurprisingly, the Judge noted that on the facts of this case, it may be difficult to mount a challenge. County had been entirely silent on how and why the debt figure might be wrong and there was a significant margin between the asserted debt and the maximum sum due under the Bond.

Contract interpretation

Royal Devon & Exeter NHS Foundation Trust v Atos IT Services UK Ltd

[2017] EWCA Civ 2196

This case was about the meaning and effect of a limitation clause. It is another example of the court deciding the meaning of a "homemade" clause.

The central issue was what was the natural meaning of the words used, applying the test of a reasonable person who had all the background knowledge of the parties. LJ Jackson noted that both parties were well-resourced, commercial organisations with ready access to legal advice. The term itself, although "poorly drafted", was perfectly rational. Therefore there was no reason for the court to depart from the natural meaning of the words used, once that natural meaning has been ascertained. Atos were engaged in 2011 to provide an IT system, whereby patient records would be held online. It did not go well. The contract included the following at paragraph 9 of schedule G:

"9. Limitation of Liability

9.1 The aggregate liability of the Contractor in accordance with sub-clause 8.1.2 paragraph (a) shall not exceed the sum of two million pounds.

9.2 The aggregate liability of the Contractor in accordance with sub-clause 8.1.2 paragraph (b) shall not exceed:
9.2.1 for any claim arising in the first 12 months of the term of the Contract, the Total Contract Price as set out in section 1.1; or
9.2.2 for claims arising after the first 12 months of the Contract, the Total Contract Charges paid in the 12 months prior to the date of that claim."

An issue arose on the pleadings as to whether, and to what extent, Atos' liability was limited by paragraph 9.2.2 of schedule G to the contract. At first instance, Royal Devon argued that paragraph 9.2 of schedule G was not capable of being construed and should be declared unenforceable. Atos accepted that paragraph 9.2 was poorly drafted, but submitted that it either imposed a single cap which, depending on the circumstances, would be either that set out in paragraph 9.2.1 or that set out in paragraph 9.2.2, or imposed two caps, the first in respect of defaults occurring in the first twelve months of the contract and the second in respect of subsequent defaults.

At first instance, Mrs Justice O'Farrell rejected the case that paragraph 9.2 was unenforceable and held that the paragraph had the first of the two meanings canvassed by Atos. On appeal, Royal Devon argued that the Judge ought to have adopted the second alternative, rather than the first alternative.

Lord Justice Coulson noted that the phrase "any claim arising" at the start of paragraph 9.2.1 meant "any default occurring". To the Judge, the language of paragraph 9.2 pointed emphatically towards there being two separate caps. For any default or defaults occurring in the first year of the contract, Atos' liability was capped at the amount of the contract sum. For any default or defaults occurring in the years 2, 3, 4 or 5, that liability was capped at a lower sum, namely the amount of the contract charges paid in the previous twelve months. If there were defaults in both periods, then the liability for defaults before 7 November 2012 was capped at the amount of the contract sum; the liability for subsequent defaults was capped at the amount of the contract charges paid in the relevant twelve-month period.

To the Judge, there was nothing surprising about that arrangement. Atos was doing the high value work in the first twelve months, when defaults could have very expensive consequences. Atos was doing lower value work in years 2, 3, 4 and 5 when defaults would have less expensive consequences.

Although paragraph 9.2 of schedule G was a "homemade clause" which may yield some odd results, the natural meaning which yielded the "least bizarre consequences" was that paragraph 9.2 imposed two separate caps, namely a high cap for defaults occurring in the first year and a separate, lower cap for defaults occurring in subsequent years.

Witness evidence

McGann v Bisping

[2017] EWHC 2951 (Comm)

A short reminder that during any hearing, whether litigation or arbitration, while giving evidence, you should not discuss the case (or your evidence) with anyone. In the case here, the witness was specifically instructed by the Judge, in the usual way, not to discuss the case with any members of his legal team or with his wife, other family members or any of his friends. Despite the instruction, the witness in question did discuss the case and evidence over the weekend. This was discovered and as the Judge noted: "*set in motion a train of events which resulted in the waste of nearly a complete court day*". Unsurprisingly, it was submitted that this reflected poorly upon the credibility of those concerned. With a degree of understatement, the Judge agreed that this was a proportionate and practical approach, and no doubt something the Judge took into consideration in drafting his judgment.

Adjudication: jurisdiction defences

Morgan Sindall Construction and Infrastructure Ltd v Westcrowns Contracting Services Ltd

[2017] CSOH 145

Another short reminder.

This was an adjudication enforcement case about liability for alleged defective flooring. Westcrowns said that the adjudicator had decided on matters which were outside the scope of the dispute referred to him and/or had dealt with two disputes when only entitled to deal with one. MS said that Westcrowns were barred from relying on the first ground on the grounds that, although they could have done, they had not taken this point in the course of the adjudication and so were now barred from doing so.

Lord Clark noted that the jurisdictional challenge did not arise until the Rejoinder. The basis for that challenge now was that there were two disputes. Therefore it was not a point that had been taken during the adjudication and Westcrowns were now barred from raising this challenge to jurisdiction.

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