

## Legal Briefing

### Had the obligations in a bond been triggered by the contractor's insolvency?

*Ziggurat (Claremont Place) Ltd v HCC International Insurance Company plc [2017] EWHC 3286 (TCC) CSOH [2017]*

Before the Hon. Mr Justice Coulson

In the Technology and Construction Court

Judgment delivered 20 December 2018

#### The facts

During 2015 Ziggurat engaged County Contractors (UK) Limited to build student accommodation blocks in Newcastle-upon-Tyne. The building contract incorporated the JCT 2011 standard form including conditions 8.4 and 8.5 providing for termination if County suspended the works or became insolvent. Condition 8.7 also provided that in the event of termination, Ziggurat could employ others to complete the work and claim any ascertained additional costs as a debt from County.

HCC provided a bond in favour of Ziggurat based upon the ABI Model Form which included the standard clause 1 that in the event of breach of contract by County, HCC would discharge the damages sustained by Ziggurat (up to a maximum of £382,519.06) as established pursuant to the terms of the building contract. The bond included a bespoke clause 2 that the damages payable would include any debt or other sum payable to Ziggurat following the insolvency of County.

On 31 March 2016 Ziggurat issued a notice of termination under condition 8.4 and County entered into administration during May 2016. Ziggurat arranged for other parties to complete the project and having carried out the ascertainment exercise provided for by condition 8.7, on 10 March 2017 claimed a balance of £621,798.38 from County. On 17 March 2017 Ziggurat issued a demand to HCC claiming £382,519.06. On 12 April 2017 County belatedly challenged the validity of the termination and contended that the ascertained sum claimed was disputed although no details were provided.

HCC rejected the demand for payment on the grounds that Ziggurat would first have to prove that a breach of contract had taken place and that losses had been incurred in consequence of that breach. HCC also submitted that the issues raised by

County on 12 April would have to be resolved in accordance with terms of the building contract before any payment could be made under the bond.

Ziggurat commenced Part 8 proceedings seeking a number of declarations as to the proper interpretation of the bond.

#### The issue

Was Ziggurat entitled to bring a claim under the bond?

#### The decision

The judge disregarded the declarations sought as being too prolix and focussed upon what he considered to be the real issue i.e. what was necessary to enable a successful claim against HCC under the bond where County was insolvent and had not paid the debt ascertained in accordance with condition 8.7?

The judge found that the wording of clause 2 in the bond meant that a valid claim under the bond did not require a breach of the building contract. Where clause 2 referred to damages payable by way of a debt, which could arise without a breach of contract, it was clear that the word 'damages' was intended to have a broader meaning encompassing any sums recoverable under the bond. Thus clause 2 amounted to a standalone obligation not necessarily initiated by a breach of contract (which would have been covered by clause 1).

Alternatively, if a breach of the building contract was required the judge said that County was in breach having failed to pay the £621,798.38 demanded by Ziggurat which County was expressly obliged to pay as a debt under condition 8.7.

The judge found that any arguments over the validity of Ziggurat's termination were superseded by County's subsequent insolvency which would have entitled Ziggurat to terminate the building contract and automatically triggered the condition 8.7 ascertainment process.

Finally, the judge agreed with HCC that it was entitled to challenge the ascertainment figure of £621,798.38 in the same way as County would have been under the building contract. The judge therefore rejected Ziggurat's submission that its claim for the maximum sum allowed for under the bond i.e. £382,519.06, was conclusive as to quantum.

#### Commentary

This is a useful decision concerning the termination

## Legal Briefing

provisions in the JCT standard form and the ABI Model Form.

Ziggurat succeeded on points of principle but did not obtain an order for payment. Having noted the limitations of the Part 8 procedure the judge left open to another day the question of whether or not Ziggurat's ascertainment was correct. The judge did however observe that where County had not previously offered any substantive challenge to the figure of £621,798.38 and where the amount recoverable against HCC was capped at £382,519.06, it seemed unlikely that any subsequent arguments on the quantum of the ascertainment would impact Ziggurat's recovery under the bond.

Ted Lowery  
January 2018