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The construction & energy law specialists

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

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Dispatch

Liability caps

Topalsson GmbH v Rolls-Royce Motor Cars Ltd

[2024] EWCA Civ 1330

Rolls-Royce engaged Topalsson through a Services Agreement to design, build, implement and maintain digital visualisation software. There were delays to the project, then disputes, and, in April 2020, Rolls-Royce purported to terminate the Agreement. At first instance, the judge held that the sums due to Rolls-Royce by way of "*termination damages*" amounted to a total of €7.9 million. This figure was reduced by the amount due to Topalsson (some €800k) and then the judge applied the contractual cap of €5 million, awarding Rolls-Royce damages in the sum of €5 million plus interest.

On appeal, Topalsson argued that the cap applied separately to both, their liability to Rolls-Royce and Rolls-Royce's liability to Topalsson, which would have the effect of fixing Topalsson's liability at €5 million less the sum owing to Topalsson. This would leave a sum due of just over €4.2 million. Topalsson also said that the claim for interest fell within the original cap.

Coulson LJ discussed the judge's approach which adopted the following sequence:

i) a consideration of Topalsson's liability to Rolls-Royce;

ii) a consideration of Rolls-Royce's liability to Topalsson;

iii) the netting off of one liability against the other; and

iv) then – and only then – the application of the cap.

However, Coulson LJ considered that there was nothing in the relevant clause (20) which suggested that the cap only applied once the net financial position between the two parties had been calculated. If that had been the intention of the parties, it would have been very easy for the clause to say that, and to make clear that the cap only applied to the net liability between the parties. However, instead the clause referred to: "*the **total** liability of either party to the other*" [Coulson LJ's emphasis].

Coulson LJ held that those words suggested a totting up, not a netting off. They were contrary to the idea that the net position had to be ascertained before the cap was applied. Further, those words positively indicated that the cap must be applied to Topalsson's liability to Rolls-Royce and to Rolls-Royce's liability to Topalsson. The words used in the contract assumed the calculation of two separate liabilities, either party to the other, with each liability being the subject of the cap. In this way, the cap would be applied to Topalsson's total liability to Rolls-Royce and would reduce it to the cap figure – €5 million. It would be applied separately to Rolls-Royce's liability to Topalsson, but that would have no financial effect because that liability was much less than €5 million. The two liability figures would then be netted off at that stage, resulting in a sum due to Rolls-Royce of €4.2 million odd.

In addition, Topalsson said that Rolls-Royce's entitlement to interest also fell within the cap. This was not an issue raised at trial. For a number of reasons, the CA declined to allow the late amendment proposed by Topalsson to deal with this issue. One of those reasons was that Topalsson were in breach of numerous court orders. This meant that costs would not be an adequate remedy for any late amendment because there was nothing to suggest that Topalsson would pay them.

Coulson LJ did, in case that view was wrong, go on to consider the claim. The appellate judge rejected the claim for a number of reasons including that the cap could not be considered in isolation. Clauses 14.1 and 14.2 set out that the parties were agreed that interest payable under clause 14.11 was "a substantial remedy for late payment" and that it was "the sole remedy" available. If the cap applied, this would mean that the innocent party – here, Rolls-Royce – would be denied the "sole and substantial remedy" for late payment that the parties had expressly agreed. Further, a provision that interest for late payment be included within the cap would require clear words, of which there was not. And, given that such a construction would be a positive disincentive on Topalsson to pay the sums when they fell due, it would be contrary to commercial common sense. Interest on late payment fell outside the cap in clause 20.

Responsibility for design

BNP Paribas Depository Services Ltd & Anor v Briggs & Forrester Engineering Services Ltd

[2024] EWHC 2903 (TCC)

In February 2021, BNP entered into a design and build contract with B&F for the design and construction of stair pressurisation works in risers A and B of a 30-storey 1960s office skyscraper.

It was always known that there was at least some asbestos containing material ("ACM") in the existing risers, and it was common ground that the contract allowed for at least some works to remove ACM within the risers. However, as HHJ Stephen Davis explained, the fundamental issue between the parties was the extent of those works and whether B&F owed any obligation to undertake further refurbishment asbestos surveys ("RASs") to identify the presence of further ACM in all areas where it was required to undertake works and, if found, to undertake all such asbestos removal works ("ARWs") as were necessary. There was a further issue in relation to certain additional structural strengthening works that had not initially been foreseen as part of the original scope of work.

B&F said that its obligations were limited to the ARWs identified in a quotation dated 17 April 2020 from its specialist licensed asbestos removal and disposal subcontractor, Woods. Problems arose when further asbestos was encountered in areas outside the scope of the Woods quotation. B&F said that this was not part of its scope of work and that it would not undertake such works without an instruction. Eventually, B&F issued a suspension notice, followed by a termination notice in February 2023, on the basis that BNP was preventing it from completing the works by not providing further RASs or an instruction. BNP said that this amounted to a repudiatory breach of the contract.

In the judge's opinion, as a general statement, the design and build contract made it "plain beyond serious argument" that the design and build obligation and the risk in relation to the scope of the works necessary to provide the complete stair pressurisation installation, including the need to survey for ACM to the extent necessary and to undertake any ARWs to the extent necessary, laid "firmly" on B&F. Under the JCT design and build contract, B&F took full responsibility for the Employer's Requirements and the Contractor's Proposals as regards the design of the works, the execution of the works, compliance with the performance specification and with the Statutory Requirements.

In particular, the judge referred to clause 2.40 which was a bespoke clause introduced by the schedule of amendments. If anything, this served to extend B&F's design responsibility:

> *"1. The Contractor has had an opportunity to inspect the physical conditions (including the sub-surface conditions) and all other conditions of or affecting the site and shall be deemed to have fully acquainted himself with the same and to have obtained all necessary information as to risks, contingencies and all other circumstances which may influence or affect the execution of the Works.*
>
> *2. Any information prepared by or on behalf of the Employer ... is provided for information only. The Employer ... make[s] no representation or warranty as to accuracy or completeness of any such information or for any representation or statement contained therein whether made by the Employer or the Employer's Persons for misrepresentation or misstatement whether made negligently or otherwise in respect of such information.*
>
> *3. No failure on the part of the Contractor to discover or foresee any physical conditions and/or other conditions affecting the site and/or any risks, contingencies or other circumstances whatsoever referred to in Clause 2.40.1 (whether the same ought reasonably to have been discovered or foreseen or not) shall entitle the Contractor to an adjustment of the Contract Sum or an adjustment of the Date for Completion of the Works or any Section thereof."*

The Woods quotation did not assist B&F. It was not a method statement, or a scope of works, but had been provided in response to a request to demonstrate that the subcontractor element of the price had been subject to market testing. The Employer's Requirements made it clear that the scope of the ARWs included, but was not limited to, the removal of all ACM identified. The relevant material had identified ACMs in the majority of places surveyed but did not suggest that this was an exhaustive list of every place where ACM might be found. In fact, it qualified the report and advised much more extensive ARWs than just those to remove the ACM found in the survey.

Nor did the Woods quotation expressly limit the scope of the works by reference to the specific areas of asbestos. It did not simply refer to removing "all ACM identified". Since the Employer's Requirements required all works to be subject to the provision of clean air certificates on completion, and since B&F would be undertaking the new installation, B&F's scope of works was not limited only to those works specifically included in the Woods quotation.

When it came to the structural strengthening works, the judge considered it sufficient to explain that the existing ductwork passed through floors within the risers which were made up of concrete with reinforcing bars underneath to provide structural support. During the course of the works, it became known for the first time that, in certain floors on riser B, the reinforcing bars were not present throughout, leading to an obvious and acknowledged risk to the safety of anyone working in this area, and the need for remedial works. The simple issue was whether that was BNP's or B&F's contractual responsibility.

As a starting point, B&F accepted full design responsibility for the whole of the design, including that contained in the Employer's Requirements, and that required to comply with the Statutory Requirements. That said, B&F's case was that repairs to the structural defects with the riser floors were not expressly identified in the contract documents and there was no term expressly requiring it to carry out these works.

The judge agreed that repairs to the structural defects within the riser floors were not expressly identified in the contract documents. But that was not surprising since the defects were not known about at the time the contract was entered into. This explained the absence of any term expressly requiring it to carry out those particular works. However, this real question was: what did the contract provide in terms of allocation of risk for such a problem? In the view of the judge, the answer was that the contract provided for the risk to lie with B&F:

> *"The impact of bespoke clause 2.40.1 was that it was not open to B&F to argue that it was reasonably unaware of existing site conditions and the associated risks associated with them. The impact of clause 2.40.2 was that B&F was not contractually entitled to rely on the accuracy of information, including that contained in surveys and reports, provided by BNP. The impact of clause 2.40.3 is that all these matters were at B&F's risk in terms of the impact of subsequently discovered matters on the time and cost of the works."*

These were special conditions not included in the JCT standard form, and thus represented the parties' specific agreed intentions.

So, was B&F entitled to terminate the contract for the reasons given? Constable J in Tata Consultancy Services Ltd v Disclosure and Barring Service [2024] EWHC 1185 (TCC) stated that:

> *"An act of prevention may be (a) a breach of an express or implied contractual obligation; and also (b) the exercise of an entitlement (such as the giving of an instruction). It will not be the happening of an event for which the parties have otherwise agreed the allocation of risk within the contract. The concept of 'prevention' is, therefore, itself rooted in consideration of the parties' express or implied obligations ...".*

It was common ground that if a contractor wrongly purports to terminate pursuant to an alleged contractual right, and leaves site undertaking no further work, then that purported termination will normally be a repudiatory breach of contract. Given the judge's conclusions, it was an inevitable result that the cause of the suspension was B&F's default, in that it had to carry out works which it was required to do under the contract. In the circumstances, B&F was not entitled to issue the suspension or the termination notice.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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