



LEGAL BRIEFING

Sweett (UK) Ltd (formerly Cyril Sweett Ltd) v Michael Wight Homes Ltd

[2012] EW Misc 3 (CC), HHJ Wildblood QC

The Facts

Michael Wight Homes Ltd (the “Employer”) engaged Sweett (UK) Ltd (the “Consultant”) on 4 February 2008 to provide quantity surveying and employer’s agent services in respect of a housing development in Martock, Somerset. The key events are summarised as follows:

- It was an express term of the consultant’s engagement that it would “prepare contract documentation and arrange for such documents to be executed by the parties thereto”;
- During pre-contract negotiations with Diamond Property Construction Ltd (the “contractor”), the consultant made it clear that a performance bond was required;
- On 25 March 2008 the contractor started work but the formal contract with Employer was not signed until 23 May 2008;
- It was an express term of the contract that the contractor would provide a bond in the form annexed to the contract;
- Over the course of the following six months, and despite numerous attempts by the consultant to resolve matters, the contractor failed to provide the bond as required under its contract;
- On 10 September 2008 as a result of unpaid fees, the consultant terminated its agreement with the Employer;
- On 15 September 2008 the consultant pursued the employer in respect of unpaid fees. The parties settled all aspects of the claim, save for the employer’s counterclaim in respect of the consultant’s failure to secure the bond; and
- The contractor went into liquidation on 17 June 2009.

The Issue

The principal issue that the court was asked to determine, was whether the consultant acted in breach of its duty to the employer in relation to the provision of a performance bond by the contractor.

The employer argued that the consultant owed an absolute obligation to ensure that the performance bond was provided by the contractor. It relied on the fact that the consultant’s schedule of services stated that:

“Prepare contract documentation and arrange for such documents to be executed by the parties thereto.”

Alternatively the employer said that even if there was no absolute obligation on the consultant to procure the performance bond, the consultant still had a duty to take reasonable care to see that the bond was provided by the contractor. The employer’s expert suggested that in order to discharge its duty the consultant should have at the very least

withheld payment from the contractor in order to apply pressure on it to provide the bond.

The consultant on the other hand argued that contrary to the employer's assertion, there was no absolute obligation on it to ensure that the contractor provided a performance bond. Rather its sole obligation was to take reasonable care to ensure that the performance bond was provided, and therefore by making numerous requests to the contractor and the employer for updates as to the provision of the bond, it had successfully discharged its obligation.

The Decision

The court rejected the employer's argument, and held that the consultant did not owe an absolute duty to ensure that the contractor provided the bond. In arriving at its decision the court considered the definition of "arrange" and held that the consultant's obligation stopped short of requiring it to "ensure" the provision of the bond. Provided it put in place the necessary steps for the bond to be executed, the consultant would effectively have discharged its duty to "arrange" under its appointment, and therefore any breach would be limited to the consultant's common law duty to exercise reasonable skill and care.

Looking at the duty to exercise reasonable skill and care in isolation, the court favoured the evidence provided by the consultant's expert and as a result held that the consultant had in the circumstances discharged its duty to act with reasonable skill and care, by making numerous attempts to secure the bond, which included attending several meetings with both the employer and the contractor, having various discussions with the contractor, and generally chasing the contractor for updates on a regular basis.

Comment

Whilst this is a county court judgment, it will offer some relief for consultants acting as architect, contract administrator or employer's agent to see that where their appointment provides that they have an obligation to "arrange" a bond, such obligations are subject to the implied test of reasonable skill and care, and are not absolute obligations.

However, in discharging their obligation to act with reasonable skill and care, consultants should note the extensive steps that the consultant took in this case to try to secure the bond from the contractor. consultants should ensure that they are careful to understand what obligations they may have assumed in relation to obtaining bonds from contractors and to ensure they have proper processes in place to check that bonds are obtained as there can be a tendency for the requirement to be overlooked once work on site starts.

David Bebb
16 March 2012
