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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 under new home warranties

Manchikalapati & Others v Zurich Insurance plc & Anr
[2019] EWCA Civ 2163

This was an appeal by the leasehold purchasers of some new-build flats about the liability cap in their new home warranty insurance policy. The leaseholders issued legal proceedings against (i) Zurich Insurance plc ("ZIP"), the insurers, who provided a new home warranty and (ii) Zurich Building Control Services Ltd (the approved inspector – appointed to verify that the construction work complied with Building Regulations). ZIP issued a Zurich policy to each leaseholder containing a provision limiting the amount that would be paid under the policy:

"... for a New Home which is part of a Continuous Structure, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £25 million. Where the combined value of all New Homes within a Continuous Structure exceeds £25 million, the total amount payable by Us in respect of all claims in relation to the New Homes and the Continuous Structure shall not exceed £25 million."

At first instance, the claimant leaseholders were awarded, against the insurers only, some £3.6 million, with individuals receiving between £99k and £305k. The Judge held that the structural steelwork lacked fire protection which was "major physical damage". However, the cost of carrying out the fire proofing works was some £4.75m and taking all the defects into account, the total cost of remedial works was £9.7m plus VAT. The Judge had capped the amount to be paid to the claimants at the £3.6 million, being the total purchase price of the flats. The claimants appealed saying that the proper interpretation of the policy was that the cap was the total purchase price of all new homes in the block, subject to a maximum of £25m; the total of the purchase prices of all the new flats being £10.8m.

In the CA, LJ Jackson referred to the case of *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453, 456 where it was held that:

"... in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."

However, he also made it clear that it was not part of the court's function to manufacture doubts in order to construe any policy against the insurer. That said, here there were "real doubts" and ambiguities. For example, the policy did not say whether the purchase price referred to was that of the individual flat or the block of flats. Therefore, the CA could take "assistance from the surrounding provisions of the contract" and have regard to its obvious commercial purpose. The Zurich policy was at the material time a standard form, widely used across the country, intended to provide peace of mind for the purchasers and mortgagees of newbuild properties. All these factors, in the view of the CA, worked in favour of the claimants' interpretation. The cap imposed by the policy was the total purchase price of all flats in the block – £10.8m.

Interest

Manchikalapati & Others v Zurich Insurance plc & Anr
[2019] EWCA Civ 2163

At first instance, the Judge held that, under s. 35A of the Senior Courts Act 1981, the claimants should receive interest at 3.5% from 7 August 2013 to 7 February 2019, resulting in total interest of £700k. As a result of the CA's decision, it was common ground that interest could no longer be claimed under s. 35A. Interest would only accrue upon the judgment from January/February 2019. However, the CA went on to set out the court's views on the interest point, on the assumption that the judge was right.

The claim made at trial was for the full cost of remedial works. The claim was said to include an allowance for inflation up to and including the time when the claimants expected to obtain judgment, then to receive payment and to be able to fund and execute the works. That allowance for inflation was not disputed by ZIP. In such circumstances, a claim for interest was unnecessary. ZIP argued that an award of interest was not justified as the claim had always been to recover remedial costs As the claimants had incurred no costs, they had not suffered loss requiring compensation by interest. ZIP further said that the evidence did not justify a claim on the basis that the claimants had been deprived of money from July 2013 in circumstances where (i) there was no evidence of what they would have done with the money; (ii) from September 2016 they would have been obliged to pay any sums to the bank funding the litigation; and (iii) they would have been able to obtain rental income until about July 2017 when the flats had to be vacated.

The trial judge rejected these objections noting that the claimants were under no obligation to have carried out works as a precondition of recovery under the policies and that the objection ignored the principle that interest was awarded to compensate claimants for being kept out of money rather than as compensation for damage done. HHJ Davies QC had said:

"The claim as presented was put on the basis, albeit disputed by ZIP, that the claimants could and would use the monies awarded to fund remedial works post judgment, hence the basis for the inflation claim. The claim as successful was on the basis that the policy allowed ZIP to discharge its liability by making a lump sum payment of the declared purchase price where the cost of undertaking the remedial works exceeded that sum. It therefore became irrelevant whether or not the claimants intended to or would be able to undertake remedial works. They were entitled to receive this lump sum capped payment and to do with it as they thought best. Thus, in this case the claimants were entitled to be paid the ML capped amounts regardless of whether or not they were to be used to fund repairs."

The CA agreed with the trial judge. If the claimants were to be fully compensated for a sum equivalent to the cost of repair, no question arose as to whether they were being kept out of their money. However, once that claim was to be limited so significantly, to the extent that the feasibility of the repairs became highly questionable, then obviously the question arose as to whether that limited sum should have been paid far earlier than in response to a judgment of the court and, if so, at what date. Generally, where there was uncertainty as to liability and

a need to investigate that; that was not a material factor in postponing the running of interest. LJ McCombe noted that where the uncertainty was as to quantum, once the answer was known and it was established, not only that payment was due, but also what was due and when, then there was no reason to postpone payment further. The trial judge had concluded that:

"... ZIP was obliged to investigate the claim, both as to liability and quantum, and to make payment once a reasonable time had elapsed for it to complete its investigations albeit that as a matter of contract law the cause of action accrued at an earlier date ..."

On that basis, ZIP had to tender payment of the claim once it had had a reasonable time to investigate and reach a conclusion. The CA saw no objection to that approach.

Timing of final statement

Amey LG Ltd v Aggregate Industries UK Ltd

[2019] EWHC 3488 (TCC)

Amey were a main contractor on the Sheffield Streets Ahead PFI project. Aggregate undertook surfacing and other civil engineering works. Although the works had come to an end, Aggregate had not yet submitted a final statement. Amey said this was a breach of the subcontract and sought a declaration setting out a time by when a statement should be provided and further declarations relating to the extent of Aggregate's right to apply for further payment. Aggregate accepted that it had an obligation to provide a final statement but said that the requirement was that it did so within a reasonable period. Clause 17 of the subcontract contained the payment terms and provided for interim payments being made by reference to the particular Works Orders. The parties did not, however, operate the contract on that basis. Instead, single composite monthly interim payment applications were made by reference to the works that had been performed. Clause 17 said that:

"The Subcontractor shall issue its final statement to the Contractor within one month following the completion of the Services.

Clause 8 of Schedule 1 dealt with "Final Accounts":

"Notwithstanding clause 17 (b) the Subcontractor shall submit his final statement for each Works Order together with full substantiation as required by the Contractor to the Contractor within one month of completion of the Works Order."

There was also a variation which dealt with additional payments to Aggregate in respect of the removal of asphalt waste. However, no agreement was formally concluded. Payments were made in accordance with the variation, but Amey said that the variation had no contractual effect. Aggregate accepted that there was no formal agreement of the proposed variation but said that by their conduct the parties agreed those terms, at least as to payment, and that it took effect as a contract agreed by conduct.

Aggregate served notice of termination on 31 January 2017 terminating the subcontract on 31 July 2017. All the services to be performed under extant Works Orders had been completed by then although some remediation works were undertaken thereafter. Aggregate incurred some further costs after 31 July 2017 but this had stopped by October 2017. The last of the monthly payments under the variation was made in April 2018. Amey accepted that as the parties continued after 31 July 2017 with the exercise of seeking and making interim payments and of making and receiving the payments in relation to the asphalt materials an estoppel arose whereby Amey was not entitled to call for the final statement while those arrangements were still in hand. However, this was brought to an end in July 2018 when Amey called for the final statement.

Aggregate said that the conduct of the parties amounted to an agreement to vary the subcontract in respect of the arrangements for payment in respect of the asphalt materials. One effect of this was that Aggregate was no longer obliged to provide a final statement within one month; instead it was obliged to provide such a statement within a reasonable time and that period had not yet expired. Mr Justice Eyre thought that it was of "considerable significance" that the draft deed of variation was never executed. This was not through inadvertence or oversight; it was the consequence of a deliberate decision on the part of Aggregate who repeatedly took issue with the proposed provisions in relation to the cost of dealing with the asphalt materials. This meant that in reality Aggregate was contending that by their conduct the parties had agreed a contract in the terms of some but not all of the provisions of the draft deed of variation.

The Judge looked at the entirety of Aggregate's actions, including the refusal to sign the draft deed and the assertions that its terms were not acceptable, and held that it was not possible to see the conduct as an agreement of the totality of the terms of the draft deed. Further, Amey's conduct did not amount to an agreement to abandon some terms of the draft deed while accepting that the others had contractual effect.

Where did this leave the provision of the final statement? The Judge could see no grounds for finding that the obligation to provide a final statement within one month had been transformed into one to provide such a statement within a reasonable period. The subcontract made express provision for the period of one month – a "potent indication" that the parties regarded one month as a reasonable period. The estoppel operated to preclude Amey from requiring a final statement until the payments for the asphalt materials had all become due and were capable of being calculated. However, those preconditions had been met by the time of Amey's letter calling for a final statement written on 1 June 2018. Accordingly, Aggregate should have provided a final statement by 1 July 2018, but did not do this and so was in breach of its obligations.

Here, work had not started on the final statement until April 2019 - a deliberate decision by Aggregate. The principal reason for this delay was the belief that a final statement would not be needed because the parties would reach a commercial compromise. The Judge noted that in doing this, Aggregate was deliberately choosing to take the risk that a deal would not be done and that it would have failed to provide a final statement at the due time.

What did this mean? The subcontract did not provide for a further period after the expiry of one month within which a final statement could or should be served. Nor did it include any default provision setting out the consequences of a failure to supply the final statement within the one-month period. There was no provision enabling Amey to submit a final statement when Aggregate was in breach. The court could not "rewrite the parties' bargain". However, Aggregate could no longer make interim payment applications and its payment entitlement was confined to payment pursuant to the final statement.

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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