FENWICK ELLIOTT

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.

Issue 266 - August 2022

Dispatch

Liquidated damages

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd

[2022] EWHC 1842 (TCC)

Buckingham sought declarations from the Court in respect of provisions relating to liquidated damages ("LADs"). Buckingham said that the LAD provisions were void and unenforceable. The contract was based on the JCT Design and Build Contract 2016 as amended. For example, Clause 2.29A dealt with LADs for failure to achieve "Milestone Dates" and Schedule 10 was a "Schedule of Agreed Liquidated and Ascertained Damages ('LADs') recoverable".

Buckingham were not saying that the liquidated damages were a penalty, but that the contractual provisions were so poorly drafted and/or incomplete that they were void for uncertainty and/or unenforceable.

When it came to considering the construction of the contract, the Judge referred to *Mashael Alebrahim v BM Design London Ltd* [2022] EWCA Civ 183, where the CA said that:

"the contract must be construed against the surrounding circumstances, in order to ascertain what a reasonable person would have understood the parties to have meant; that this should be done primarily by reference to the language that the parties have used; and that it is only if the meaning of the words used is uncertain or ambiguous that the court needs to have regard to other matters, such as commercial common sense, on the one hand, or excessive literalism, on the other."

The Judge noted that the courts were reluctant to hold a provision in a contract void for uncertainty, particularly where the contract has been performed. It is only if the court cannot reach any conclusion as to what was in the minds of the parties or where it is unsafe to prefer one possible meaning to other equally possible meanings that the provision would be void.

Finally, the Judge referred to the Supreme Court decision in *Triple Point Technology v PTT Public Company Ltd* (*Dispatch* Issue 254), where Lady Arden said:

"The difficulty about this approach is that it is inconsistent with commercial reality and the accepted function of liquidated damages. Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do."

Buckingham said that it was important that there should be certainty as to what should happen in the event of delay. The comments about the need for predictability and certainty were not made in respect of the operability of the LAD provisions, which was assumed, but rather in respect of the amount which would be payable for a given delay.

The Judge disagreed; reviewing the contract, it was possible to find an interpretation of the provisions which gave clear effect to the intention of the parties. For example, there was a dispute over the date for Practical Completion which was given two different dates within the contract. Buckingham said that a clause which provides for liquidated damages to accrue if works are not completed by a certain date cannot be considered clear and certain when the contract contains two competing dates for completion, with no other terms to assist in resolving the question of which date applies.

The Judge noted that, by choosing to include within clause 2.29A a comprehensive and bespoke milestone date regime which actually included a date for practical completion of the whole of the Works and liquidated damages in respect thereof, the parties must have intended for that clause to operate as the sole regime in this respect. The bespoke regime prevailed. Liability arose pursuant to clause 2.29A.1 for not meeting the milestone dates, not for failing to meet the Date for Completion of the Works.

Further, the different dates had different functions and so did not render the provisions in Schedule 10 void. The defined Date for Completion (or second date), namely 1 October 2018, was intended to serve a function within clause 2.29A. Pursuant to clause 2.29A.3, as Peel had a discretion to refund damages if, say, any or all of milestone dates 1 to 5 were late but completion of the whole of the Works was nonetheless achieved by the Date for Completion.

Buckingham also noted that Schedule 10 contained two sets of rates and Buckingham said it was impossible to discern which, if either, of the parties intended should apply. One option included a weekly cap of £200,000 whereas the other option did not. In the absence of clarity and certainty as to which, if any, columns applied, the provisions in Schedule 10 were void for uncertainty.

Peel said that the parties had reached agreement on the content of Schedule 10 and that agreement was reflected by the right hand set of columns. Peel had adduced evidence explaining some of the background to Schedule 10. The Judge said that, in this instance, it was appropriate to have this evidence as factual background because it shed light on why the parties included within their executed agreement a table described as "LADs Proposal" and why there were two sets of columns. The evidence was not being relied on to demonstrate the substantive position of one party in negotiations, nor to show the subjective intention of a party. Instead, it was relevant to explain why the parties chose to include within their executed contract a document which had plainly been used as a mere

proposal before that. The reason for having included two sets of rates within the table was to identify, for clarity, the changes in applicable LADs that had been made from the tender submission.

There was also discussion about partial possession. Ordinarily, the Judge noted, contracts which make provision for partial possession also provide a regime for an adjustment to be made to the applicable rate of liquidated damages to reflect partial possession. In respect of partial possession, there have been cases in which the courts have been asked to determine whether the provisions for adjustment of the applicable damages are operable and/or whether they are penal, or alternatively, whether the absence of any such provision makes the liquidated damages unenforceable. Here, Buckingham said that the parties must have intended to allow partial possession to be taken since that was provided for in clauses 2.30 to 2.34. There was a drafting error or omission in that the parties failed to provide a formula that gave effect to their common intention that partial possession of a section could be taken in return for a proportional reduction in liquidated damages.

The Judge agreed with Peel that the contract did not provide for completion by sections, but the parties did provide a regime for the achievement of milestone dates as expressly set out in clause 2.29A. Milestone dates, rather than sectional milestones, were referred to throughout the conditions. Conventionally, the achievement of a milestone was a step along the way but involved no transfer of possession of the works comprised within that milestone in the way that completion of a defined section would do. If it was the case that some work (such as drainage) cut across different milestones that made it less, not more, likely that each milestone was to be regarded as a separate section capable of independent completion.

Accordingly, the Judge considered that the LAD provisions were certain and enforceable.

Part 36 Offers

Omya UK Ltd v Andrews Excavations Ltd & Anr

[2022] EWHC 1882 (TCC)

If a defendant fails to beat a Part 36 Offer to Settle made by a claimant, under CPR 36.17 (4), the Court must, unless it considers it unjust to do so, order that the claimant is entitled to interest at an enhanced rate (not exceeding 10% above base rate), costs on the indemnity basis, interest on those costs at an enhanced rate and an additional amount calculated as a specified percentage of the sum awarded in damages.

CPR 36.17 sets out five factors that the Court must take into account when deciding whether it would be unjust to make the normal order, namely:

(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
(c) the information available to the parties at the time when the Part 36 offer was made;
(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
(e) whether the offer was a genuine attempt to settle the proceedings.

Here, the judgment awarding £765,094.40 to Omya exceeded a Part 36 offer made by Omya in the sum of £756,287.05. As AEL said, the judgment exceeded the offer "*albeit by a very small margin*". AEL argued that, as a consequence, the offer relied upon by Omya was not a genuine attempt to settle the proceedings.

Deputy High Court Judge Ter Haar QC commented that, whilst the mathematical proportion of the offer to the amount claimed is a potentially relevant factor, it is not in itself determinative of whether an offer is a genuine attempt to settle the proceedings. The discount offered here was just £8,806.95 (1.15%), albeit it rose to 5% if interest was taken into account, but the Judge said this was a case in which there was never likely to be (and, in the end, there was not) any significant debate as to quantum. The offer was also made at a relatively early stage, which was consistent with a genuine attempt to settle. The offer was in all the circumstances:

"a genuine attempt to settle – an entirely sensible course for a commercial enterprise such as the Claimant which had no interest in the proceedings being dragged out and faced risks that important witnesses might not appear at trial. These matters indicate to me that the Claimant had every incentive to try to achieve a settlement and that this was not, as in some cases posited in the authorities, a cynical attempt to manipulate a scheme designed to encourage settlement."

As to the rate of interest, Omya sought the full 10%. AEL said the court should either award interest at a commercial rate, (in 2018, interest rates were at 0.75% over base dropping to 0.1% in March 2020) or at most at a rate of 4% over base. The Judge referred to the case of *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, where the CA said that the court has a discretion to include a non-compensatory element in its award under CPR 36.17(4)(a), but that the level of interest awarded must be proportionate to, among other factors:

(a) the length of time that had elapsed between the offer and judgment;
(b) whether the defendant took entirely bad points or whether it behaved reasonably, despite the offer, in pursuing its defence; and
(c) the general level of disruption caused to the claimant by a refusal to negotiate or to accept the Part 36 offer.

The White Book, (which provides judicial guidance on the interpretation of the court procedural rules) noted that whilst OMV was a high value fraud case, where the defence had been founded on lies and the CA ordered interest at the full 10% over base, there was no default rule in favour of interest at that rate.

Here, the Judge noted that there was a significant period between the date of the offer (June 2020) and the date of judgment (December 2021) where "*the defence pursued was wholly implausible and that it was unreasonable to pursue that defence.*" Against that, proportionality required the Judge to take into consideration the maximum rate of enhanced interest permitted under Part 36 and prevailing commercial rates. The result was that a figure of 5% was deemed appropriate.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN