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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

Disclosure: control over subcontractor's documents

Mornington 2000 LLP (t/a Sterilab Services) & Anor v The Secretary of State for Health And Social Care

[2024] EWHC 1708 (TCC)

The dispute here arose out of a contract for the supply of COVID-19 lateral flow test kits. In order to perform the contract, the second claimant ("**Santé**") had a subcontract with a German supplier ("**Bio**") and Bio, in turn, had a subcontract with the manufacturer of the test kits in China ("**Boson**").

The application before Jason Coppel KC concerned whether, as a result of the arrangements between Santé, Bio and Boson, documents in possession of Bio and Boson were to be regarded as within the control of Santé for the purposes of discharging its disclosure obligations. The TCC had ordered extended disclosure primarily on the basis of Model D (narrow, search-based disclosure), with certain categories on the basis of Model C (disclosure of particular documents or narrow classes of documents).

The judge noted that it was well-established that an arrangement or understanding which gave a party practical or *de facto* control of a third party's documents was sufficient to constitute control for disclosure purposes. It was submitted that Santé was to be treated as having practical control over the documents held by Bio and Boson, which were responsive to the categories of disclosure ordered. For example, undertakings had been made where Bio and Boson had committed to providing Santé with assistance in terms which were applicable to the claim. Clause 6.14(a) of the contract between Santé and Bio stated:

> "*The Supplier shall, at Santé's request, promptly provide (and procure that the Manufacturer provides) Santé with all reasonable assistance requested by Santé in connection with:*
>
> *(a) any dispute between [Santé] and the [SoS] in relation to a claim that Goods supplied to the [SoS] are defective or not in accordance with the Client Contract …*"

The judge decided that the balance of the evidence demonstrated that Santé enjoyed practical control over documents held by Bio and, in particular, Boson, which may contain information that was required for the determination of the claims. Applying the factors found in the case of *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch):

1. Practical control did not depend upon there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship. There was no reason, in principle, why a contractor could not enjoy practical control over certain documents held by a subcontractor or a sub-subcontractor. Here, the relationship between Santé, Bio and Boson was a close one in the sense that they participated in what was, in substance, a joint venture, in seeking to be awarded contracts for the supply of lateral flow tests. That relationship during the litigation had continued to have: "*a strong flavour of being a joint enterprise*". That relationship had "*gone beyond*" a standard, arm's length contractor/subcontractor/sub-sub-contractor relationship.
2. The balance of the evidence showed that there was an arrangement or understanding that Boson would search for relevant documents or make documents available to be searched. Boson had an ongoing commitment to do this in the contractual assistance clause in its contract with Bio, and Bio had an ongoing commitment to secure that Boson did so, insofar as this constituted assistance (Boson clause) or reasonable assistance (Bio clause) with the claim. The contractual assistance clauses were, however, broader in their effect and would extend to searches for documents, favourable or unfavourable, which are necessary to the fair disposal of the claims. The judge rejected the idea that assistance or reasonable assistance was confined to making available or searching for documents which were helpful to Santé's claims.
3. The Defendant did not suggest that all documents held by Bio and Boson were within Santé's control but only the documents responsive to the disclosure categories ordered by the court.
4. The contractual assistance clauses were the starting point for inferring the arrangement or understanding, but there were significant other factors which gave rise to that inference. This included the evidence of past access to documents being provided by Boson. These matters taken together were "*more specific and compelling*" than there merely being a close commercial relationship between Santé, Bio and Boson.
5. It was not necessary for the Defendant to establish that Santé, or Bio, had free and unfettered access to Boson's documents. Here, the judge was satisfied that there was an understanding that access would be permitted and that Boson would cooperate in providing the relevant documents or direct access to them. That documents may have been provided previously on request, rather than by Boson permitting direct third-party access to its documents, did not establish that searching of Boson's documents would not be permitted. Any refusal to cooperate by Boson would be a matter which could be taken into account by the court in assessing the credibility of the evidence given on behalf of the claimants, in particular by Boson's employees.

The evidence also supported there being a similar arrangement or understanding with Bio as with Boson, albeit that Bio might be expected to have many fewer documents which were relevant to the proceedings than Boson. If documents were then provided by Boson to Bio, rather than to Santé, there must be no doubt that they remain within the scope of the claimants' disclosure obligations.

Case update

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP

[2024] UKSC 23

We reported on this case in Issues 254 and 265. At first instance, the judge said that, "*applying commercial common sense*", it was difficult to see how a collateral warranty executed four

years after practical completion, and months after the disputed remedial works had been remedied by another contractor, could be construed as an agreement for carrying out of construction operations. By a split majority, the CA disagreed.

The Supreme Court unanimously disagreed. The collateral warranty here was not a construction contract, and, further, most collateral warranties would not be considered a construction contract capable of conferring the right to adjudicate under the HGCRA. A construction contract under the HGCRA is defined as an agreement "*for … the carrying out of construction operations*". In determining whether a construction contract exists, a tribunal must, therefore, assess whether "'*the object or purpose' of that contract is the carrying out of construction operations*". In the opinion of the Supreme Court, it was "*difficult to see*" how most collateral warranties could be assessed in that way.

JCT: termination provisions

Providence Building Services Ltd v Hexagon Housing Association Ltd

[2023] EWHC 2965 (TCC)

Providence brought a Part 8 claim seeking a declaration against Hexagon as to the proper construction of clause 8.9 of the JCT Design and Build Contract 2016 Contract between the parties. Providence had agreed to carry out and complete works involving the erection of a number of buildings at a site in Purley. The original contract sum was approximately £7.2 million.

The background to the dispute was agreed. Under Payment Notice 27, issued by the employer's agent, Hexagon was obliged to pay the sum of £260,000 on or before 15 December 2022, but it did not do so. Providence, therefore, served a Notice of Specified Default under clause 8.9.1 of the Contract. The agent issued a further relevant Payment Notice, number 32, in the sum of £360,000. Hexagon did not pay by the final date of payment.

Providence, therefore, issued a Notice of Termination under clause 8.9.4, relying on the Notice of Specified Default of December 2022, and the repetition of that specified default. There was also, without prejudice to the contractual termination, an acceptance, or purported acceptance, of Hexagon's repudiatory breach.

Hexagon subsequently paid the sum claimed but challenged the validity of the Notice of Termination. They then accepted, or purported to accept, Providence's repudiatory breach on 31 May 2023. Hexagon referred the dispute between the parties to adjudication, seeking decisions and declarations inter alia as to the Notice of Termination and the clause 8.9.4 point. The adjudicator found substantially in favour of Hexagon.

The issue for Adrian Williamson KC related to Providence's right, or otherwise, to terminate their employment pursuant to clause 8.9 thereof, a standard JCT clause amended by the Schedule of Amendments. Clause 8.9.1.1 provided that, if the employer does not pay by the final date for payment the amount due to the contractor, the contractor may give to the employer a notice specifying the default.

Clause 8.9 then further provided at:

> "*.3 If a specified default or a specified suspension event continues for 28 days from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 28-day period by a further notice to the Employer terminate the Contractor's employment under this Contract.*
>
> "*.4 If the Contractor for any reason does not give the further notice referred to in clause 8.9.3 but (whether previously repeated or not):*
>
> "*.1 the Employer repeats a specified default; . . . ".2 . . . then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract.*"

The judge noted that contractual termination clauses are to be strictly construed, and must be strictly complied with. The key task was to ascertain the natural and ordinary meaning of clauses 8.9.3 and 8.9.4.

Clause 8.9.3 was "*straightforward*". If a specified default continued for 28 days after a clause 8. 9.1 notice, the contractor may give notice to terminate. The clause gave the contractor a choice whether or not to serve a notice to terminate, and termination required the contractor to take an active step – namely serving the notice.

With clause 8.9.4, the judge did not consider that the words "does not give" in the context of a clause 8.9.3 notice envisaged an active step being taken by the contractor, or not. If the contractor took that active step under clause 8.9.3, then termination ensues. If they did not, then, if there was a repeated default, the contractor may serve termination notice under clause 8.9.4.

Nothing in clauses 8.9.3 and 8.9.4, as a whole, envisaged that a contractor can give a valid clause 8.9.4 notice in circumstances where the right to give a clause 8.9.3 notice has never arisen. That is, where the specified default has been cured within the 28-day period. Clause 8.9.4 required that a clause 8.9.3 notice could have been given but the contractor had decided not to do so for whatever reason.

This meant that as Providence had not acquired any prior right to terminate for the continuation of a specified default under clause 8.9.3, it did not have any right to terminate for the repetition of a specified default under 8.9.4. As a result, the termination notice was invalid for the purposes of clause 8.9.4.

Providence had argued that the construction of clause 8.9.4 contended for by Hexagon would produce the harsh and uncommercial result that the employer could make every payment 27 days late, and thus avoid the possibility of termination because the right to serve a clause 8.9.3 notice would never arise. The judge noted that a contractor has a "battery of weapons" available to protect its cash flow position. These included the right to suspend, the payment of statutory interest, and the right to refer disputes to adjudication. It was not, therefore, necessary or appropriate to read into clause 8.9 a right to terminate to deal with such a situation.

Further, the judge considered that it would be surprising if clause 8.9 was so drafted that a contractor could terminate where there was a specified default that had been cured and was then repeated, perhaps only to a very minor extent, subject only to recourse to the contention that the termination was unreasonable or vexatious.

Here, the "*business commonsense*" arguments did not take the matter very far one way or the other. The parties had chosen to draft clause 8. 9.4 in a particular fashion which was, to the judge, clear as a matter of language. That might produce unsatisfactory results for one party or the other, but that was the choice the parties had made.

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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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

www.fenwickelliott.com