

## Legal Briefing

### Ted Lowery looks at a successful claim for loss of chance

*Mallino Development Ltd v Essex Demolition Contractors Ltd*  
[2022] EWHC 1418 (TCC)

Before Martin Bowdery QC sitting as a  
Deputy Judge in the High Court

In the Technology and Construction Court

Judgment delivered 10 June 2022

#### The facts

On 24 April 2018, Mallino entered into a building contract with Essex to carry out works as part of the expansion of a tourist attraction known as the Dark Walk at the former Bodmin jail site. The building contract provided for the works to be carried out in three sections: demolition, excavation to level 1 and all other remaining works. On the same date, the parties executed a variation contract whereby Mallino would invite tenders for the section 2 and 3 works with a new contract to be entered into for these works with the successful tenderer. Clause 2.1 in the variation contract provided that Mallino would invite Essex to tender and clauses 2.2 to 2.6 provided for the building contract to be terminated or novated depending upon whether or not Essex was the successful tenderer.

Essex completed the section 1 and 2 works during May to August 2018. At the same time, Mallino entered into negotiations with a new contractor, PIN-CM, and on 27 July, awarded PIN-CM the section 3 contract without having invited Essex to submit a tender and without having undertaken any competitive tendering process.

On 8 October 2020, Essex commenced Part 7 proceedings seeking enforcement of an adjudication decision in its favour dated 22 September, and on 22 October, Mallino issued Part 8 proceedings challenging enforcement. On 14 December 2020, the court ordered that Mallino's challenge could be managed and tried in the Part 7 proceedings.

In those proceedings, Essex claimed lost profit and overhead contribution suffered as a result of Mallino's breach of clause 2.1 in the variation contract. In response, Mallino admitted a breach insofar as it had failed to invite Essex to tender for the section 3 works but contended that, as a matter of law, Essex was not entitled to any loss of profit or overheads; relying upon the minimum contractual obligation principle, Mallino contended that its most favourable course of action would have been to terminate the building contract without incurring any liability to Essex. Mallino further contended that, even if it had competitively tendered the section 3 works, it would not have selected Essex as the contractor.

#### The issue

Was Essex entitled to recover profit and overhead contribution on a lost chance basis and, if so, in what sum?

#### The decision

The judge concluded that the minimum contractual obligation principle did not assist Mallino: the courses of action available to Mallino did not include simply terminating the building contract because clause 2 of the variation contract included a mandatory obligation to re-tender the section 3 works and to include Essex in that process.

Turning to causation, the judge found that Essex would have submitted a tender for the section 3 works using their original tender (for all three sections). He also found that there was a real and substantial chance that Essex would have been successful where: (i) there was no evidence of any other contractors expressing an interest; (ii) Essex's tender price would have been £500,000 less than PIN-CM's; (iii) Essex's presence on site gave them a competitive advantage; (iv) Mallino's concerns about Essex having damaged the listed building were over-exaggerated; and (v) Essex had appropriate expertise whereas PIN-CM did not.

As to quantum, the judge first considered the likely value of the benefit Essex would have gained had the section 3 work contract been awarded. By reference to the overhead and profit allowances provided for in the original building contract, the judge considered that, on the balance of probabilities, the benefit gained by Essex in completing the section 3 works would have been some £321,391.71. Having found that Essex would have had a real and substantive chance of their tender for the section 3 works being accepted (but not an absolute certainty), he assessed that chance as being some 66% and applied that to the anticipated benefit to produce a figure in damages of £212,118.53.

## Legal Briefing

### Commentary

Loss of chance cases rarely make it to the courts and this judgment provides a useful step-by-step guide to considering whether there is any liability on a loss of chance basis and, if so, how that liability is to be measured (given that the exercise is essentially speculative).

An interesting aspect of this case is the judge's rejection of Mallino's reliance on the contractual obligation principle. Where the variation contract provided that Essex was to be invited to tender for the section 3 works, Mallino could not say that their discretionary options including terminating the building contract at minimal cost.

Ted Lowery  
September 2022