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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Termination: repudiatory breach of contract

Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd

[2013] EWCA Civ 577

Telford, a developer, agreed to build and develop and grant long leases of commercial units to Ampurius. Although work started promptly on the construction, in March 2009 Telford decided that it would be necessary to put work on blocks A and B on hold because of funding difficulties. Work on those blocks did not resume until early October 2010. Ampurius sought to terminate the contract in October 2010 on the basis of repudiatory breach by Telford. Telford itself terminated the contract on 9 November 2010 following non-payment by Ampurius of monies said to be due. There was no termination clause in the contract, although Telford had agreed to use its reasonable endeavours to procure completion of the Works by the Target Date or as soon as reasonably possible thereafter. The Judge, at first instance, found that Telford was in repudiatory breach because it had stopped work, something which was contrary to the obligation to proceed with due diligence.

It was agreed that Telford's delay in carrying out the works to blocks A and B and the deliberate decision to put the works on hold amounted to a breach of contract. The question was whether the breaches were serious enough to amount to a repudiation of the contract. Telford on appeal said that the Judge did not adequately analyse what benefit the investor was intended to receive under the contract in order to decide whether the breaches of contract had deprived the investor of at least a substantial part of that benefit. Further, in assessing whether the breaches of contract were repudiatory breaches, the Judge did not concentrate on the right date; this was the date when the investor purported to terminate the contract. LJ Lewison agreed.

The CA said that the first task of the court was to look at the position as at the date of purported termination of the contract. Second, the court must take into account any steps taken by the guilty party to remedy accrued breaches of contract. Third, the court must also take account of likely future events, judged by reference to objective facts as at the date of purported termination. The starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract. Here the overall benefit that Ampurius was intended to obtain from performance of the contract was a leasehold interest of 999 years' duration in four blocks. What therefore was the effect of the breach on Ampurius? For example, what financial loss had it caused? Had the breach fundamentally changed the value of future performance of Telford's outstanding obligations?

Had Ampurius only been able to acquire interests in two out of the four blocks, then it would have been deprived of the benefit of a substantial part of the contract. But that was not the case. Hypothetically, to deprive someone of one year out of 999 years does not deprive them of a substantial part of the benefit he was intended to receive. The effect of the breach was to increase the gap between handover from seven months to thirteen months: an increase of six months. The CA asked what difference that made, given that the contract itself contemplated a gap of seven months. There was therefore no loss to Ampurius. The CA thought that it would be unusual that a breach of contract that has caused no actual loss could be characterised as a repudiatory breach. Even a loss of say £100k in respect of additional funding costs, set against the context of a purchase price in excess of £8 million and an overall development cost exceeding £100 million, was not a loss of such magnitude to warrant characterising it as repudiatory.

At trial the Judge had noted that at the end of 2009 Telford was unable to say when work on blocks A and B would recommence. To the Judge, what gave the breach its repudiatory character was the uncertainty that works to blocks A and B would ever be restarted. This gave rise to the question whether the Judge was right to freeze the situation at that date; or whether he should have taken into account the fact that on 15 September 2010, Telford had told Ampurius that work would recommence on 4 October as well as the fact that work did recommence at that time. The CA thought that it was the date of termination that mattered. When Ampurius sought to terminate the contract, work on blocks A and B had been restarted, and had been in progress for two and a half weeks. Therefore it could no longer be said that "*the cessation of work … was indeterminate and prolonged*". The date for completion of the works might well have been indeterminate, even at that stage, but that was a feature of every building programme, and was reflected in the fact that the contractual completion dates were said to be only Target Dates.

At the date of termination, the delay that had already occurred had caused Ampurius no loss. Whilst future delay was likely to require Ampurius to fund deposits and the balance of the purchase price for blocks C and D for longer than it would otherwise have had to have done, Telford had offered to defer the completion of the purchase of blocks C and D, thus neutralising much of that expected loss. Further, Telford had made "strenuous" (and successful) efforts to find the necessary funding. Telford was therefore committed to building out the whole project. Therefore the trial Judge had been wrong to find that Telford was in repudiatory breach and that Ampurius had been justified in terminating the contract.

Architect's certificates

Hunt & Others v Optima (Cambridge) Ltd & Others

[2013] EWHC 681 (TCC)

In this case the (successful) claimant leaseholders made a number of claims against both the developer landlord (under the terms of the sales agreement and a repairing covenant) and also against the architects ("S&P") who had been retained by Optima (and not the Claimants) to carry out periodic inspections with a view to producing certificates for the benefit of potential purchasers which said that each individual flat had been constructed to a satisfactory standard, and in general compliance with the drawings approved under the building regulations.

The certificates issued by S&P noted that S&P was aware that it was being relied upon by the first purchaser of each property and confirmed that S&P would remain liable for a period of six years from the date of this certificate. Such liability was expressed to be to the first purchasers and their lenders and upon each sale of the property during the six years to subsequent purchasers and their lenders. One question arose as to what cause of action existed. There was no doubt that the certificates were issued by S&P knowing or believing that they would be relied upon by purchasers and that they could be relied upon by subsequent purchasers. Therefore following the traditional *Hedley Byrne v Heller* (i.e. negligent misstatement) line of cases, Mr Justice Akenhead considered that S&P owed an actionable duty of care to the Claimants. This duty extended not only to the making of the statement but also to the performance of the services necessary to enable S&P to issue the certificates. This led to two duties: the duty to exercise reasonable care first in the performance of the services leading up to the issue of the certificate, and secondly in the issuing of the certificate itself.

The duty of care owed by S&P to the Claimants stemmed from what the Judge said "*might properly be called a special relationship and one which is at least akin to contract*". Whilst S&P had a contract with Optima, it was engaged primarily, if not solely, to do what was reasonably necessary to put itself in a position in which it could issue the certificates to, or for,the benefit of, first or subsequent purchasers and for them and their lenders to rely upon them.

Further, the Judge said that on its face the certificate amounted to a warranty. It was not a guarantee that the property had been built perfectly. It was explicit that it was a warranty based on inspection by an architect that the property was satisfactory, it being necessarily implicit that the inspections and certifying are done with reasonable care. It should be noted here that the Judge felt that the architect had been too dependent on assuming that others were in effect doing his job for him. Time and again, he said that he relied on what the developer had told him as to whether defective work had been put right, or on the fact that the local council building inspectors "must" have vetted various items of work. In some of the cases here, this amounted to an enforceable contractual warranty.

The Judge dealt with the argument that there had been no consideration (the Claimants had not made any direct payment to S&P and S&P's only contract was with the developer) in this way. The purchasers, in paying for their flats, knew that they were entitled to receive the certificates when they did so. Therefore the receipt of the certificates was paid for by the purchasers in circumstances where S&P must have known that it was to provide the certificates for the benefit of the purchasers at or after the time of purchase. There was consideration and it moved not to S&P but to the developer, as everyone knew that it would. Where a Claimant had not been told prior to purchase that a certificate had been issued and did not actually physically receive a copy prior to purchase, this was not sufficient to provide consideration such as to create a contractually enforceable warranty. There was, however, a tortious duty owed by S&P which was created and then confirmed by the issue of the certificate. In terms of reliance (leaving aside that the Claimants knew that they were entitled to receive the certificates and so had the assurance that the flats had been properly inspected by an experienced architect), many of the Claimants used the certificate (or the fact that there would be one) in order to obtain mortgage finance. The Judge concluded that:

"a duty of care was owed by S&P to each of the Claimants both in relation to the issuing of the Certificates as well as the execution of the inspection services referred to on the Certificates … One needs to bear in mind that none of the Claimants were made aware of the contractual terms as between Optima and S&P and the Certificates are not limited by any number of inspections because all that the Certificates said was that appropriate inspections were carried out. The scope is simply what the Certificates said."

In terms of limitation, the warranties ran for six years from the date of their issue. The claims based on negligent misstatement ran from the date of the purchase of the property in question or the date of the certificate, whichever was the later. This was because the damage for the purposes of the tort related to the price actually paid since the purchasers were buying a property which, because of the defects, was actually worth less than the price they were paying for it.

In terms of damages against S&P, these were assessed on the basis of the capital diminution as at the date of purchase, i.e. the value of the property free from defects. The diminution in value of the common parts was assessed on a proportional basis, based on the number of properties. The Judge did not award general damages against S&P because the breaches of duty had not caused inconvenience or distress and certainly it was the developer and not S&P who could be criticised for not remedying the problems.

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