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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

Trial witness evidence: new rules

Mad Atelier International BV v Manes

[2021] EWHC 1899 (Comm)

In this case, Sir Michael Burton GBE had to consider an application brought by Manes to strike out parts of MAI's witness evidence. The application relied on the new Practice Direction, 57AC, which applies to trial witness statements signed on or after 6 April 2021. The Judge commented that:

"The Practice Direction is obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it."

However, he did not consider that it was intended to affect the issue of admissibility. The Judge did discuss the extent to which witnesses of fact may be able to give opinion evidence which relates to the factual evidence which they give, particularly if they have relevant experience or knowledge. This can happen on construction cases. For example, where the evidence given was as to a hypothetical situation as to what would or could have happened. The key here is that the witness can give evidence by reference to personal knowledge and involvement, to what would or could have happened in the counterfactual or hypothetical circumstances. The Judge cautioned that these witnesses are, of course, not independent in the sense that experts are, and to that extent, their evidence would need to be tested by reference to cogency and weight.

Here, the Judge accepted that MAI could put before the experts and later, before the judge, its evidence as to what could or would have happened. It was very likely that MAI would have given instructions to its expert as to what it considers would have happened. Those instructions would have been addressed by the expert in, their report: *"but by setting out that same information in witness statements, there is not only much greater transparency but it enables the Defendant's Counsel to cross-examine the witnesses and seek to challenge or destroy their reliability, rather than getting at it indirectly through the expert."* Thus, the evidence here did not seek to get round the absence of expert evidence but helped the independent expert evidence to be better tested.

Liquidated damages

Eco World - Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd

[2021] EWHC 2207 (TCC)

This was a Part 8 hearing for declarations about the liquidated damages provisions in a construction contract entered into between EWB and Dobler, in circumstances where EWB had taken over part of the works as completed.

EWB said that the liquidated damages clause was void and/or unenforceable as the contract permitted EWB to take partial possession of the works in advance of practical completion but did not contain any mechanism for reducing the level of liquidated damages to reflect the early possession. In other words, the provisions were penal and/or unenforceable, having regard to the provisions for partial take-over of the Works and any mechanism for reducing the level of liquidated damages to reflect such take-over. As a result, EWB was entitled to claim general damages for delay, including any substantiated damages above the contractual liquidated damages cap. Dobler disagreed.

The Works comprised the façade and glazing works for Blocks A, B and C of Building A04 within the development. The original completion date was extended to 30 April 2018. During the week ending 15 June 2018, EWB took over Blocks B and C but did not issue a practical completion certificate in respect of these parts of the Works. On 20 December 2018, the entire Works were certified as having achieved practical completion.

Mrs Justice O'Farrell referred to the Supreme Court case of *Triple Point Technology, Inc v PTT Public Company Ltd* (*Dispatch* 254) where Lady Arden had considered the commercial benefits to both parties of an effective liquidated damages provision:

"... 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 ..."

The contract provided for liquidated damages to be paid by Dobler if it failed to complete the Works by "the relevant Date for Completion of ... the Works". It did not contain any provision for sectional completion or specify separate completion dates for each block. Nor did it provide for an alternative rate of liquidated damages that would be applicable to any late completion affecting only one of the blocks, or part of the Works. Therefore, if Dobler failed to complete any of its work in Blocks A, B or C by the New Completion Date (or any extended date), EWB would be entitled to liquidated damages at the rate set out in the Trade Contract Particulars.

As a matter of construction, the Judge considered that the contract provisions were reasonably clear and certain. There was one completion date for the whole of the Works. Liquidated damages are payable at the rate set out in the Trade Contract Particulars for failure to complete the whole of the Works by the completion date. There was no reduction in the rate of liquidated damages where partial completion is achieved or the employer takes over part of the Works prior to practical completion.

Was the liquidated damages provision penal and/or unenforceable because of the use of the same rate of liquidated damages as compensation for late completion of any combination of Blocks A, B and/or C, despite the fact that different levels of loss would be incurred; in particular, where EWB chose to exercise its right to take over part of the works? The Judge did not think so.

Firstly, the liquidated damages provision was negotiated by the parties, who both had the benefit of advice from external lawyers. A court should be cautious about any interference in the freedom of the parties to agree commercial terms and allocation of risk in their business dealings. The provisions limited Doblers's exposure to an unknown and open-ended liability, while at the same time giving EWB certainty about the amount that it will be entitled to recover as compensation. Both could, therefore, better manage the risk of delay in the completion of the project.

Secondly, EWB had a legitimate interest in enforcing the primary obligation of Dobler to complete the Works as a whole by the revised Completion Date. Late completion of any part of the Works was likely to have an adverse impact on the work of following trade contractors carrying out fit out and other finishing works, causing not just delay but also disruption to the project as a whole. Late completion of Blocks B and/or C would expose EWB to liability for liquidated damages to the local authority. Late completion of Block A would expose EWB to the risk of losing purchasers for the apartments.

Thirdly, quantification of the damages that would be suffered by EWB would be difficult, particularly if part, but not all, of the Works were completed on time. Different combinations of partially incomplete blocks could result in a wide range of the categories of loss referred to above. By fixing in advance the liquidated damages payable for late completion of the whole Works, the parties avoided the difficulty of calculating and proving such loss.

Fourthly, the level of damages was set at £25,000 per week (or pro rata for part of a week), with a grace period of four weeks and a maximum of 7% of the Trade Contract Sum. There was no evidence before the court, and it was not suggested by either party that this level of damages was unreasonable or disproportionate to the likely losses in the event of late completion of the work in any one or more of the blocks forming part of Building A04.

In those circumstances, the liquidated damages provision was not extravagant, exorbitant, or unconscionable. It was a secondary obligation which imposed a detriment on Dobler which was proportionate to the legitimate interest of EWB in the enforcement of the primary obligation of completion of the Works in accordance with the terms of the Contract.

Dobler further submitted that the clear intention of the parties was that Dobler would not pay more than £25,000 per week if it fell into culpable delay. The fact that the mechanism for imposing that liability might fail ought not to detract from their bargain in this regard. Further, the agreement that delay damages would be capped at 7% of the Trade Contract Sum was an independent covenant on the part of EWB that operated as a limitation of liability provision in any event. The Judge agreed.

Guarantees & on-demand bonds

LLP Shanghai Shipyard Co. Ltd. v Reignwood International Investment (Group) Company Ltd

[2021] EWCA Civ 1147

This was an appeal about the construction of a guarantee given to support the obligation of a buyer to pay the final instalment of the price under a Shipbuilding Contract. Was the guarantee in question a demand guarantee, such that the Guarantor's liability thereunder arose upon and by reason of the Demand, or was it a "see to it" guarantee or a conditional payment obligation, such that the Guarantor's liability thereunder arose upon the Demand only if the Buyer was liable to pay the Final Instalment under the terms of the Contract.

LJ Popplewell in the CA reminded the parties that, where the debt or performance obligation arises under a contract between the obligor/debtor and obligee/creditor, the essential feature of such a guarantee, for present purposes, is that the liability of the guarantor depends upon there being a liability of the obligor/debtor. Such guarantees, however, sometimes describe the guarantor's obligations as those of a primary obligor, to make clear that the default of the obligor gives rise to an independent and primary liability of the guarantor, who is liable and in breach of his obligation by the very fact of default by the obligor without more; hence the "see to it" characterisation of the guarantor's obligation.

Alternatively, security for performance of a payment obligation may be provided by an undertaking to pay a sum on demand, or within so many days of a demand, irrespective of whether the obligor/debtor is under a liability to make the payment. These undertakings are also commonly termed guarantees, but their defining characteristic is that they are payable on or by reference to an event, namely the demand, and without reference to the obligor's liability. The demand may have to be in prescribed form, and/or may have to be accompanied by prescribed documents, but it is the demand which triggers the liability to pay. The defining characteristic of a demand guarantee, for present purposes, is that the guarantor's obligation to pay arises by reason of the demand, without the beneficiary having to establish a liability of the obligor.
Here, the CA thought that the critical language which pointed strongly towards the guarantee being a demand guarantee included the following:

(1) The capitalised words "ABSOLUTELY" and "UNCONDITIONALLY" in clauses 1 and 3 would convey to a businessman that the obligations were not conditional on the liability of the Buyer.
(2) The words in clause 1 "[as primary obligor] and not merely as the surety" were a clear indication that the document was not a surety guarantee. They were at the heart of the obligation.
(3) The words in clause 4 that trigger the obligation "upon receipt by us of your first written demand". Payment against demand was very the hallmark of a demand guarantee.
(4) The words in clause 4 "[upon receipt by us of your first written demand] we shall immediately pay to you ..." would not be appropriate in the case of a surety guarantee, in which some period would be needed for the guarantor to investigate and form a view on whether there was an underlying liability to make the final instalment payment under the Shipbuilding Contract.
(5) Clause 7(a), expressly provided that obligations on the Guarantor are to be unaffected by any dispute under the Building Contract.

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