Legal Briefing

Stephen West and Carol West v Ian Finlay & Associates (a firm)

[2014] EWCA Civ 316 (Court of Appeal), Lord Justice Moore-Bick, Lady Justice Gloster and Lord Justice Vos

The Facts

In June 2005 Mr and Mrs West ('the Wests') purchased a property in Putney, London for £1.7 million. The Wests planned major refurbishment works and engaged Ian Finlay & Associates ('IFA') as architect to redesign the property and administer the building contract.

IFA's terms of engagement included a net contribution clause ('the NCC') in the following terms:

"*Our liability for loss or damage will be limited to the amount that is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you.*"

The Wests engaged Maurice Armour (Contracts) Ltd ('Armour') to carry out the building works and Armour took possession on 19 June 2007.

Following completion of the works during May 2007 the Wests moved in, but within a month significant defects were discovered. In order to facilitate the extensive remedial works required the Wests vacated the property and did not return until June 2009.

Armour became insolvent during April 2010.

In September 2011 the Wests issued court proceedings against IFA alleging negligence due to IFA's failure to notice or remedy the various defects. The Wests claimed the remedial works costs and damages for distress and inconvenience.

IFA denied liability and alternatively relied upon the NCC contending that any award for damages should be reduced to take into account the liability of Armour.

In a first instance decision dated 16 April 2013 Edwards-Stuart J held that IFA was liable and awarded the Wests over £800k including interest and damages for distress. The Judge found that the NCC did not cover any potential liability on the part of Armour. Having decided that the wording of the clause was uncertain per se, the Judge applied the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR'), to give the clause the meaning most favourable to the Wests as the consumer i.e. holding that the words "other consultants, contractors and specialists" excluded the main contractor.

IFA appealed. In a Respondent's Notice the Wests submitted that contrary to regulations 5 – 8 of the UTCCR the NCC was unfair as it gave rise to a significant imbalance in the parties' rights that was detrimental to their interests and had not been drawn to their attention. The Wests also submitted that NCC was unreasonable and as such, contrary to section 2 of the Unfair Contract Terms Act 1977 ('UCTA').

The Issues

(i) Did the NCC operate to limit IFA's liability to the Wests?

(ii) Was the inclusion of the NCC unfair under the UTCCR?

(iii) Was the NCC unreasonable under UCTA?

The Decision

The Court of Appeal considered the normal meaning of the words used in the NCC and found there was no ambiguity so that the references within the NCC to the "contractual responsibilities of other consultants, contractors and specialists" meant any such persons appointed by the Wests, including the main contractor.

On the second issue, the Court of Appeal decided that the inclusion of the NCC was not unfair. Whilst it would have been preferable for IFA to have specifically drawn the NCC to the Wests' attention the appellate Court concluded that this was not enough to trigger Regulation 5 of the UTCCR given the overall circumstances including that:

(i) the NCC did cause an imbalance but not a significant imbalance between the parties, contrary to the requirement of good faith; and

(ii) the parties were in an equal bargaining position.

On similar grounds the Court of Appeal found that the NCC fulfilled the requirement of reasonableness within the meaning of UCTA.

The Court of Appeal remitted the case back to the original judge for the task of carrying out an assessment of liability as between Armour and IFA.

Commentary

Bearing in mind that the Court of Appeal thought that the wording of the NCC was "crystal clear" it is perhaps difficult to understand how the court at first instance could have considered the clause to be ambiguous. However, it was accepted that the wording of the NCC could have been drafted more clearly. The Court of Appeal noted that the NCC did not specifically highlight that the effect of the clause was to shift the risk of insolvency of other contractors from IFA to the Wests. IFA's case may have been helped by Court of Appeal's observation that the net contribution clause in the RIBA's SFA/99 standard form similarly failed to expressly draw this risk to the reader's attention.

The clear lesson to be drawn from this decision is that construction professionals who seek to include net contribution clause in contracts with consumers should flag up the clause in advance and explain its effect in order to avoid complications with clients who may subsequently seek to rely upon their own commercial naivety.

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