Hawkswell | Kilvington

CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Implied Terms Relating to Discretionary Assessments

In the recent case of *Everwarm Limited v BN Rendering Limited*, the court considered a claim by Everwarm Limited ("**Everwarm**") relating to an alleged overpayment of £798,468 to BN Rendering Limited ("**BN**"), and a counterclaim by BN in relation to alleged underpayment of £1,957,905.

Background

Everwarm provides external building insulation services and engaged BN to provide associated labour. The parties worked together for several years under a number of different sub-contracts incorporating Everwarm's terms and conditions (the "**T&Cs**") and undertook work valuing around £8 million.

In 2016 the relationship between the parties began to deteriorate with BN alleging it had been underpaid. Everwarm subsequently had BN's work under each sub-contract costed and issued valuations (which indicated that BN had been overpaid) along with demands for repayment pursuant to clause 4.9 of the T&Cs. BN responded with its own valuations indicating that it had been underpaid.

The Construction of Clause 4.9

A key issue was the true construction of clause 4.9 of the T&Cs. Clause 4.9 allowed Everwarm to make a discretionary assessment "*at any time whatsoever*" of the value of all work performed by BN in relation to a sub-contract (an "**Assessment**"). If Everwarm's Assessment equalled less than the sums paid to date, it would be entitled to recover the difference from BN as a debt.

BN made a number of arguments opposing Everwarm's use of clause 4.9. Firstly, BN argued that, because following completion of the sub-contract works Everwarm would be able to recover any overpayment in the final account process, the proper construction of clause 4.9 meant that it could not be operated post-completion (as it had been in this case). The court rejected this argument, holding that "*any time whatsoever*" meant any time up until the final account was resolved.

Secondly, BN argued that Everwarm's discretion under clause 4.9 was limited by an implied term that it would not be exercised unreasonably. Everwarm argued that clause 4.9 was instead a "*self-help remedy,*" akin to a provision permitting termination for breach, allowing "*one party [to] act in his own interests*". Agreeing with BN the court held that, as an Assessment would affect the rights of both parties, the discretion afforded under clause 4.9 must be limited – to suggest otherwise would be "*absurd.*" A term was therefore implied that any Assessment must not be undertaken in an "*arbitrary, capricious or irrational manner*" (the "**Implied Term**").

BN made two further arguments, contending that clause 4.9 was unenforceable in its entirety by virtue of (a) the Housing Grants, Construction and Regeneration Act 1996 (as amended), and (b) by virtue of the Unfair Contract Terms Act 1977. Both these arguments were dismissed.

Everwarm's Assessments

The court then considered Everwarm's Assessments and found that they were in breach of the Implied Term. Principal failings included:

I. only a small sample of the properties concerned having been measured then a standard percentage reduction being applied to the value of all sub-contracts;
II. no allowance being made for variations;
III. no account being taken for special features of the properties;
IV. re-measurements being undertaken of Everwarm's own measurements, with significantly different results (indicating "*inherent unreliability*" in Everwarm's approach); and

HAWKSWELL KILVINGTON LIMITED
CONSTRUCTION & ENGINEERING SOLICITORS

17 Navigation Court, Wakefield, WF2 7BJ | 28 Queen Street, London, EC4R 1BB
Tel: 01924 285719 | Fax: 01924 257666 | enquiries@hklegal.co.uk | www.hklegal.co.uk

V. no allowance being made for the release of retention.

On this basis, Everwarm's Assessments were found to have been undertaken in an arbitrary and capricious manner and consequently, its claims were dismissed.

BN's Counterclaim

BN's counterclaim was a 'smash and grab' claim based upon its own valuation of each sub-contract, issued to Everwarm in response to the Assessments to which Everwarm had failed to issue a Payment or Pay Less Notice. This claim failed on the basis that the valuations submitted were not detailed enough to represent applications for payment and BN's alternative 'true value' claim was postponed. BN's second alternative claim for retention succeeded, however, and BN was awarded £406,015.90 (plus VAT).

Analysis

The court's judgment in this case provided a detailed consideration of the law applicable to 'discretionary assessment' clauses, often inserted into construction contracts to counter the effect of payment notices being served late. Parties' whose contracts contain such clauses will be pleased to know that, in principle, they remain valid and enforceable. Caution must be taken, however, when a discretionary assessment is undertaken; if the court believes the process was unreasonable, any claims pursuant to the clause may fail.