

Construction Law Update

Ascertaining Damages under an ABI-Type Performance Guarantees

In the recent case of *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd and another*, the TCC considered the operation of ABI-type performance guarantees and the requirements for making valid demands under such instruments.

Background

In July 2014, the main contractor, Multiplex, engaged Yuanda under a sub-contract to carry out façade works for a development in London (the “Contract”). Yuanda obtained a guarantee from the Australia and New Zealand Banking Group Ltd (“ANZ”) as security for its performance under the Contract (the “Guarantee”). The maximum amount of the Guarantee was £4.411m and its wording closely followed the ABI Model Form of Guarantee Bond.

A dispute arose as to the cause of delay to both the main contract works and the Contract works. Thereafter, Multiplex entered into a settlement agreement with the Employer wherein Multiplex would pay LADs under the main contract in the sum of £7.5m. By a letter dated 22 November 2019, Multiplex demanded that sum by way of LADs from Yuanda and, after Yuanda denied responsibility, Multiplex subsequently commenced an adjudication in December 2019.

In January 2020, Multiplex made a demand on the Guarantee. In this case before the TCC, Yuanda sought continuation of an injunction that it had obtained which prevented Multiplex from pursuing the demand and thereby prevented ANZ from paying out to Multiplex.

The issues

The key issue was whether Multiplex was entitled to make a demand on the Guarantee in January 2020. If not, the next issue was whether Multiplex could make a valid demand on the Guarantee after the adjudicator’s decision and before the expiry date of the

Guarantee (assuming Multiplex was successful in the adjudication).

The TCC had to determine whether the Guarantee was a performance bond or an on-demand bond and, if a performance bond, what the requirements were for Multiplex to make a valid demand on the Guarantee.

The TCC’s Decision

The TCC had to interpret the following clauses of the Guarantee in particular:

- Clause 1: *“the Guarantor [ANZ] guarantees to the Contractor [Multiplex] that in the event of a breach of Contract by the Sub-Contractor [Yuanda], the Guarantor shall... satisfy and discharge the damages sustained by the Contractor as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Sub-Contractor”.*
- Clause 4: *“...the obligations of the Guarantor...shall be released and discharged absolutely upon Expiry. Any claim in writing containing particulars of the Sub-Contractor’s breach of his obligation(s) under the Contract must be made upon the Guarantor before expiry, or would be deemed invalid otherwise”.*

Firstly, the TCC noted that on-demand bonds are instruments of primary liability where guarantors will pay out on-demand whereas performance bonds are instruments of secondary liability which depend upon the underlying liability between contracting parties.

The TCC held that the Guarantee was a performance bond as it established secondary liability on ANZ’s part to the primary liability of Yuanda to fulfil its obligations under the Contract. A breach was clearly required by Yuanda before ANZ’s guarantee obligations were

Construction Law Update

triggered. Further, there was a complete absence of any words that would be both expected and required in an on-demand bond.

Ultimately, the wording of the Guarantee invoked and depended upon the terms of the underlying Contract. Guarantees of the form drafted in this case require establishment and ascertainment in accordance with mechanisms in the underlying contract.

The TCC held that Multiplex's mere statement/assertion to Yuanda that a sum was due to it by way of LADs could not be treated as a "certificate" and/or could not establish and ascertain the damages due to Multiplex pursuant to and in accordance with the terms of the Contract. Multiplex was not a "decision-maker" (such as an architect or contract administrator) under a legal duty to balance the competing interests of Multiplex and Yuanda and the Contract did not have any mechanism whereby "certificates" were issued in this sense to certify sums due to Multiplex. Multiplex incorrectly believed that a statement of sums due to it had the same status as a certificate issued by a decision-maker.

However, an adjudicator's decision which awarded Multiplex a sum of money would qualify as being an amount established and ascertained pursuant to and in accordance with the Contract. Indeed, the adjudication process was an express mechanism for the resolution of disputes under the Contract. Therefore, given the wording of both the Guarantee and the Contract, Multiplex could make a demand on the Guarantee for the amount of any decision by the adjudicator in its favour. However, a valid demand could only be made in the sum of that decision up to the amount of the Guarantee itself (i.e. £4.411m).

The TCC also dismissed Yuanda's contention that the words "taking into account all sums due or to become due to the Sub-Contractor" meant that no valid demand could be made on the Guarantee unless and until Yuanda's final account had been agreed or resolved.

This 'final account' contention was counter to the fact that the Guarantee would expire on 4 April 2020 and therefore may defeat the Guarantee's commercial purpose of providing security during the project. In response, Yuanda relied on the wording in Clause 4 of the Guarantee to argue that, as long as a valid demand was made pre-expiry, the Guarantee would remain in force after the expiry date.

The TCC held that such an interpretation was incorrect and ignored the clear words in Clause 4 of the Guarantee – "the obligations of the Guarantor...shall be released and discharged absolutely upon Expiry" – amongst other practical considerations such as the undesirability of guarantors assuming open-ended payment obligations leading far into the future. However, two commercial parties could, in principle, expressly enter into such arrangements.

Analysis

This case reaffirms that, in the case of performance bonds, the underlying contractual machinery covering the parties' liability to one another becomes integral to determining the effect of guarantees and the demands made pursuant to them.

Contracting parties ought to carefully consider the terms of their guarantees and underlying contracts in order to accurately establish the circumstances in which valid demands on guarantees can be made.

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