

Construction Law Update

Assignment and Contribution Claims

In the case of *Energy Works (Hull) Ltd -v- MW High Tech Projects UK Ltd and Outotec (USA) Inc*, the Technology and Construction Court (“**TCC**”) considered the legal effect of an assignment and a contribution claim.

Background

In November 2015, Energy Works (Hull) Ltd (“**EW**”) engaged MW High Tech Projects UK Ltd (“**MWH**”) as main contractor under an EPC contract to construct a bed gasification power plant (the “**Main Contract**”). MWH engaged Outotec (USA) Inc (“**Outotec**”) under a sub-contract to supply key elements of the power plant (the “**Sub-Contract**”).

In March 2019, EW purported to terminate the Main Contract for MWH’s delay in completing the works and outstanding defects.

In June 2019, MWH assigned the Sub-Contract to EW, which was a requirement following termination of the Main Contract. The assignment clause in the Sub-Contract provided that “*if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the Purchaser*”.

EW commenced proceedings against MWH claiming damages of £133m including the costs of rectifying defects and delay damages. MWH counterclaimed £47m based on the contractual provisions for payment following a termination for convenience and also sought to pass any liability they may have to EW onto Outotec.

In light of the Sub-Contract having been assigned to EW, the TCC had to consider as a preliminary issue whether Outotec still owed any contractual liability to MWH.

MWH advanced their claim against Outotec on 3 alternative bases:

- i. Assignment of the Sub-Contract to EW assigned future rights to performance but did not assign

accrued rights. MWH could therefore claim against Outotec based on direct accrued contractual rights in existence pre-assignment.

- ii. If assignment transferred all past and future rights under the Sub-Contract to EW, the proper effect of the assignment was to also transfer all past and future liabilities and obligations and took effect as a novation.
- iii. If both Outotec and MWH are liable to EW in respect of the same damage, MWH can claim contribution from Outotec under the Civil Liability (Contribution) Act 1978 (the “**Contribution Act**”).

Outotec disputed MWH’s claim and contended that:

- i. Assignment of the Sub-Contract transferred all benefits, including accrued rights and the right to sue in respect of those rights, to EW.
- ii. MWH were not entitled to contribution under the Contribution Act because Outotec were not liable to EW in respect of the same damage.

The legal effect of the assignment

The TCC set out the following principles:

- i. Subject to express contractual restrictions, a party can assign the benefit of a contract, but not the burden, without the other contracting party’s consent.
- ii. Subject to clear contrary intention, assignment is understood to mean assignment of the benefit i.e. both accrued and future rights.
- iii. It remains possible to assign future rights without the accrued rights under a contract, but clear words are needed to do so.

The TCC considered the words “*assign the Sub-Contract*” in both the Main Contract and the Sub-Contract and concluded that they must mean assignment of all MWH’s benefits under the Sub-Contract to EW. There was little indication that the parties had intended to separate future and accrued rights for the assignment.

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The commercial purpose of the assignment was to allow EW to enforce rights under the Sub-Contract against Outotec to mitigate losses; in so doing, MWH assumed commercial risk in giving up their right under the Sub-Contract to pass liability/claims onto Outotec for which MWH retained responsibility to EW under the Main Contract. It was for the parties to allocate risk, not for the TCC to re-write contractual arrangements or impose what it considered equitable.

Accordingly, on a true construction of the Main Contract and the Sub-Contract, the parties had agreed that, upon termination of MWH's employment under the Main Contract, MWH would assign all of their rights under the Sub-Contract to EW.

Was there an assignment of both the benefit and burden of the Sub-Contract?

MWH's alternative case was that, if assignment transferred all past and future rights under the Sub-Contract to EW, the assignment under proper construction also transferred all past and future liabilities and obligations and took effect as a novation.

The TCC stressed that assignment and novation are distinct legal concepts and that the use of the words "assign the Sub-Contract" strongly indicated that the parties intended assignment and not novation. Moreover, there were no words in any of the relevant documents to indicate an intention to extinguish the Sub-Contract and replace it with a new contract. The TCC concluded that there was an effective assignment of MWH's accrued and future rights under the Sub-Contract, but there was no novation.

Could MWH pursue claims for contribution against Outotec?

The effect of the assignment of the Sub-Contract to EW was that MWH had no right to seek any direct remedy from Outotec under the Sub-Contract. Any claim by MWH for an indemnity or contribution against Outotec therefore had to arise under the Contribution Act.

Under section 1(1) of the Contribution Act, any person liable in respect of damage may recover contribution

from any other person liable in respect of the same damage. The key issue was whether MWH had a right to pursue Outotec for the same damage that was being claimed by EW against MWH. Three heads of loss required consideration: delay; defects; and termination losses. The court considered whether EW would be able to pursue Outotec in respect of each head of loss and concluded that:

- MWH could claim a contribution from Outotec in respect of delay, notwithstanding that the relevant dates for completion and the amounts payable under the Main Contract and the Sub-Contract were different, because the underlying harm (delay) was the "same damage".
- MWH could claim a contribution from Outotec in respect of damages for defects because the same defects were in issue under the Main Contract and the Sub-Contract.
- MWH could not claim a contribution in respect of termination losses because there was no apparent route for EW to claim the additional costs of completing the works or other losses arising out of termination of the Main Contract from Outotec.

Analysis

This case provides an important analysis of the legal effect of assignment and novation and has stressed that the two are very distinct legal principles. In particular, general wording which refers to an assignment of a contract is likely to be construed as giving effect to an assignment of both future and accrued rights under a contract.

The TCC's analysis of contribution claims is also useful and reiterates that such claims are contingent upon parties being liable to a claimant in respect of the same type of damage, not the same damages.

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