Construction Law Update

Entitlement to Liquidated Damages Lost After Alleged Verbal Agreement

In the case of *Mansion Place Limited v Fox Industrial Services Limited* [2021], the TCC considered an alleged verbal agreement between parties and its impact on future claims.

Background

In February 2020, Mansion Place Limited ("**MPL**") engaged Fox Industrial Services Limited ("**FISL**") to undertake the refurbishment and extension of student accommodation at Hockley Point in Nottingham (the "**Works**"), under a JCT Design and Build Contract 2016 with amendments (the "**Contract**").

From an early stage, the Works were delayed. FISL's position was that the Covid-19 pandemic and MPL's failure to give timely possession of the site, or to clear it of students, was responsible for the delays. In contrast, MPL blamed FISL's failure to progress the Works and to commit sufficient labour and resources for the delays. This led to a series of purported notices of delay being issued by FISL under clause 2.24 of the Contract and MPL serving a number of purported non-completion notices under clause 2.28 of the Contract.

On 22 October 2020, FISL served its Interim Payment Application 10. In response, on 13 November 2020, MPL served a pay less notice and a number of notices of intention to deduct liquidated damages ("**LADs**"). A dispute arose as to MPL's entitlement to deduct LADs following an alleged verbal agreement that it would not do so, said to have been made during a phone call between the directors of MPL and FISL on 14 October 2020 (the "**Phone Call**"). The dispute was referred to adjudication.

In a decision dated 11 January 2021 (the "**Decision**"), the adjudicator decided that the Phone Call *had* resulted in a binding agreement ("**Agreement**"). In this Agreement, MPL had agreed to forego its entitlement to LADs and in return FISL had agreed to forego its right to claim loss and expense. The Agreement thus precluded MPL from serving a pay less notice seeking to deduct LADs from the sums due to FISL.

The Proceedings

MPL disagreed with the Decision and applied to the Court for a declaration that there was no Agreement and that, to the extent that reference was made to it foregoing its right to claim LADs under the Contract, this was a waiver which it is was entitled to, and did, revoke. FISL counterclaimed seeking declarations giving effect to the Agreement as outlined in the Decision. The Court addressed the issues in turn as follows.

Did the Phone Call result in a binding agreement which precluded MPL from deducting LADs under the Contract?

It was accepted by the parties that at the time of the Phone Call both participants were driving and using hands-free mobile phones meaning neither took a contemporaneous written note. It was also accepted that the Phone Call lasted less than 10 minutes and was cordial. The parties' positions as to what was said during the Phone Call were distinctly different.

MPL argued that the Phone Call consisted of a discussion that FISL should proceed with the remaining Works and that, once the Works were completed, the parties would seek an amicable resolution to any 'outstanding matters'. In contrast, FISL argued that a binding agreement had been reached during the Phone Call that both parties would abandon their competing claims for LADS and loss and expense in order that the project could move forward to completion.

Having considered the contrasting witness evidence *"through the prism of the contemporaneous documents; of [the parties] subsequent actions; of those events which [were] accepted or clearly*

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demonstrated to have happened; and of inherent likelihood," the Court favoured the evidence of FISL. Of particular relevance was internal correspondence of both parties prior to and after the Phone Call, which the Court considered to be evidence of the parties' intentions and understandings at the time. Another key factor was inaccuracies in MPL's recollection of the events that followed the Phone Call. In particular, MPL's director testified that an email had been sent following the Phone Call when it had (unhelpfully to MPL's case) been sent beforehand. The Court saw this as evidence of the directors "*ability to persuade himself of the truth of an error which supported [MPL's] case*".

The Court confirmed that, in order to conclude an agreement had been reached between the parties, it was not necessary to "*make a finding as to the actual words used*". Instead, the question was whether it could "*make a finding as to the gist of the conversation on the balance of probabilities*". The Court was satisfied that it could and ruled that the Phone Call resulted in a binding Agreement that MPL and FISL would abandon their competing claims for LADS and loss and expense on a final and not provisional basis.

Was MPL precluded from serving a non-completion notice and seeking LADs under the Contract?

Whilst not strictly necessary given the findings made above, the Court considered FISL's alternate arguments. The Court confirmed that had it not been for the Agreement, MPL would have been entitled to serve notices under clauses 2.28 (non-completion notice) and 2.29 (payment or allowance of LADs) of the Contract, even if a valid notice of delay had been given by FISL under clause 2.24 of the Contract pursuant to which MPL should have granted an extension of time.

Was the provision for LADs under clause 2.29 of the Contract void or unenforceable as a penalty clause?

FISL argued that the LADs provision was penal because there was no bespoke assessment of loss, there was no bespoke negotiation in respect of the same and the sum payable did not reflect the actual loss which would be suffered by MPL.

Having considered *Cavendish Square Holding v Makdessi* [2016], *Eco World-Ballymore Embassy Gardens v Dobler* [2021] and *Triple Point Technology v PTT* [2021], the Court determined that clause 2.29 of the Contract was <u>not</u> a penalty clause because: (i) FISL was in a sufficiently strong negotiating position to obtain a variation in the LADS provision (and in fact did); and (ii) the effect of the LADS provisions was not wholly disproportionate – MPL's interest in the completion of the Works was very significant and FISL was aware of this.

Was the provision for LADs under clause 2.29 of the Contract inoperative and therefore enforceable?

FISL contended that the provision for taking of partial possession in clause 2.30 of the Contract, combined with the mechanism in clause 2.34 for reducing LADs and the provisions of clause 2.29 and the Contract Particulars were incompatible on the basis that it was not possible to apply a proportionate reduction.

Having considered *Eco World-Ballymore*, the Court found that clause 2.29 and 2.34, when read together, were enforceable and set out a clear and effective, albeit somewhat cumbersome, mechanism in respect of reducing LADs in the event of partial possession.

Analysis

This case serves as an important reminder to parties to be wary of having one-to-one discussions which may be wrongly interpreted and/or recalled, especially if written notes cannot be immediately made. In such circumstances, a sensible step is to send a follow-up email as soon as possible summarising the discussion.

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