

## Construction Law Update

### Be Sure to be Certain: Avoiding Potential Pitfalls with Liquidated Damages Provisions

In the recent case of *Buckingham Group Contracting Ltd -v- Peel L&P Investments and Property Ltd*, the TCC looked at the construction of liquidated damages provisions through the lenses of contractual uncertainty and limitation of liability.

#### Background

Buckingham Group Contracting Ltd (“BGC”) was engaged by Peel to design and construct a production building and certain external works at a new plant for manufacturing corrugated cardboard, pursuant to a JCT Design and Build Contract 2016 with bespoke amendments (the “Contract”).

The Works were significantly delayed and, on 14 November 2018, Peel issued a pay less notice notifying its intention to deduct from sums otherwise due to BGC an amount of c£1.9m by way of capped liquidated damages pursuant to clause 2.29A.1.2 of the Contract.

Clause 2.29A was a bespoke clause concerning liquidated damages for failure to achieve “Milestone Dates” and Schedule 10, on which the proceedings turned, provided that “*if there is any conflict or inconsistency between the wording of [Schedule 10] and clause 2.29 the wording of [Schedule 10] shall take precedence.*”

BGC contended that the liquidated damages provisions were void and unenforceable and that any remedy in respect of general damages was capped at c£1.9m. BGC sought declarations to this effect in these Part 8 proceedings, amongst various other declarations.

#### Part 1: Void for Uncertainty and/or Unenforceable?

The TCC reiterated the reluctance of the courts to hold provisions void for uncertainty and emphasised that judges can “*find*” interpretations giving effect to party intention. A provision will nevertheless be void for uncertainty if a court cannot conclude as to what is in the parties’ minds or where it is “*not safe*” to prefer

one possible meaning to other equally possible meanings.

BGC contended that the liquidated damages provisions in this case were so defectively drafted and/or incomplete that they were void for uncertainty and/or unenforceable. This was due to alleged errors regarding completion dates, the rates of liquidated damages, the Contract Sum, and partial possession.

#### ***Alleged Error 1: Completion***

The completion date in Schedule 10 contradicted a different date stated in the Contract Particulars. BGC contended that a liquidated damages clause cannot be considered clear and certain when the Contract contains two competing dates for completion, with no other terms to assist in resolving the question of which date applied.

Whilst there was an inconsistency, the TCC accepted it was possible to find an interpretation which gave clear effect to party intention. The different dates for completion served different functions and, whilst BGC was obligated to complete works by the earlier completion date, no liquidated damages attached to such breach i.e. the date from which liquidated damages ran for non-completion was the later completion date identified in Schedule 10 and, from the TCC’s perspective, the parties clearly intended for this bespoke regime to apply.

#### ***Alleged Error 2: Two Rates of Liquidated Damages***

BGC submitted that Schedule 10 contained two different sets of rates for liquidated damages and, as such, it was impossible to discern which the parties intended should apply. As Schedule 10 also referred in multiple places to a “*LADs Proposal*”, that was indicative that the parties had failed to reach agreement on any rates in Schedule 10. For its part, Peel submitted that it was possible to identify the

**HAWKSWELL KILVINGTON LIMITED**  
**CONSTRUCTION & ENGINEERING SOLICITORS**

## Construction Law Update

parties' actual agreement in the right-hand set of columns in a proposal document.

The TCC accepted Peel's submission, holding that it would be wrong to interpret "*Proposal*" literally and it was preferable to consider the wider context i.e. the parties had acted informally by (likely) copying a table entitled "*Proposal*" and proceeded to execute the agreement as a deed, thereby incorporating that schedule into the Contract. It was also acceptable to assume that the right-hand set of columns came later in time than the left-hand set of columns, and that these later rates applied.

### ***Alleged Error 3: Contract Sum***

The Contract Sum was c.£26m whilst the Contract Sum Analysis in Schedule 10 was c.£25m. BGC submitted that it was unclear whether liquidated damages would be based on the percentage rates in the daily column applied to the Contract Sum or based on lump sums contained in the weekly rate column, calculated upon a different Contract Sum Analysis.

The TCC accepted Peel's submission that there was no error to correct and that the parties had simply agreed the weekly lump sums contained in the table of Schedule 10. If the parties had intended to change lump sums to reflect a new Contract Sum Analysis, they would have done so. In addition, if their intention was to set liquidated damages at a daily rate, there would have been no need to calculate a weekly rate. It was clear that a weekly rate would apply, not a daily one.

### ***Alleged Error 4: Partial Possession***

BGC submitted that Schedule 10 failed to provide a workable scheme in respect of partial possession. It submitted that the parties had intended to allow for partial possession per clauses 2.30 to 2.34 and the "Sectional Milestones" in Schedule 10 were intended to equate to "Sections". However, contrary to clause 2.34, the parties failed to provide any means of calculating the value that a Relevant Part bore to the relevant Section Sum in the Contract Particulars.

However, the TCC accepted Peel's submission that clauses 2.30 to 2.34 did not refer to Milestone Dates; the Contract did not provide for completion by Sections and this was stated at various points in the Contract; and no Sections were identified in the Fifth Recital which was key for the application of "Sections".

The reference to "Sectional Milestones" in Schedule 10 did not equate to completion by Sections; conventionally, the achievement of a "Milestone" was a "*step along the way which involves no transfer of possession of the works comprised within that Milestone in the way that completion of a defined Section would do.*"

### ***Conclusion on Uncertainty***

None of the arguments advanced by BGC in respect of liquidated damages succeeded. The provisions were certain and enforceable.

### **Part 2: Cap on General Damages?**

BGC submitted that any remedy in respect of general damages for delay was capped in the amount of c.£1.9m, in reliance on *Eco World-Ballymore Embassy Gardens Company Ltd -v- Dobler UK Ltd [2021] EWHC 2207 (TCC)* which concerned whether a liquidated damages provision, if not void or penal, would operate as a general limitation of liability clause.

Peel argued that it was impossible to separate the cap provision from the liquidated damages regime; the cap was on "*Maximum LADs*" and this was its literal and only meaning. Both liquidated damages and the cap were calculations based upon a percentage of the Contract Sum; in contrast, general damages would never be calculated on this basis.

The TCC accepted that the liability cap applied to liquidated damages, and not anything else. There was nothing in Clause 2.29A to suggest that liability for general damages would be capped, and the rates and cap clearly formed part of a single scheme. Whilst *Eco World* shows that it is possible, in principle, for a clause to operate as a general limitation of liability even though it is literally expressed as applicable only to

## Construction Law Update

liquidated damages, the fundamental question is whether the language of the provision is broad enough to encompass any alternative liability that could arise in respect of general damages.

For those reasons, the TCC in this case held that there was no cap on liability for general damages for delay.

### Analysis

This case demonstrates the judiciary's reluctance to interfere with parties' intentions and to hold that contractual clauses are void for uncertainty and unenforceable. In addition, the case acts as a reminder for parties to draft very clear liquidated damages provisions to avoid any potential pitfalls regarding uncertainty and/or potential caps on alternative areas of liability.

*This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.*

© Hawkswell Kilvington Limited 2022