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Construction Law Update

Intent on Disaster – TCC decision again highlights the perils of relying on a letter of intent

In *CLS Civil Engineering Ltd v WJG Evans and Sons* [2024] EWHC 194 the TCC found that in the absence of a formally agreed building contract, a liability cap contained in an unsigned letter of intent was binding. As a result, the claimant contractor was not entitled to additional payment exceeding the cap.

Background

CLS Civil Engineering Ltd ("**CLS**") engaged WJG Evans and Sons ("**WJG**") to construct a library, retail provision and three apartments at a development in Pembrokeshire (the "**Works**").

Works commenced under an unsigned letter of intent (the "**LOI**") while the parties sought to agree terms of a JCT Intermediate Building Contract (the "**JCT Contract**"). The LOI contained provisions capping CLS' liability for payment to WJG at £150,000 (the "**Cap**"). The Cap was revised several times to £1.1million but the JCT Contract was never signed.

A dispute arose following CLS' termination of the contract, with WJG applying for final payment in the sum of £1,413,669.24.

In response to this, CLS commenced Part 8 proceedings against WJG seeking declarations that:

1. There was no construction contract between the parties and their relationship was governed solely by the unsigned LOI (as amended); and

2. CLS' maximum liability under the LOI (as amended) was £1.1million.

Pausing here, readers may be aware that under Part 8 of the Civil Procedure Rules ("**CPR**") there exists an abbreviated, alternative procedure for determining legal/contractual issues which are unlikely to involve substantial questions of fact.
Here, WJG argued that CLS' claim was not suitable for Part 8 proceedings and should instead be assessed via the conventional Part 7 route. In particular, WJG argued that the Works were governed by the terms of the JCT Contract (which did not contain any limitation of liability provisions) and that CLS was estopped from refuting the same. WJG suggested its case was therefore likely to involve questions of fact.

Held

The Cap contained in the unsigned LOI was binding on the parties and WJG was not entitled to the additional payment sought.

Guidance on the use of Part 8

The first issue to be determined was whether the present claim was suitable for Part 8 proceedings. If not, the TCC Judge, Deputy Judge Neil Moody KC, could exercise his discretion under CPR 8.1(4) and give directions to have the claim continued under Part 7 instead.

In dealing with the issue the Judge cited the importance of adhering to the 'overriding objective' of the CPR by ensuring things were dealt with "*justly and at proportionate cost*" (CPR rule 1.1(1)). In the current case, the true value of the claim was c.£300k (i.e. the difference between the gross value of WJG's claimed final payment and the Cap). As such, the dispute value was "modest" by the standards of the TCC, and re-booting the claim under Part 7 would lead to additional delay and expense. The court should therefore look carefully to see whether Part 8 might work.

The Judge also referred to extracts of the recent decision in *Berkeley Homes (South East London) Limited v John Sisk and Son Limited* [2023] EWHC 2152 (TCC) which provides guidance on the correct approach to Part 8 proceedings: namely, that where such proceedings are contemplated, the claimant should follow the procedure set put in the earlier *Cathay Pacific* case, so that the parties approach the

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hearing already having agreed the scope of the dispute and the manner in which any disputed questions of fact should be determined.

The Judge concluded that the current claim had been correctly brought under Part 8 because:

- There were no disputed issues of fact making the case unsuitable for Part 8 determination. The key issue in dispute was the validity and enforceability of the Cap. To the extent the facts of the case were disputed, WJG had failed to properly substantiate why Part 7 proceedings should be issued and appeared simply to be hoping "*that something may turn up*" in the event further disclosure was required.

- WJG's estoppel arguments (discussed below) had no real prospects of success.

Estoppel

Despite it being uncommon for estoppel claims to be considered using Part 8 (because they often involve disputed facts too complex for Part 8), the Judge considered WJG's estoppel claims by applying the summary judgment test under CPR 24 – namely, whether WJG's claims had any "*real prospect of success*". WJG's estoppel arguments were:

1. Estoppel by acquiescence – WJG argued CLS was estopped from alleging there was no agreement that the JCT Contract would apply because of emails exchanged between the parties which referred to the JCT Contract.

2. WJG argued that one of CLS' emails amounted to a representation as to agreement of the JCT Contract conditions proposed by WJG, so CLS was estopped from denying the same.

The Judge found that neither of WJG's estoppel arguments had any "*real prospect of success*" so were not an impediment to Part 8 determination. In particular, the Judge observed that the emails WJG sought to rely on post-dated the LOI and amended the LOI, not the JCT Contract, which was still being negotiated.

Validity and enforceability of the Cap

The Judge determined that WJG was bound by the Cap because:

- WJG conceded in a witness statement that the Cap had been agreed. This was consistent with the Acknowledgement of Service which stated the same. These points alone were sufficient to dispose of the point and confirmed the LOI (and not the JCT Contract) was the document governing the party's relationship.

- WJG accepted the Cap in the LOI by commencing the Works 10 days after the LOI was sent. The Cap was also affirmed by WJG when it asked the same to be varied several times.

- It was clear from the parties' correspondence that that the JCT Contract was still being negotiated and the parties "*never achieved a meeting of minds*" in that regard.

Analysis

This case again illustrates the importance of taking the time to properly negotiate and allocate risk under a formal contract prior to commencing works.

To the extent parties wish to rely on a letter of intent prior to entering a formal contract, considerable caution must be exercised and the same should be drafted to include key non-negotiable terms. Any stated caps on liability (whether in a party's scope of services or money related) should be closely monitored at all times to ensure they are not exceeded. In this case, for example, at the point at which the £1.1m Cap was about to be exceeded, WJG ought sensibly to have ceased work pending negotiation of a variation to the Cap/conclusion of a formal contract.

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