Sloan Plumb Wood

SOLICITORS

Legal Update

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Introduction

Welcome to the latest edition of the Sloan Plumb Wood LLP legal update.

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Local Democracy, Economic Development and Construction Act 2009

By the introduction of the Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 2) (England) Order 2011 (SI 2011/1582) the Government has confirmed that the relevant amendments to Part II of the Housing Grants, Construction and Regeneration Act 1996 introduced by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 ("the Act") take effect from **1 October 2011** in England and Wales.

The changes made by the Act will affect a wide range of matters including adjudication, payment and suspension and will impact on standard forms of contract such as the JCT and NEC standard forms of contract and also on bespoke terms and conditions which will need to be reviewed to ensure compliance with the new Act before 1 October 2011.

In preparation for the Local Democracy, Economic Development and Construction Act 2009 ("LDEDC Act") coming into force Sloan Plumb Wood LLP will be presenting in-house seminars on the impact of the Act.

If you would be interested in holding such a seminar please contact Philip Vickers (philip.vickers@spw-law.co.uk).

Analysis of Consultation responses on Scheme for Construction Contracts 1998

The Government has published its analysis of the responses to the consultation on the Scheme for Construction Contracts 1998. The analysis can be found on the website of the Department for Business Innovation and Skills.

The responses address a number of key issues in respect of the Scheme with responses provided by various affected groups including trade associations and industry bodies.

One issue not addressed directly in the consultation was that of "Tolent" clauses (see SPW legal update 112). Notwithstanding the absence of reference to "Tolent" clauses from the consultation issued by the Government, a number of respondents took the opportunity to express concerns about the drafting of new section 108A, which seeks to prohibit agreements as to the costs of adjudication.

It was suggested in a number of consultation responses that section 108A does not make the distinction between legal costs and adjudication fees and expenses. The Government however believes that section 108A as drafted is fit for purpose as it draws a very clear distinction between the adjudicator's fees which may be allocated and other costs associated with the adjudication process, and including legal costs which may not.

A copy of the summary paper can be found at:

http://www.bis.gov.uk/assets/biscore/business-sectors/docs/s/11-1013-scheme-for-construction-contracts-consultation-responses

Case Law Updates

Exclusion Clauses - Deliberate Repudiatory Breach

AstraZeneca UK Limited v Albemarle International Corporation and Albemarle Corporation [2011] EWHC 1574 (Comm)

This recent decision in the Commercial Court has considered issue of the construction of clauses which seek to exclude liability for deliberate repudiatory breach of contract.

Astra Zeneca (AZ) and the First Defendant (AIC) entered into a contract for the supply by AIC to AZ of a substance called DIP which would then be used by AZ to distil to produce an anaesthetic (propofol). The agreement between the parties included a clause to the effect that if AZ decided to stop distilling DIP and decided to buy propofol directly from a supplier, AIC would have the right of first refusal to supply the propofol. AZ had envisaged at the start of the agreement that it would buy propofol directly from a supplier eventually and in October 2007, AZ notified AIC that it proposed to enter into an agreement with a third party (S) for the supply to it of propofol. AIC complained that it had not been given the right of first refusal to supply AZ with the propofol and negotiations started between AZ and AIC as to the terms of a new supply agreement for propofol. However, agreement was not reached between the parties and AZ entered into a supply agreement with S. During the negotiations, AZ tried to stockpile DIP and AIC refused two of the orders.

In February 2008, AIC served notice to terminate the supply agreement of DIP on the basis that AZ had breached the agreement by not allowing it the right of first refusal of the new agreement for the supply of propofol. Subsequently, AZ issued proceedings against AIC for their refusal to comply with the two additional orders and claimed it was entitled to terminate the agreement on the basis of AIC's repudiatory breach (i.e. not fulfilling the orders). AIC denied that the failure to comply with the two orders was a repudiatory breach but that any liability it did have was limited by an exclusion clause in the agreement. AZ argued that the wording of the exclusion clause could not protect AIC because of its deliberate repudiatory breach.

The judge held, on considering the existing agreement, that AZ had wrongfully refused to award the contract for the supply of propofol to AIC and was liable for AIC's lost profits in this regard. He further held that AIC was liable to AZ for loss arising from its failure to supply under one of the orders (but not both) but held that this was not so serious as to amount to a repudiation of the contract. The Judge then had to consider the quantum of the parties' liability under the contract.

In considering the liability of the parties and the effect of the exclusion clause, if any, on that liability, the judge went on to comment on the previous case of *Internet Broadcasting Corporation Limited v NetTV Hedge Funds Limited v MAR LLC [2009]* ("the *NetTV* case") and discussed whether this case should be followed. In the *NetTV* case, the judge held that there is a rebuttable presumption that an exclusion clause should not apply to a deliberate repudiatory breach. The judge in the present case stated that although he did not technically need to rule on this because he had already decided that the breach by AIC had not been deliberate, his view was that if he had had to consider this argument he "would have declined to follow" the *NetTV* decision. He stated that even if AIC's breach had been deliberate, the exclusion clause would have to have been constructed strictly against the party seeking to rely on it but without any presumption, as held in the *NetTV* case.

The comments in the present case in respect of the *NetTV* case were the Judge's opinion and do not overturn the decision in *NetTV* as they are both High Court Judgments. However, it is widely agreed that the present case, rather than the *NetTV* case, represents the correct position of English law in this area. In effect, this means that if the present case is correct, a standard exclusion clause is likely to exclude liability for deliberate repudiatory breach. However, it is worth reviewing standard exclusion clauses to ensure they accurately reflect the requirements of the business.

Adjudication – Use of Without Prejudice Material

Ellis Building Contractors Limited v Victor Goldstein [2011 EWHC 269]

Although Judgment was given in this matter by Mr Justice Akenhead in February the Judgment has only recently been released because of the reference in the Judgment to without prejudice material.

This was a claim by Ellis Building Contractors for summary judgment to enforce a decision of an adjudicator who had found against Mr Goldstein. The project related to the demolition rebuild and refurbishment of commercial units in Brighton. The parties disputed a number of issues to defend the claim including the value of the works and the effect of various letters of intent. Mr Goldstein raised two issues the first relating to an alleged breach of natural justice because the adjudicator was alleged to have decided the case on a basis that had not been argued by either side. Mr Justice Akenhead rejected that argument. Of more interest in this context was the consideration of the impact of the deployment of "without prejudice material". Mr Justice Akenhead set out the following principles about the consequences of the improper submission of without prejudice material:

continued overleaf →

Case Law Updates Continued

Ellis Building Contractors Limited v Victor Goldstein [2011 EWHC 269] Continued

(a) Such material should not be put before an adjudicator. Lawyers who do so may face professional disciplinary action.

(b) Where an adjudicator decides a case primarily upon the basis of wrongly received "without prejudice" material, his or her decision may well not be enforced.

(c) The test as to whether there is apparent bias present is whether, on an objective appraisal, the material facts give rise to a legitimate fear that the adjudicator might not have been impartial. The Court on any enforcement proceedings should look at all the facts which may support or undermine a charge of bias, whether such facts were known to the adjudicator or not.

In these circumstances Mr Justice Akenhead decided that the without prejudice material did not give rise to a legitimate fear that the adjudicator might not have been impartial and so the adjudicator's decision was enforced.

Reasonable Endeavours

Jet2.Com Ltd v Blackpool Airport Ltd [2011] EWHC 1529 (Comm)

A requirement on a party to a contract to achieve an objective is often qualified by stating that the party will 'endeavour' to achieve it (as opposed to the absolute requirement which would exist without that qualification). The terms "best" and "all reasonable" are sometimes used in conjunction with the term 'endeavour' to try and limit or extend its scope and so affect the lengths to which a party must go to comply with its obligation.

A recent case in the High Court involving the low-cost airline Jet2.com and the airport operator Blackpool Airport Limited ("Blackpool Airport") has provided a useful reminder of just what can be entailed in an obliged to use "best" or "all reasonable" endeavours.

In September 2005 Jet2.com and Blackpool Airport entered into a 15 year agreement which provided (amongst other things) that "*Jet2.com and BAL [Blackpool Airport] will co-operate together and use their best endeavours to promote Jet2.com's low cost services from BA (i.e. Blackpool Airport)*". The contract also provided that "*BAL will use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low cost pricing*".

The contract made no mention of the opening hours of the airport. Mr Justice Beatson found however that both parties understood that a low-cost operator (such as Jet2.com) would need flexibility to leave early and arrive late, so that it was implied (and "*too obvious to mention*") that Jet2.com would not be limited to the airport's usual opening hours (6am to 8pm in Summer and 7am to 9pm in Winter). Indeed for four years after the contract was entered into Blackpool Airport regularly allowed Jet2.com to use the airport outside of its published opening times.

In 2009 Blackpool Airport launched an initiative to improve its profitability. As part of that initiative it decided that it would refuse to accept arrivals or departures which were outside of its published opening hours and gave Jet2.com one week's notice of the change.

Jet2.com sued Blackpool Airport alleging breach of contract and sought initially an injunction to allow flights to continue and also a declaration that Blackpool Airport must accommodate its flights at a much wider range of times (and at least from 7am to midnight).

Blackpool Airport argued that the duties incumbent on it under the agreement to use "best" and "all reasonable endeavours" did not extend to a requirement to take steps which were contrary to its legitimate commercial interests (i.e. such obligations were limited to what, from Blackpool Airport's perspective, was commercially viable).

In accepting Jet2.com's argument that by refusing to accommodate flights arriving or departing outside of its published opening hours, Blackpool Airport had committed a serious breach of contract Mr Justice Beatson held that "*it cannot have been intended that BAL [Blackpool Airport] should be able to pick and choose what to do in the light of what suits it or Balfour Beatty [its majority shareholder] financially*". The opening hours of the airport were something within Blackpool Airport's control, in those circumstances whilst Jet2.com did not necessarily have an absolute right to insist on any hours it chose (and indeed the judge did not feel able to rule on hours when Blackpool Airport should ensure that the airport was open), the fact that opening the airport specifically for a relatively small number of Jet2.com flights would mean incurring a loss did not take it outside the scope of a "best" or "all reasonable" endeavours obligation.

Whilst the scope of an "endeavours" provision will vary with the surrounding commercial context and other provisions of a contact, any party agreeing to an 'endeavours' obligation should carefully consider the extent of the commitments that could arise. In many circumstances more specific obligations (i.e. to accommodate flights during specific, stated hours) will be more certain and entail less risk for all concerned.

Part 36 Offers

C v D [2011] EWCA Civ 646 & Carillion JM Ltd v Phi Group Ltd [2011] EWHC 1581 (TCC) & Shah v Elliot [2011] EW Misc 8

A number of recent decisions on Part 36 offers of settlement have offered some clarity as to what will constitute a valid Part 36 offer, whether a Part 36 offer can be time limited and when and how such an offer is withdrawn.

Part 36 of the Civil Procedure Rules 1998 sets out a mechanism by which a party to civil proceedings may make an offer of settlement which will have prescribed costs consequences. Part 36 is prescriptive in terms of the contents of the offer. It also generally requires the court to make certain costs orders at the end of a trial in certain circumstances, for example, broadly where a Part 36 offer has been made and a party does better than its offer at trial. It can therefore be a very important tool in litigation.

In C v D [2011] EWCA Civ 646 the Court of Appeal had to consider a purported Part 36 offer that was stated to be *"open for 21 days"*. One view, and the view of the court which first heard the case, was that the words meant that the offer would not be open after 21 days. On another view, the words meant that the offer would not be withdrawn for 21 days.

The confusion in the offeror's offer may have arisen as Part 36 provides that an offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted. Part 36 however does not expressly explain what happens to a time limited offer.

The offeree attempted to accept the offer outside of the 21 day period following the making of the offer. The offeror argued that the offer had lapsed after 21 days had expired. At first instance the judge held that the Part 36 regime could not include a time limited offer, therefore the offer was not a Part 36 offer.

The Court of Appeal concluded that a Part 36 offer, in order to have effect in terms of costs consequences has to be an offer that has not been withdrawn but has remained on the table. As a result, in construing the words *"open for 21 days"* in the context of an offer that purported to be a Part 36 offer, the Court of Appeal concluded that the words *"open for 21 days"* mean that the offer will not be withdrawn for 21 days but that after those 21 days a withdrawal could only be effected by serving a valid notice of withdrawal under Part 36. The offer was therefore a valid Part 36 offer.

The offeror also argued that it had withdrawn the offer in any event by email correspondence. However, whilst those emails chased a response to the offer, they did not expressly withdraw the offer in accordance with the requirements of Part 36 and the Court of Appeal concluded therefore that the offer remained open for acceptance and was validly accepted by the offeree. The effect of this decision was that the offeror could accept an offer that the offeree believed had been withdrawn.

The decision in C v D can be contrasted with Carillion JM Ltd v Phi Group Ltd [2011] EWHC 1581 (TCC) (June 2011) where Mr Justice Akenhead was asked to consider whether an offer could be a valid Part 36 offer in circumstances where the offer did not specify a period of not less than 21 days within which the defendant would be liable for the claimant's costs if the offer was accepted. As mentioned above, Part 36 is prescriptive as to the contents of any offer and Mr Justice Akenhead concluded that in the absence of such a specified term, the offer could not be a valid Part 36 offer, notwithstanding that it purported to be a Part 36 offer. As such the offer could be withdrawn in a manner not prescribed by Part 36 meaning no formal notice to withdraw was required and instead the usual rules of contract applied.

The decision in Carillion can in turn be compared with the decision in Shah v Elliot [2011] EW Misc 8 (June 2011) where again an offer was stated to be *"open for acceptance until 21 days after the date you receive this letter".* Again, the judge at first instance had decided the offer was not a valid Part 36 offer as it was time limited. The appeal judge, deciding the case after C v D, applied the C v D principles and construed the offer letter as a whole and found that it could be construed as a valid Part 36 offer as the letter was headed "Part 36 offer" and envisaged that the offer might be accepted after the 21 day period referred to in the letter had expired. The offer did however fall down on separate grounds, namely that it sought to avoid the cost consequences of Rule 36(10). That was not acceptable; the offeror was attempting to achieve the protection of a Part 36 offer without at the same time accepting the burden of the costs consequences of Rule 36(10). Therefore this was not a Part 36 offer.

There appears to be some ongoing confusion regarding the circumstances in which the court will construe an offer as being a valid Part 36 offer, notwithstanding an apparent deficiency, and circumstances in which the offer will be considered invalid due to a deficiency. Parties will need to be careful to ensure that any intended Part 36 offer complies strictly with the requirements of Part 36 and conversely that any offer not intended to be a Part 36 offer is expressed not to be a Part 36 offer. Parties should also be careful to ensure that any withdrawal of a Part 36 offer is done properly in accordance with Part 36.

Case Law Updates Continued

No liability because what was damaged was "the thing itself"

Broster & Ors v Galliard Docklands Ltd & Anor [2011] EWHC 1722 (TCC) (07 July 2011)

The legal principle in issue in this case was helpfully explained in an earlier case, Linklaters Business Services Limited v Sir Robert McAlpine [2010] EWHC 1145 (TCC), where the court explained that *"a claimant cannot recover for the cost or loss of the negligently manufactured, designed or constructed "thing" itself. So, the purchaser of a ginger beer bottle which contains a snail may recover for personal injuries caused if she drinks the ginger beer but not for the cost of the bottle."*

In this case the builder of 6 terrace houses failed to ensure that the roof joists in respect of each of the premises were strapped to the walls and the installation of the ceiling joists into an open bed joint. When winds gusted at 44 knots the roof raised off the walls of the premises up to a height of one metre before falling back down onto the walls of the premises.

The claimants are the current owners of the properties and the defendants are the employer that instructed the construction of the properties (Gaillard) and the contractor, East London Construction Limited (ECL). The building contract was in the standard JCT Standard Form with Contractor's Design (1981 edition incorporating amendments).

ECL argued that this was a claim which relied upon physical damage as a constituent element of tort and there could be no liability because what was damaged was in essence "the thing itself". In general terms a party may not sue a contractor in tort in relation to damage to a building built by a contractor, where there is no contract between the two parties.

Mr Justice Akenhead considered the dicta of Lord Bridge in Murphy v Brentwood DC [1991] 1 AC 398 and concluded that one needs to consider the structure in question as a whole and to avoid any artificiality in practically considering the structure. Mr Justice Akenhead found that:

(1) ECL owed no duty of care to the claimants in relation to the physical damage to their houses; and
(2) The damage was to the whole of the building. It could not be argued that the segment of the roof over each individual terraced unit was to be considered as separate from the whole roof or that the roof as a whole was to be considered as separate from the walls of the units below. It follows that there was here damage "to the thing itself".

Mr Justice Akenhead held that the Claimants had no realistic prospect of success in their claims as put forward.

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