



Construction Law Update Seminar

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Bonds & Guarantees

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In tougher economic climates the importance of bonds and guarantees comes to the fore. We have been advising more on these in the last six months than at any time over the last few years. The construction industry will be familiar with the various types of bond/guarantee on offer including:-

- Parent company guarantee
- Performance bond
- Retention bond
- Advance payment bond

The reasons for seeking or providing a bond are well known. For the employer, parent company guarantees and performance bonds provide security for performance and protection against breach of contract by the contractor. They mean the employer will not be left in the lurch in the event of breach or in the event of insolvency of the contractor.

For contractors, it may be in their interest to provide, for example, a retention bond in lieu of retention being deducted which will assist cash flow.

Advance Payment Bonds may be required by an Employer where the Contractor has requested an advance payment to cover plant, equipment or materials. For example a Contractor may require an advance payment to cover the cost of high capital value materials manufactured specifically for the particular project. Rather than take the risk of making the payment with no control over the use of the funds or the materials, the Employer may seek, in return, an Advance Payment Bond to protect themselves

The type of issue we tend to be involved in is resisting bond calls when they are made. There are, very broadly, two types of wording contained within bonds – on demand wording and conditional wording. Typical wording of an on demand bond would be:-

"We [bondsman] irrevocably and unconditionally undertake to pay [£] immediately upon receipt by us of your first demand in writing (and we hereby waive all rights of objection and defence in this regard)... Such demands shall be accepted by us as conclusive evidence that the amount claimed is due to you."

Resisting the call of an on demand bond is very difficult and there are extremely limited possibilities of resisting any calls.

If you have advance notice of a possible call then stopping that happening by obtaining an interdict is the best bet, if there are grounds for this i.e. the underlying basis of the call is unfounded.

After a call is made, options are limited. It is worth checking, if there is a bond call on an on demand bond, that the procedural requirements have been followed including whether the correct designation of parties has been used, correct addresses, method of service and form of wording of the demand. If these are not correct it may be possible, at least on a temporary basis, to persuade the bondsman not to pay out under the bond. However, these aspects are easily remedied by a further call in the correct terms and all this will do is buy some time before the call is made. However, as that may be time enough to allow an interdict to be obtained so it could be valuable.

Conditional bonds are a different story. Typical wording here would be:-

"The Guarantor guarantees to the Employer that, in the event of a breach by the Contractor, the Guarantor shall satisfy and discharge the damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provisions of the contract and taking into account all sums due or to become due to the Contractor."

A bond with wording such as that allows a number of possibilities for resisting a call. Firstly, the procedural requirements for a bond call require to have been met so these should be checked in the same way as for the on demand bond.

More substantively however, there is a lot within the wording of the conditional bond which allows arguments to be raised. The first requirement for the call is that there has been a breach by the contractor. It may be possible to argue there has been no such breach and to persuade the bondsman of this, or at least put enough doubt in the mind of the bondsman to suggest that further enquiry is required before any payment is made.

The next issue is the wording "as established and ascertained" in respect of the damages. There is an argument that unless there are agreed sums in respect of damages, establishing and ascertaining the level of damages would require at the least a decision of a third party such as an adjudicator or a court.

The third issue within this wording is the reference to sums due or to become due to the contractor. Again, it may be that these have not yet been established or they may be in dispute. Again it might be possible to resist the call on the basis that these require to be established either through a certification process or through a third party determination procedure such as adjudication.

It is important when there is any threat of a call on a conditional bond or immediately upon becoming aware that the call has been made to contact the bondsman to make representations in relation to all and any arguments available to try to prevent them paying out in terms of the bond.

An interdict can also be considered if dialogue with the bondsman is not successful.

The reason it makes sense to prevent any bond call is that after the bondsman has paid, it is likely that the counter indemnity which the contractor will have had to provide to the bondsman will kick in. They tend to be on "on demand" terms meaning that if the bondsman has already paid out, the contractor requires to repay them under the counter indemnity, regardless of any arguments available in terms of the validity of the bond call itself.

If attempts to resist a bond call being made or to prevent a bondsman paying out fail, there are still steps which can be taken.

There was a case in the Scottish courts last year which dealt with the position after sums had been paid out on a bond call of an on demand bond. This was *Speirsbridge Property Developments Limited -v- Muir Construction Limited*.

This case involved a performance bond for £593,000. It was an on demand bond which was payable on receipt of the employers' first demand in writing stating that the contractor had failed to perform and observe all the conditions and stipulations of the contract.

Speirsbridge made a demand to the bank which had provided the performance bond for payment of £503,000. The bank made payment. In terms of the counter indemnity which had been provided, Muir repaid the bank.

Muir then alleged that the grounds of the bond call were erroneous in that they denied there had been any failure to perform in terms of the contract. Muir claimed for repayment of the sums paid by them based on a term which they said required to be implied into the building contract namely that if a bond call is made, Speirsbridge will account to Muir for the proceeds of the bond and will retain only the amount equivalent to any loss suffered as a result of Muir's breach of contract, if any.

In this case, it was agreed that there was such an implied term related to the obligation to account. The question in this case was whether that term should be implied into the building contract or into the bond itself.

Speirsbridge queried whether their obligation to account was to the bank which had paid out under the bond or to the contractor which had repaid the bank under the terms of its counter indemnity. Speirsbridge were concerned that if they accounted to Muir, they would then be pursued by the bank for the same money.

Muir claimed that because they had paid under their counter indemnity, the bank had been fully reimbursed and the payment was due to Muir.

Lord Glennie decided that the obligation to account was to the contractor and that the term was to be implied into the building contract.

This obligation to account following a bond call is controversial. Although it was agreed between the parties in this case that there was such an implied term, that has not been the case previously. In *Cargill -v- Bangladesh Sugar and Food Industries Corp.*, the court accepted that there was a duty to account. However in *Seepong Engineering Construction -v- Formula One Administration Limited*, it was held that there should be no accounting after a bond call. This is still undecided in Scotland because the Speirsbridge case proceeded on the basis of agreement between the parties on this issue but the case may assist.

Other things to watch out for when dealing with bonds are multiple sureties and expiry provisions.

Where there are multiple sureties for the same obligation, the surety who discharges the obligation can then look to the others for a contribution (see *Stimpson -v- Smith 1999*). This situation could arise where there is both a Parent Company Guarantee and a Performance Bond in place on a particular contract. The parent company will not necessarily be off the hook because an employer chooses to call a Performance Bond.

The expiry provisions of bonds are important. Where there is no expiry provision stated within the bond, the bond will continue in force until the end of the prescriptive period unless it can be agreed within the employer that the bond can be released earlier than this. That can mean the cost and administration of the bond continues for many years after completion of the project. That may not matter in terms of the cost of the bond since this can be relatively low but the impact is on the effect on borrowings because of the existence of the counter indemnities which accompany these bonds.

The message is here to make sure your bond contains an expiry date or an expiry linked to an event which will happen under the contract such as one year after the practical completion certificate or other certificate issued under the contract.

Look out however for clauses only linking expiry of the bond to issue of certificates. If the relevant certificate is not issued, the bond will continue in place until the end of the prescriptive period. The way to prevent that is to include a longstop date.

Project Bank Accounts

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One of the key aims of the Latham Report of the early 1990s was to address poor payment practices in the construction industry. The report was followed by the Housing Grants, Construction and Regeneration Act 1996 which laid down certain minimum provisions regarding payment practices and the Late Payment of Commercial Debts (Interest) Act 1998 which provided for interest payable at 8% above base on late payment of debts. However despite the best efforts of the policy makers and legislators, poor payment practices remain a key issue affecting the industry, and one which arguably is unlikely to improve in the current economic climate.

The introduction of project bank accounts (or PBAs) is one measure which has been heralded by some as offering comfort in the current climate. Indeed the Office of Government Commerce Guide to Best "Fair Payment" Practices published in January 2008 commended as part of its "fair payment charter" the use of Project Bank Accounts by public sector clients "where practical and cost effective" and there is no reason in principle why such accounts could not be used by private sector clients.

Establishing a Project Bank Account

Put simply, establishing a project bank account requires the client to set up a trust account and to make payment of amounts due under the main contract directly into that account. Before the client's money is paid into the account, the main contractor must prepare a breakdown of the main supply chain payments included in its valuation. Under the operating mandate for the account, the authorised signatories for the client and the contractor then release funds directly to the supply chain in the amounts contained in the contractor's breakdown.

The account itself is set up in trust and provided that the trust is properly constituted and is upheld on the insolvency of the main contractor (which remains to be tested and which we shall consider in more detail below) the intention is that the project bank account is ring fenced against the insolvency of the contractor so that monies payable to sub-contractors are protected. Such accounts typically guarantee 30 day payment period for sub-contractors which is in line with the OGC guidance, and thus mitigate against the risk of supply chain failure through poor cashflow.

How do PBAs operate?

Typically,

- the Contractor prepares an interim or milestone payment application in the normal way
- he performs due diligence on the supply chain applications
- he agrees the application with the client representative/PM
- the client representative/PM prepares the certificate
- the Contractor prepares a payment schedule or analysis
- invoices are raised
- client matches invoice with certificate and releases funds to PBA
- contractor issues payment schedule to client and bank
- once Bank has authority from both parties it makes payment by BACs or CHAPs
- contractor and supply chain receive payment electronically within 5 days of deposit of funds

How PBAs assist Payment Flow

So how significant are Project Bank Accounts likely to be in delivering increased security and speed of payment to the supply chain?

Project Bank Accounts normally include the following features:

- They usually deal with interim payments only – i.e. the whole contract sum is not paid into the Project Bank Account in advance. Instead, sums are paid in on a month by month or on a staged basis as payments become due.
- Parties have the advantage of knowing that the money should already be in the bank at the time when payment falls due.
- Project Bank Accounts speed up the cashflow to sub-contractors as there is no need to allow time for money to cascade down to the supply chain; instead, the supply chain is paid direct from the Project Bank Account itself.
- If a valid trust is established, the amount in the Project Bank Account at the relevant time may be protected if the Contractor becomes insolvent.

Note however that certain things which Project Bank Accounts do not normally do:

- They do not cut across contractual provisions governing the preparation and submission of interim applications or the valuation authorisation or certification of interim payments.
- There is no guarantee that use of this mechanism will ensure that the *right* amount of money will be available for sub-contractors (as opposed to just some money) as they do not cut across normal rights of what is commonly described as set off.
- They do not take away the Contractor's responsibility for managing the supply chain so that work is performed in accordance with the contract.
- The wider insolvency risk is not covered since only the interim payment which is already due to the Contractor is paid into the account (although full client pre-funding is of course an option if appropriate).

It is clear that Project Bank Accounts should have a positive effect in preventing contractors from simply sitting on cash.

PBAs and Trusts

There is some uncertainty over the level of protection afforded by a Project Bank Accounts in the event of the insolvency of the Contractor. In order to obtain protection in the event of insolvency, a valid trust must be established. It should be noted that the requirements of Scots law for the establishment of a trust are different and more onerous than those applying in England and Wales, where the concept of a "constructive" trust assists. So to determine the validity of the proposed arrangements in Scotland it is necessary to consider "what is a trust?"

A working definition of "trust" for the purposes of Scots law can be found in the Stair Memorial and Encyclopaedia.

"A legal relationship in which the **legal title to property is transferred to a person (the trustee)** who does not require an unlimited right to the property but who **holds it subject to an obligation to apply it** in accordance with the directions of the person who constituted the Trust **for the benefit of certain persons (the beneficiaries)**".

Accordingly, in Project Bank Accounts the beneficiaries will clearly be the Contractor and the relevant Sub-Contractors.

Note however, that in Scots law there are certain essential requirements for a trust:

There must be -

- an asset
- defined trust purposes
- a beneficiary with defined rights
- **EITHER** delivery of the trust deed **OR** delivery of the subject of the trust to achieve an irrevocable divestiture of the truster and investiture of the trustee

All of that no doubt sounds terribly academic so it is worth considering a number of examples:

Example 1 – Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd 1981 SC111

Example 1 concerned a contract for the sale of bricks which stated that the buyer would hold in trust any rights in the contract of resale until full payment had been made to the seller.

The Court held that no trust had been created since (1) there had been no delivery of a trust deed (the contract containing merely a contractual obligation to constitute a trust rather than amounting to a declaration of trust of itself) and (2) no beneficial interest was conferred upon the "so called" beneficiaries i.e. all they were entitled to under the contract was the price of the bricks rather than to an interest in the sums held "on trust".

The Court's view was that the "trust" device in this case was designed to do no more than keep the company's valuable assets out of the hands of its creditors on insolvency at least until payment had been made in full for the bricks.

Example 2 – Balfour Beatty Ltd v Britannia Life Ltd 1997 SLT10

The second example involves the JCT/SBCC wording regarding the fiduciary nature of a management contractor's (or employer's) interest in retention monies. It was held that no trust was created because no actual asset existed which could be the subject of a trust. The retention monies were not really "held" as such – the retention provisions simply reduced the amount of interim payments, and there was

then a contingent liability to pay an amount at a future date once certain calculations had been carried out (e.g. to taking into account the performance of the contractor and any necessary remeasurement at the end of the project).

Implications for Project Bank Accounts in Scotland

Whilst the requirements of the common law for the establishment of valid trust are more demanding in Scotland than in England, Project Bank Accounts should nonetheless be able to deliver the same benefits in Scotland as in England and Wales.

However, as the examples given above will demonstrate, careful drafting is required to establish a valid trust to allow for potential protection on insolvency.

Finally, if the intention is to establish a Project Bank Account, it is advisable to document the arrangements in contracts and sub-contracts.

To date, two industry standard form contracts have been amended to make provision for project bank accounts:

NEC – the NEC launched a new option clause for the NEC3 Engineering and Construction Contract on 11 June 2008.

The PPC Suite of Contracts have also been updated and now include a project bank account option.

Importantly, it is anticipated that the JCT/SBCC will follow early this year.

Case Law Update

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Introduction

In the past year, once again, there have been a number of significant legal developments affecting the construction industry.

This paper covers the following cases:

1. *Transfield Shipping Inc v Mercator Shipping Inc* (also known as "*The Achilleas*") on how far reaching a claim for damages can be;
2. *Balfour Beatty Construction (Northern) Ltd v Modus Corovest (Blackpool) Ltd* in relation to staying proceedings for mediation; and
3. the conclusion of the saga of *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* which concerned the dispute over the steel works at the new Wembley stadium.

1. *Transfield Shipping Inc v Mercator Shipping Inc* ("The Achilleas")

The Facts

Transfield chartered a single decker bulk carrier ship (The Achilleas) from Mercator (the ship owner) for a five to seven month period in January 2003. Transfield had an option to extend the hire charter period for a similar amount of time at the end of the charter period. In September 2003, Transfield exercised their option to extend the charter period for a further period of the same duration, at the rate of US\$16,750 per day. The latest date for returning the ship was 2nd May 2004.

By April 2004, however, the demand for single decker bulk carriers had increased so much that the market rates had more than doubled compared to those which prevailed in September 2003 (when Transfield had first chartered the ship). So, when Transfield gave notice to Mercator that they would redeliver the ship between 30th April and 2nd May, Mercator tried to take advantage of the increase in rates and fixed another charter to someone else.

In terms of this contract, the last day that Mercator could deliver the ship to the new charterers was 8th May 2004, failing delivery by then the new charterers were entitled to cancel. The daily rate for the new charter was agreed at US\$39,500 per day.

Transfield had decided on one last run before returning the ship to Mercator. This was to deliver coal from China to Japan. Due to a delay at one of the Japanese ports there was a delay. The vessel was not returned on time. By 5th May. It had become clear to everyone that the vessel would not be available to the new charterers on time. By that date, rates had fallen again and so, in return for an extension of the delivery date to 11th May, Mercator agreed to a reduced daily rate for the new charter of US\$31,500. Transfield redelivered the ship to Mercator on 11th May 2004.

Mercator raised an action against Transfield for the profit they lost for having to accept a lower rate for the new charter due to the delay in redelivery of the vessel. They calculated that had the second charter gone ahead on the originally agreed rate, they would have made US\$8,000 extra per day totalling approximately US\$1,400,000 over the period of the charter.

Transfield, on the other hand, accepted that they were due to pay Mercator damages in respect of the loss they had caused, but argued that Mercator were only entitled to the difference between the market rate and the charter rate for the 9 days that they were deprived of the use of the ship. This worked out at approximately US\$160,000.

Arbitration

The case first went to arbitration, where a majority of the arbitrators agreed with Mercator that the full \$1,400,000 should be paid by Transfield. The seminal case in the UK as to how one determines the measure of damages for breach of contract is *Hadley v Baxendale*, which was decided over 150 years ago. In terms of *Hadley v Baxendale*, if someone has breached their contract with you, you can recover the resulting foreseeable losses that either:

1. arise naturally from the breach and would have been considered to have been in the minds of the parties when they entered the contract; or
2. would have been in the minds of the parties when they entered into the contract because they knew of some special circumstances when they entered into the contract.

The commercial reasoning behind the *Hadley v Baxendale* test is that the courts will try and look at what the parties thought their risks were when they entered the contract. If they were aware of the risks (either because they were of the sort that arose naturally or they had been made aware of the specific risks), then they could either have walked away from the contract, limited their liability in some way, or simply proceed and face the potential risks. If they knew of the risk and simply proceeded, then they would be liable for the risk of losses arising from a breach of contract.

In this case, a majority of the arbitrators found that the loss suffered by Mercator, the ship owner, in not being able to deliver the ship to the second charterer on time was of a kind that arose naturally, according to the usual course of things, from the breach of contract, i.e. the failure to redeliver the ship on time. They felt that the possibility that Mercator could lose out on a subsequent charter as a result of Transfield's late redelivery was something that would have been in Transfield's mind when they extended the charter period.

As a result, the arbitrators found that the loss were foreseeable under the first rule in *Hadley v Baxendale* and Transfield were ordered to pay Mercator the full US\$1,400,000.

House of Lords

The decision of the majority of the arbitrators was upheld by both the Commercial Court and the Court of Appeal. The House of Lords, however, took a more restrictive view and found in favour of Transfield that only the smaller amount was recoverable.

The starting point for the House was that they needed to decide whether the loss suffered by the ship owner, Mercator (i.e. the loss of profit on the subsequent charter) was of the type that the original charterer, Transfield, ought fairly to have accepted responsibility for at the time they chartered the vessel.

In this case, they decided that it was not. Such losses would have been completely unquantifiable at that time since Transfield would not know the duration (or other material terms) of the subsequent charter and therefore could not have quantified the risk that they would be taking on. Furthermore, what was not foreseeable (to either party) in this case was the market rate volatility.

As such, the House held that Transfield could not be held to have assumed responsibility for the extreme and unpredictable market changes when they entered the contract and were therefore only liable in damages for the smaller sum, for which they were taken to have assumed the risk.

Conclusion

Shipping cases, in many ways like construction cases, are recognised as a "specialised subject", however, the decision of the House of Lords in *The Achilleas* addresses an issue of general principle applicable to contracts of every sort. The House was keen to emphasise that their decision was aimed at increasing commercial certainty. With that in mind, the words of Lord Rodger of Earlsferry (at paragraph 52 of the decision) merit repeating:-

"In any event, amidst a cascade of different expressions, it is important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are *likely* to result from the breach in question - in other words, those losses which will generally happen in the ordinary course of things if the breach occurs. Those are the losses for which the party in breach is held responsible - the stated rationale being that, other losses not having been in contemplation, the parties had no opportunity to provide for them."

2. Balfour Beatty Construction (Northern) Ltd v Modus Corovest (Blackpool) Ltd

The second case we consider is one from the TCC from December 2008. It is the decision of Mr Justice Coulson in the dispute between Balfour Beatty Construction (Northern) Ltd ("Balfour Beatty") and Modus Corovest (Blackpool) Ltd ("Modus").

The Disputes

Balfour Beatty sought summary judgment in respect of two separate claims. The first the enforcement of an adjudicator's decision in their favour, dated 2nd October 2008, in the sum of £180,858.69 with

interest. The second based upon a valuation / interim certificate 29 in the sum of £976,265.20, together with interest.

Modus sought a stay of the proceedings so that the disputes could go to mediation. If the proceedings were not stayed, they opposed both applications made by Balfour Beatty; sought to set off their counterclaim against any sums that would otherwise be due to Balfour Beatty and sought summary judgment on that counterclaim for liquidated damages in the sum of £2,073,300.

For present purposes, the aspect of the court's decision that is of particular interest relates to the application by Modus for a stay of proceedings in relation to the Balfour Beatty claims.

The Facts

Modus had engaged Balfour Beatty to carry out the design and construction of major works at Hounds Hill Shopping Centre in Blackpool. The contract sum was £33,066,218. The contract works were subdivided into 33 separate sections and a sectional completion supplement was agreed.

Clause 39B has been comprehensively amended so as to remove any reference to arbitration. Instead, the new clause read as follows:

"39.1 Either party may identify to the other any dispute or difference as being a matter that it considers to be capable of resolution by mediation and, upon being requested to do so, the other party shall within seven days indicate whether or not it consents to participate in the mediation with a view to resolving the dispute or difference. The objective of mediation under clause 39 shall be to reach a binding agreement in resolution of the dispute or difference."

The Arguments

Modus argued that all of the applications should be stayed for mediation in accordance with clause 39 of the parties' agreement.

The judge accepted that if the parties have agreed a particular method by which their disputes are to be resolved, then the Court has an inherent jurisdiction to stay proceedings brought in breach of that

agreement, see *Channel Tunnel Group Limited & France Manche SA v Balfour Beatty Construction Limited* [1993] AC 334.

Furthermore, such a stay may be granted even where the term of the contract on which the claiming party is said to be in breach was a general agreement to refer disputes to ADR, see *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).

There were two reasons why in this case the judge considered that it would not be appropriate to grant a stay.

First, he accepted Balfour Beatty's argument that the mediation agreement in the parties' contract was nothing more than an agreement to agree. It was too uncertain to be enforced by the Court.

Secondly, even if he was wrong about that and there was a binding agreement to mediate, the judge would only have been prepared to stay the claim and the counterclaim for mediation if he had concluded that the party making the claim was not entitled to summary judgment, i.e., that there was an arguable defence on which the other party had a realistic prospect of success, and the best way of resolving that dispute was a reference to mediation.

Sadly for Modus, the judge found that the only realistic prospect of success in resisting anything were Balfour Beatty's relative to the counterclaim! The application for a stay was refused and summary judgment granted in respect of both Balfour Beatty's claims. He considered that there was a bona fide dispute in relation to the Modus claim for liquidated damages and so declined to give summary judgement for it, leaving the parties to decide whether they wanted that dispute to be dealt with by way of mediation, adjudication or litigation.

Application in Scotland

It must be said that the criteria applied by Mr Justice Coulson in this case were, to all intents and purposes, identical to the criteria that we would expect to be applied by the Scottish Courts in a case of this nature.

There are, however, two particular aspects worthy of note.

Firstly, many of you will be aware of the ongoing Civil Courts Review, being chaired by the Lord Justice Clerk, Lord Gill. It is due to publish its report in April. One of the particular issues being considered by the review is the role of mediation and other methods of dispute resolution in relation to the court process.

The second consideration is the terms of the Standard Building Contract for use in Scotland.

The standard wording used in relation to mediation is as follows:-

"The Parties may by agreement seek to resolve any dispute or difference arising under this Contract through mediation."

It is difficult to see how this could be interpreted as anything other than an agreement to agree. That being so, if that is accepted as the correct analysis then, clearly, if parties are serious about the use of mediation, a revisal to the Scottish Standard Forms would be necessary.

3. Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd

The potentially high costs of litigation – both in respect of money and time – is nothing new. Litigation itself is often used as a bargaining chip to secure an out of court settlement and the rise of alternative methods of dispute resolution such as mediation, arbitration, and adjudication is well documented (especially in the construction industry). All three of these methods are often cheaper and quicker than a lengthy court battle.

Nonetheless, sometimes a court action is simply necessary – although even then parties should (and usually do) undertake a serious cost / benefit analyse to gauge what the maximum costs they may be exposing themselves to in a court action if they are not successful. However, this is not always the case even when the parties are experienced commercial entities as was most recently and very clearly illustrated in the case of *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* regarding the Wembley stadium saga.

The Facts

The building of the £800 million Wembley national stadium was plagued by a number of well publicised disputes. The case is interesting on a number of legal points, however, by far the most fascinating aspect of this case was the parties' enthusiasm to litigate.

The main contractor on the project was Multiplex who had sub-contracted the steelworks (including Wembley's new eye-catching steel arch) to Darlington based Cleveland. Over the course of the works on the new stadium, the relationship between Multiplex and Cleveland gradually deteriorated, with the result that Cleveland's role in the project was substantially reduced by an agreement that varied the original sub-contract. Under the new agreement, Cleveland were to complete a reduced scope of works for a new fixed sum. After a dispute over unpaid bills, Cleveland walked off site in August 2006. Multiplex were then required to employ a new steel subcontractor to perform Cleveland's uncompleted works.

Multiplex's new sub-contractor was in fact able to complete the works for much less than Multiplex would have had to pay to Cleveland, had they not walked off site. As a result, Multiplex had in fact profited from Cleveland's breach, an unusual turn of events, to say the least. Nonetheless, Multiplex claimed damages for Cleveland's breach of contract. Cleveland, on the other hand, submitted that Multiplex's claim had to fail because Multiplex would have incurred costs for the steel fabrication regardless of Cleveland's breach.

The Decision

At various stages throughout the court action, the court advised parties that although the recourse to court was always an option it might make more commercial sense if an alternative method of dispute resolution (such as mediation) was employed and some sort of settlement was achieved. This would save not only on the parties' legal costs, but also greatly reduce their losses both in terms of legal costs and the cost to their business of lost management time spent on the case rather than the company's business.

Mediation was in fact attempted but both parties returned to court without achieving a settlement. The court eventually found (in its 200 page judgement) that Multiplex had failed to show that Cleveland's repudiation of the contract had caused any delay to the project or indeed any loss in production at the relevant time. Multiplex could not prove any loss flowed from Cleveland's breach because in fact its gains exceeded its loss. Nonetheless, the judgement meant that overall Cleveland were required to pay Multiplex approximately £6 million in respect of overpayments made to them, damages for breach,

and interest. A further £2 million (representing only 20% of Multiplex's legal costs) was also due to be paid to Multiplex by Cleveland.

Nonetheless, perhaps in light of the current financial climate, and the difficulty faced in explaining such wasted expenditure to shareholders, both parties have called the judgement a success. Multiplex stated that,

"The settlement, as it stands, is within our expected range of outcomes and we are pleased that the judgement in our favour does at least vindicate our claim. However, we are currently reflecting on the judgement in detail and considering our options."

A spokesperson for Cleveland stated that they too felt "vindicated on most of its arguments."

By the time the judgement was handed down in September 2008, the costs of the litigation had in fact risen to an almighty £14 million; 550 ring binders of information had been produced; and the cost of photocopying alone had approached £1 million. The court remarked strongly on the parties' failure to fully explore the courts' previous suggestions of alternative methods of dispute resolution, which were summed up in a chapter in the judgement entitled "The Lesson to be Drawn from this Litigation."

The court remarked that,

"Both parties have a measure of responsibility for this situation. Over the last two years both parties have brushed aside repeated judicial observations on the wisdom of settling this particular litigation. Each party has thrown away golden opportunities to settle this litigation upon favourable terms"

And that,

"...the level of expenditure far exceeds the sums which...are seriously in dispute between the parties."

Conclusion

The decision is interesting as yet another example of the courts' endorsement of utilising other means to resolve disputes, such as mediation. The court also promotes the effective management of cases by encouraging parties to seek a court's decision on certain matters of principle which are likely to be blocks to negotiating a deal in order to progress negotiation or mediation. Effective case management is key in making sure litigation is handled as efficiently as possible.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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