Case Law Handout

Ownership after construction

Royal Parks Ltd v Bluebird Boats Ltd [2021] EWHC 2278 (TCC)

Facts

The Defendant (Bluebird) has been operating boating facilities on land owned by the first Claimant (Crown), but managed by the Second Claimant (Royal Parks) since 1998. In 2004, both parties entered into a concession contract for the Defendant to replace the current boathouse and provide boating services.

The contract entitled the Defendant to occupy the premises during the duration of the contract and expired in November 2020. Although the Defendant sought to renew it, the Claimants refused.

Issue

The Claimants issued proceedings regarding the ownership of the boathouse and to obtain a restraining order which prevents the Defendant from trading from the boathouse and from its removal.

The Claimants relied on the fact the boathouse was constructed on land owned by them, and therefore they were the rightful owners of the property, and any associated rights, such as the right to trade.

However, the Defendant argued the property was a chattel and was not affixed to the land. This was so that if the contract expired, the Defendant had discretion to dismantle it as a form of capital investment for them. Therefore, they were the rightful owners of the boathouse.

Decision

In deciding the matter, the judge considered:

1. Who owns the boathouse and is it part of the land?
2. Can the Defendant dismantle it?

The boathouse is comprised of both the sub and superstructure; the concrete and piled foundation form the superstructure, and its steel frame creates a permanent connection between the materials. This illustrates the boathouse was built to be fixed to the land and if removed, would significantly destruct its components. Therefore, the Claimants owned the boathouse, as it formed part of the land they owned.

In considering the second point, the judge referred to the contract which did not include any specific provisions permitting the Defendant to dismantle the boathouse.

For further information, please see: The Royal Parks Ltd & Anor v Bluebird Boats Ltd [2021] EWHC 2278 (TCC) (11 August 2021) (bailii.org)

Liquidated Damages after take over

Eco World – Ballymore Embassy Gardens Company Limited v Dobler UK Limited [2021] EWHC 2207 (TCC)

Facts

The Claimant (EWB) is an employer, who appointed the Defendant (Dobler), a UK subsidiary of a German company, as trade contractor to design, supply and carry out glazing works.

The works were governed by a contract dated July 2016 and the works commenced in August 2016. A completion date had been agreed for August 2017, although there was no specific reference to sectional completion. The completion date was later extended to April 2018, by way of a deed of variation.

The Defendant had failed to complete the works by the revised completion date, and the Claimant took over specific areas of the premises (Blocks B and C), even though no practical completion certificate had been issued in relation to these areas.

Practical completion was achieved in December 2018, but disputes arose regarding the final account valuation, including the entitlement of liquidated damages, which led to the commencement of an adjudication.

As a decision was not issued during the first adjudication, a second adjudication was issued, whereby the Defendant argued the Claimant was not entitled to liquidated damages because they took over Blocks B and C early, which amounted to practical completion and therefore, removed their right to claim liquidated damages. However, the Claimant's position was that they had not taken over Blocks B and C and practical completion was delayed because of defects in the works.

The adjudicator decided the Claimant was entitled to liquidated damages from the date of the revised completion date, until it took over part of the works but not thereafter. This was upheld during the third adjudication.

Issue

Part 8 proceedings were issued by the Claimant to determine the validity of the liquidated damages provisions under clause 2.32.1 of the contract, and their right to claim general damages for delay.

The Claimant's position is that this provision in unenforceable and partial possession of specific blocks is permitted under the contract, without any limitations on the ability to claim liquidated damages.

However, the Defendant argues that provision is valid and partial possession reduces the ability to claim liquidated damages. If the provision is unenforceable, the Claimant's ability to claim general damages is capped at the rates of liquidated damages under the contract.

Decision

Clause 2.32.1 states "*if the Trade Contractor fails to complete the Works or works in a Section by the relevant Date for Completion of a Section or the Works, the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4.16, give notice to the Trade Contractor which shall state that for the period between the relevant Date for Completion of a Section or the Works and the date of practical completion of the Works or Section:*

2.32.1.1 he requires the Trade Contractor to pay liquidated damages at the rate stated in the Trade Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or

2.32.1.2 that he will withhold or deduct liquidated damages at the rate stated in the Trade Contract Particulars, or at such lesser stated rate, from sums due to the Trade Contractor."

The judge held that the above provision is enforceable on the basis that the "natural and ordinary" meaning should be given to it and it does not provide an alternative mechanism to adjust the rate of liquidated damages, where there is partial possession of the site or where the completion date for part of the works is not met.

However, if the provision was void, then general damages would be available to the Claimant at a capped rate based on rate of liquidated damages.

For further information, please see: Eco World - Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC) (03 August 2021) (bailii.org)

Warranties – can they be constituted as contracts under the Act?

Toppan Holdings v Simply Construct [2021] EWHC 2110 (TCC)

Facts

The Claimant (Toppan), a freeholder appointed the Defendant (Simply Construct), a contractor, to carry out works at care home in London.

Works were completed in 2016, however the Claimant and tenant discovered fire safety defects a few years later.

Instructions were given to the Defendant to remedy the defects, but the Defendant refused. The Claimant employed another contractor to carry out repair works and upon doing so, discovered additional defects.

Proceedings were issued by the Claimant requiring specific performance under the contract and successfully forcing the Defendant to execute a collateral warranty.

The Claimant issued adjudication proceedings against the Defendant, for the losses incurred (defects and remedial works). However, the Defendant argued the adjudicator lacked jurisdiction on the basis the warranty did not fall within the definition of "construction contract" under section 104 of the Housing Grants, Construction and Regeneration Act 1996 ("the Act").

A decision was issued by the adjudicator in favour of the Claimant, requiring the Defendant to pay sums. However, the Defendant failed to do so and the Claimant issued enforcement proceedings.

Issues

The judge had to consider whether a warranty is a "construction contract" under the definition of the Act and therefore, whether the Claimant was entitled to issue adjudication proceedings, and enforce the adjudicator's decision.

Decision

The court relied on previous case law, Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd [2013], where the classification of a warranty as a construction contract depended on if the required works had been completed or were due to be completed.

In the above case, the warranty was deemed a construction contract on the basis the works were yet to be completed.

However, in considering the current case, the court held the warranty had been granted for retrospective works. Therefore, it did not amount to a "construction contract" under the Act and the Claimant was not entitled to adjudicate, nor can the adjudicator's decision be enforced.

For further information, please see: Toppan Holdings Ltd & Anor v Simply Construct (UK) LLP [2021] EWHC 2110 (TCC) (27 July 2021) (bailii.org)

Protective equipment and suspension

Draeger Safety UK Ltd v The London Fire Commissioner [2021] EWHC 2221 (TCC) (04 August 2021)

Facts

The Defendant ("LFC") is the fire and rescue authority for London, it awarded the Claimant ("Draeger") a contract in 2010 for provision of respiratory protective equipment.

LFC wanted to upgrade its protective equipment, and on 5 August 2020 it published a contract notice in the Official Journal of the European Union for a ten-year contract for supply of protective equipment and repair and maintenance services.

Draeger submitted a bid for the project but was unsuccessful, LFC informed Draeger that the contract had instead been awarded to MSA Britain Limited ("MSA").

Issues

On 23 April 2021 Draeger issued proceedings seeking to challenge the award alleging breaches of The Public Contracts Regulations 2015 ("PCR"), this led to an automatic suspension under Regulation 95(1) preventing LFC from entering into a contract with MSA. LFC issued an application to lift the suspension, which Draeger followed with an application for an expedited trial to take place in October 2021.

Judgment

The court needed to decide the following 4 issues:

1. Is there a serious issue to be tried?
2. If so, would damages be an adequate remedy for the claimant if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant should be confined to its remedy of damages?
3. If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?
4. Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?

Serious issue to be tried

The test for this was whether the Court is satisfied that the claim is not frivolous or vexatious. Here, the court found that it was not in a position to evaluate the competing arguments of the parties on the merits of the case as this would require a detailed analysis of the technical documents and factual evidence. The Court was therefore satisfied that there is a serious issue to be tried.

Adequacy of damages for Draeger

The Court accepted that if the suspension were lifted and Draeger was removed from its position as apparatus suppler for LFB, Draeger may suffer a loss for which damages may not adequately remedy.

Adequacy of damages for LFB

The Court also accepted that damages would not be an adequate remedy for LFB as the continued suspension would delay the introduction of the operational benefits.

Balance of convenience

The balance of convenience test requires the Court consider all circumstances of the case to determine which course of action is to carry the least risk of injustice to either party if it is subsequently established to be wrong.

The Court was able to provide an expediated trial in 3 months after the hearing, so on this basis the Court found that this delay would not have any significant impact on the equipment improvements and would carry the least risk of injustice for the parties.

For further information, please see: Draeger Safety UK Ltd v The London Fire Commissioner [2021] EWHC 2221 (TCC) (04 August 2021) (bailii.org)

Replacement of the Architect and rights to claim loss of profit

Front Door (UK) Ltd (t/a Richard Reid Associates) v Lower Mill Estate Ltd [2021] EWHC 2324 (TCC)

Facts

- This claim related to the development of a holiday village in Dorset.
- The Claimant, a firm of Architects, had entered into a deed of assignment with another firm of Architects called WFA. WFA were invited to tender as architects on the project, they provided a sketch landscape design to the Defendant (the Developer) and received a fixed fee. WFA also assigned the copyright of the sketch to the Developer.
- WFA were not used as the Developer's architect for this project but planning applications were made using the drawing, the applications did not credit WFA as the designer but instead used other parties' names.
- The Claimant claimed that, although WFA had assigned the copyright for the sketch to the Developer, it had not assigned the moral rights for it (which are unassignable under Section 94 Copyright Designs and Patents Act 1988).
- The Claimant sought damages for loss of fees which it should have got once the planning permission was achieved and lost profits it would have earned if it had continued to work on the Development. It also sought damages in respect of breach of its moral rights.

The Judgment

- The Court determined the following:
    - The Claimant could not be the 'author' of the sketch for the sake of moral rights under the CDPA 1988. The author of the sketch was Mr Richard Reid, who was not a party to the claim.

  - The deed of assignment between the Claimant and WFA did not provide that any moral rights would be assigned to the Claimant.
  - There is no evidence that the Claimant had previously asserted it had moral rights over the sketch. The only person who could claim such rights was Mr Richard Reid.
  - Section 79(3) of the CDPA 1988, which states *The right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author's or director's employer by virtue of section 11(2) (works produced in the course of employment*. Provides a full defence to the claim for moral rights. In this case, the Developer had copyright ownership and was therefore able to use the drawings as the copyright owner, the moral rights argument was dismissed by the court.
- In respect of the Claimant's claim that the Defendants had committed the tort of passing off (i.e. that the Defendants had posited misrepresentations which served to damage the goodwill of the Claimant), the Court determined that:
  - The Claimant did not initially plead that it had been assigned the goodwill of WFA and the deed of assignment between the Claimant and WFA did not refer to assigning WFA's goodwill but to the contractual rights of WFA only.
  - In respect of the misrepresentation, evidence was provided by one of the architect Defendants which indicated WFA's sketch drawing had not been used and, according to witness evidence, this Defendant had not seen the drawings until 2020 (6 years after it was engaged on the project).
  - The Developer owned the copyright to the sketch and therefore was unlikely to have committed the tort of passing off as a result.
  - The Claimant was unable to provide any evidence that would support the assertion that the public would be deceived as to which party was responsible for the drawings and house designs which helped the planning application and construction of the project.
- The Court also found the particulars of claim did not set out in enough detail the formation of the contract or the specific terms on which the claimant could rely on. The Defendant would struggle to understand the case it was to defend as a result of these deficiencies.
- The Court refused to allow the Claimant to bring in additional Defendants to its claim because it was arguable that at least some of the claims being raised were statute barred and the limitation period had ended for these claims.

Graeme W Cheyne (Builders) Ltd v Michael Duthie Wilson 2021 SAC (Civ) 24 ABE-CA14-20

Facts

- This case concerned the build of a residential property in Cults, Aberdeen using the Scottish Building Contracts Committee: Minor Works Building Contract with Contractor's Design for use in Scotland (MWD/Scot 2016).
- The Contractor was to make interim payment applications to the 'Architect/Contract Administrator', which was a company known as 'WCP'.
- The Contractor submitted its interim application 14 by email to WCP on 21 February 2020, with final date for payment being 15 March 2020. Mr Wilson argued this

application had not been served validly as WCP had resigned as Architect/CA at the time of submitting the application. Mr Wilson refused to make the payment as a result.

- WCP had terminated its employment in July 2019. Mr Wilson did not inform Graeme W Cheyne ('GWC') that had resigned at the time of resignation.
- An adjudication was launched by GWC, which found they had validly served interim application 14 and Mr Wilson owed GWC £263,357.53 with interest and was responsible for paying the adjudicator's fees.
- Mr Wilson did not pay the amount stipulated in the adjudicator's award and an enforcement action was launched. The Sheriff Court enforced the adjudicator's award and did not grant Mr Wilson's counterclaim. Mr Wilson appealed to the Sheriff Appeal Court.

Judgment

- The judge agreed with the Sheriff Court on the basis the conduct shown by GWC was sufficient to show the interim payment application had been validly served, as decided by the adjudicator and therefore, enforcing it was justified.
- The appeal was dismissed.

For further information, please see: MICHAEL DUTHIE WILSON IN THE CAUSE GRAEME W CHEYNE (BUILDERS) LTD v MICHAEL DUTHIE WILSON [2021] ScotSAC Civ 24 (03 August 2021) (bailii.org)

Judicial Review – application for further information and specific disclosure under CPR rules.

Good Law Project Ltd v Secretary of State for Health And Social Care [2021] EWHC 1237 (TCC)

Facts

This was an application made by the Claimants, seeking the following orders;

1. For further information under CPR 18, as set out in schedule A of the order; and
2. For specific disclosures under CPR 31.12, to identify documents that falls with the classes of documents set out in schedule B of the order.

The application was heard by Mrs Justice O'Farrell and the proceedings before the court concerned challenges by way of judicial review, to contracts awarded by the defendant for the supply of PPE, from the interested parties.

The claimants' position was that the information provided through the defendant's evidence, have been supplied very late and incomplete and in the absence of additional information and documents, the claimants were unable to interrogate and respond to the defendant's evidence.

The defendant's position was that requests for information and documents were made at a very late stage. No orders for standard disclosure on a standard basis was made by the court or sought by the claimants and the claimants' requests at this stage would increase the costs and derail the timetable for the trial.

Judgment

Mrs Justice O'Farrell, upon considering the tests of CPR 18.1 and CPR 31.12, assessed each request made by the claimants and granted orders for searches to be carried out against items numbered 1-2 and 6-7 as set out in Schedule B of the order. The court held that no orders were needed, for items numbered 3-5 and 8-20 as sufficient information/documentation was previously disclosed and/or were provided as part of this application.

For further information, please see: Good Law Project Ltd v Secretary of State for Health And Social Care [2021] EWHC 1237 (TCC) (29 April 2021) (bailii.org)