Technical

Quarterly Case Law Update

Date: 20 August 2021

Introduction

This Article considers 3 recent Decisions from the English Courts. The issues within these cases centre around:

1. The Employer's Right to Make Deductions.
2. The 3rd Party Designs Duty of Care.
3. Contract Formation.

Employer's Right to Make Deductions

In the case of ***Shepherd Construction Limited v Drax Power Ltd [2021]*** **EWHC 1478 (TCC), Drax Power Limited** ***("Drax")*** entered into a Contract with Shepherd Construction Limited ("*Shepherd")* in 2012 to construct 4 Biomass Fuel Domes following Drax's decision to switch to a more sustainable fuel model.

The 1st phase of the Project commenced in early 2012 and focussed on delivering the Ecostore facility which unloaded the biomass pellets from the incoming trains, and stored them within the domes, to be transported to the Boiler Distribution System *("BDS").* Later in 2012, the BDS Works were introduced into the Contract by way of a Variation.

Subsequently, in 2014, Drax issued Taking Over Certificates for the Ecostore Works with the balance of the retention held by Drax, in accordance with the Contract, being released to Shepherd in December 2014.

In 2019, Shepherd applied for the release of retention on the BDS Works which was held by Drax. However, when calculating the sum to be released to Shepherd, Drax deducted monies from the sums due in relation to defective works on the Ecostore facility.

The Contract was based on the FIDIC Yellow Book 1st Edition (1999) and Drax relied upon the wording in Clause 14.9.6 which stated, *"if any work remains to be executed under Clause 11 (Defects Liability) or Clause 12 (Tests after Completion) the Employer shall be entitled to withhold the estimated cost of this work"*.

Shepherd disputed Drax's interpretation of the meaning of these Conditions and contended that this clause did not allow Drax to deduct sums associated with the BDS Works for issues associated with the Ecostore Works.

The difficulty Shepherd encountered was that the BDS Works were a Variation to the Contract, including the Ecostore facility, rather than being the subject of a separate Contract. The Court considered the wording *"any work"* and, as this is undefined and there was no qualification to sections of the Works (as there was in other clauses), it ruled that the words related to both the Ecostore Works and BDS Works and Drax was therefore entitled to deduct the sums.

Once a Variation is instructed and incorporated into a Contract it becomes part of the Works, unless explicitly stated otherwise, and is bound by exactly the same Terms and Conditions, obligations and requirements as the Works included in the initial Contract.

3rd Party Designs, Duty of Care

In the case of ***Multiplex Construction Europe Limited v (1) Bathgate Realisations Civil Engineering Limited (in administration) (2) BRM Construction LLC (3) Argo Global Syndicate 1200 [2021]*** **EWHC**, Multiplex Construction Europe Limited ("Multiplex") appointed Dunne Building and Civil Engineering Limited which later changed its name to Bathgate Realisations Civil Engineering Limited (*"Bathgate*").

Bathgate appointed BRM Construction LLC ("BRM") to design and construct a slipform rig which, under British Standard BS:5975, was required to have a Category 3 design check. Bathgate then appointed RNP Consulting Engineers to undertake this check.

Bathgate entered into Administration and a new Sub-Contractor was appointed to complete Bathgate's works. This new Sub-Contractor advised that the slipform rig was defective. Multiplex was advised that the cost of rectifying the Works was estimated to be over £12 million.

Multiplex brought a claim against Bathgate under the Contract, and against BRM in tort and for breach of Warranty. Multiplex obtained a Judgment, however, encountered difficulty in seeking payment as Bathgate had entered into Administration in 2016 and BRM was out of jurisdiction and also apparently uninsured.

RNP, the Party employed to undertake the Category 3 check, had entered into Liquidation and was insured. Multiplex attempted to bring a claim against RNP's Insurers – Argo Global Syndicate 1200 *("Argo")* via the Third Parties (Rights Against Insurers) Act 2010.

To establish any duty RNP may have owed to Multiplex, the Courts were required to ascertain RNP's duty to Bathgate. Unfortunately, this proved more difficult than envisaged as there appeared to be a complex Contract formation issue (a fairly typical *"battle of the forms*" scenario) resulting in a witness from Bathgate declaring that reaching an agreement with the Contract was the responsibility of a colleague and he had no recollection as to how it was concluded.

Multiplex claimed that RNP had issued a Certificate to Bathgate, knowing that Bathgate would provide this to Multiplex (who would rely on it), and was therefore negligent.

In a turn of events, more astonishing than the contractual arrangement between RNP and Bathgate, it transpired that 2 Certificates were actually issued by RNP (with the version issued by Bathgate to Multiplex) omitting several qualifications made by RNP. To further exacerbate matters, the design warranted by RNP was not the design Bathgate proceeded with, apparently making further uncertified changes.

Unsurprisingly, the Court found that RNP did not hold a duty to Multiplex.

This case highlights the clear requirement for Collateral Warranties to be executed between Main Contractors and key Sub-Consultants/Sub-Sub-Contractors. Ramskill Martin also recommends a key stipulation is that adequate P.I. Insurance, with run-off cover, is included.

Contract Formation

In the case of ***Balfour Beatty Regional Construction Limited v Van Elle Limited [2021]*** **EWHC 794 (TCC)**, the Court was required to decide whether a Sub-Contract could be deemed to govern works which commenced prior to execution of the Contract.

Van Elle Limited ("*Van Elle*") was engaged as a Sub-Contractor for the Piling Works by Balfour Beatty Regional Construction Limited ("*Balfour Beatty*"). Van Elle had completed a single section prior to entering into the Contract, but subsequent to Van Elle's Quotation having been accepted by Balfour Beatty and Balfour Beatty issuing a Letter of Intent to Van Elle.

Once the Works were mainly complete, an excessive settlement was discovered in the Piling Works undertaken by Van Elle. Balfour Beatty issued a claim against Van Elle, however, Van Elle argued that although a Contract was signed this did not govern the Piling Works.

This argument was predicated on the fact that, following a review of the contemporaneous information, it appeared whilst Van Elle had issued a Quotation (which contained Van Elle's Terms and Conditions) Van Elle argued that these Terms and Conditions had been accepted as a result of Balfour Beatty's conduct.

The Court was required to decide whether Van Elle's Terms and Conditions governed the Contract or the executed Sub-Contract.

The Court found in favour of Balfour Beatty. The reasons for this included the fact that Van Elle had requested a Limited Order/Letter of Intent on numerous occasions and demonstrated that the Parties anticipated there would only be a single Contract.

Parties should seek to ensure that Contracts are in place prior to commencement of the Works, as this would remove any uncertainty and prevent other such cases from reaching the Courts.

Conclusion

The above cases again demonstrate that great care needs to be taken when entering into a Contract.

The Shepherd Construction case shows that a Party should exercise caution when agreeing to vary works, which are significant in size and price into an existing Contract. They may be liable for deductions in respect of defects on all the Works dependent on the wording of the Contract.

The Multiplex case demonstrates that despite the existence of the Third Parties (Rights Against Insurers) Act 2010, when seeking to bring a claim under this, it is likely the actions of the Insurer and its Client will be examined closely and could (as with the Multiplex case) prevent a claim being made. Also, should a Party wish to protect itself in the future (rather than relying on claims under tort) a contractual arrangement via a Collateral Warranty would be advantageous.

Finally, the Balfour Beatty case once again demonstrates the importance of clear unambiguous Contracts being agreed prior to commencement wherever possible.