



Contractual interpretation, expert independence and reasonable settlements – a jam-packed judgment

DAN PRESTON – PARTNER, RPC'S CONSTRUCTION AND PROJECT TEAM SUMMARISES THE KEY POINTS AND LESSONS TO BE LEARNED FROM A RECENT COURT JUDGMENT.

RPC and Driver Trett acted for the claimants in the recent case of *OBS 125 (Nominees 1) and anr v Lend Lease Construction (Europe) Limited and anr* [2017]. The judgment raised a number of important points, summarised below, and the success of the case highlighted the benefits of the legal and expert teams working together from an early stage.

Background

RPC and Michael King of Diales acted for Hammerson in a claim concerning spontaneous glass breakages on the Old Stock Exchange building in London. The claimants had engaged the defendants to undertake the full refurbishment of the

building and, in the four years following the date of Practical Completion, 17 panes of glass failed with a number falling from the building. The cause was established as the presence of nickel sulphide inclusions (NIS).

Contractual interpretation

The courts' approach to interpreting commercial contracts has been recently restated by the Supreme Court in *Wood v Capita Insurance Services Limited* and also the highly publicised *MT Hojgaard* case. The present claim was heard before the reporting of those Supreme Court decisions, but it provides a practical example of the literal and commercial approaches

to interpretation being used as, "two tools forming part of the same approach".

The contract for the works on 125 OBS stipulated that toughened glass, heat soaked in accordance with European Standard BS EN 14179 (the 2005 Standard) with a bespoke extended holding period should be used. Heat soaking glass is accepted to reduce the risk of NIS breakages on the building. The contract also stated that the contractor should complete the works in accordance with the employer's requirements and contractor's proposals, using materials of good quality which were appropriate for their purpose.

In *MT Hojgaard*, it was held that →

requiring a contractor to comply with a particular specification did not prevent the contract from imposing, through clear language, an obligation to achieve a particular result. The judge in 125 OBS took the same approach and held that the parties had intended to impose multiple obligations on the defendants. The defendants were obliged to use glass heat soaked in accordance with the 2005 standard and, in addition, to comply with the aforementioned documents. These contained provisions stipulating the design and service life of the curtain walling system and the appropriateness of the materials.

These additional obligations were found to be consistent with the parties' commercial intention to limit the impact of the residual risk of NIS breakages.

Exclusion clauses

The court restated that clear language will be required to exclude a party's liability under a contract. In 125 OBS, the defendants sought to argue that a provision, which stated that they were responsible for breakages caused by NIS up to the end of the defects liability period, meant that the claimants had assumed responsibility for any breakages which occurred thereafter. The court disagreed that this provision, and a provision stating that the claimants were responsible for 'third party risks' after the date of practical completion, were sufficiently clear to exclude the defendants' liability for NIS failures.

Record keeping

The judgment also emphasised the importance of keeping good records, particularly when the contract requires it. In this case, the absence of contemporaneous evidence that the defendants had complied with their contractual obligation (coupled with a contractual obligation to keep such records) was fatal to their defence.

Experts

The judgment reiterated two important points on experts and their evidence. Firstly, that the court will not allow experts to opine on areas outside of their expertise. Secondly, that an expert's primary duty is to the court and that their independence is of paramount importance.

The first point arose from the defend-

ants' quantum expert's criticisms of the settlements which the claimants had entered into with third parties; the amounts of which formed part of their claim against the defendants. The court recognised that the quantum experts did not have the expertise to opine on the reasonableness of the settlements. They also did not have the necessary expertise to comment on legal costs incurred by the claimants while negotiating the settlements. The claimants' experts were not levied with the same criticism. Diales had stuck within the remit of their expertise and not sought to opine on matters which would not generally fall to a quantity surveyor.

The judge's second point arose from the defendants' technical expert's failure to make clear in his reports or evidence that he was aware that documentation relied upon by the defendants had been fabricated. The documentation had been provided by the defendants' supply chain and the defendants asserted that it evidenced compliance with its contractual obligations to heat soak. The expert knew that its authenticity had been questioned but did not flag this to the defendants or the court.

This is one of a number of recent cases which emphasise the importance of independence and experts not being seen to try to advocate their client's case. Experts owe their duties to the court rather than those paying their bills and the court will not be assisted by experts advocating their client's case, particularly where the arguments are patently deficient.

It was testament to the independent approach taken by Diales and the claimants' technical expert that the claimants were able to recover some £14.75m of their circa £15m claim. Indeed, by the commencement of trial, and largely due to the early involvement of the expert team, the quantum experts had agreed some £12m of the amount claimed on a 'figures as figures' basis, whilst liability remained in dispute. The result was a shortening of the original planned trial length and a saving on costs for all parties.

Reasonable settlements

As set out above, the reasonableness of the settlements entered into by the claimants was a contentious element of

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the quantum. In his decision, the judge reiterated now well-established principles relating to the reasonableness of a settlement and went on to add:

1. The court encourages reasonable settlements, particularly where strict proof would be very expensive.
2. The test of reasonableness is generous, reflecting the fact that the paying party has been put in a difficult situation by the breach.
3. Reasonableness is evaluated as at the time of the settlement.
4. A claim will generally have to be so weak as to be obviously hopeless before it can be said that settling it is unreasonable.
5. The evidential burden of proving unreasonableness falls upon the defendants.

Applying those principles to the facts before him, the court had no time for a forensic, retrospective audit of the initial third parties' claims to assess their merits as the defendants' expert had sought to undertake. The judge took a commercial approach to assessing whether a settlement should have been made and whether the amount it settled for was reasonable; deciding it was not proportionate to test the merits of the claim as rigorously and forensically as if that particular dispute was before the court. Contemporaneous evidence of an attempt to mitigate loss and reach a sensible commercial agreement, to buy off risk, was held to be sufficient and the claimants put forward compelling evidence about the difficulties faced by them, their tenants, and third parties due to the defendants' breaches. The witness evidence documented circumstances where claims had been intimated but had been resolved through negotiation or relationship management. In this context, it was clear from the settlements that the claimants did seek to recover from the defendants that they were not weak or hopeless, which made it easier to assess the reasonableness of the compromise.

This case reiterates the court's reluctance to go behind commercial settlement agreements when a party seeks to recover payments made under them. The defendants need to demonstrate either that settling the claim at all, or the value at which the claim was settled for, was unreasonable. ■