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Insights

BE CERTAIN, BE SPECIFIC AND BE CLEAR: MILESTONE JUDGMENT FOR LIQUIDATED DAMAGES

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SUMMARY

Recent case law has shown how careful parties need to be when drafting a *liquidated damages* (LDs) regime. The case of *Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd* provides yet another example of what can happen if there is any ambiguity in the drafting.

This blog takes a closer look at this case.

WHAT HAPPENED?

Buckingham was engaged by Peel under an amended *JCT Design and Build contract, 2016 Edition* to design and construct certain aspects of a plant for manufacturing corrugated cardboard in Merseyside. The contract included a bespoke LDs provision and a schedule (schedule 10) that set out the LDs regime.

The works were significantly delayed. This led to Peel submitting a *pay less notice* notifying Buckingham of its intention to deduct from a sum that would otherwise have been due to it an amount of £1,928,253.77 by way of capped LDs. Buckingham resisted liability for LDs and sought declarations from the court that:

- The LD provisions were *void and unenforceable*.
- Any remedy in respect of general damages should be capped in the amount of £1,928,253.77. In other words, the *cap on LDs also applied* to any liability Buckingham may have for general damages for delay.

ISSUES

Buckingham argued that although the parties had included an entire schedule devoted to LDs, they were void for uncertainty because they had been drafted defectively. Various errors were alleged including:

- The date of completion was incorrect because two dates had been included.
- It was impossible to discern which rate of LDs was payable because schedule 10 included two sets of rates.
- The contract failed to provide a workable scheme for partial possession. The LDs provisions did not provide a means for calculating such possession.

JUDGMENT

Mr Alexander Nissen QC, sitting as Deputy High Court Judge, found in favour of Peel.

Points of key interest from the judgment include:

Competing dates for completion

The contract particulars stated the "date for completion" was 1 October 2018, however this differed from the milestone date for practical completion in schedule 10 (30 November 2018). Buckingham contended that these two competing dates resulted in the LDs provisions being unclear with no other term to assist in resolving the issue of which date applied, both options being plausible.

Peel accepted this inconsistency but argued the dates were capable of being reconciled and served different purposes. The earlier date stated in the contract particulars was the date on which the works were required to be completed, but no LDs attached to this date if it was not achieved. The later date in schedule 10 was, according to Peel, the milestone date for completion. If Buckingham failed to achieve this date it would become liable for liquidated damages.

The judge rejected Buckingham's argument on the basis that although there were two dates for "completion", they could each be explained "by a process of conventional construction" and did not render the provisions in schedule 10 void for uncertainty.

Ambiguity over the rate of liquidated damages payable

Schedule 10 contained two different sets of rates for delay LDs. As a result, Buckingham contended that schedule 10 lacked clarity and certainty as to which, if any, of the rates applied. In addition, one set of rates contained references to a "proposal" indicating the parties had not come to an agreement over which set of rates applied. Consequently, Buckingham argued that the whole schedule was void for uncertainty.

Peel rejected the proposition that schedule 10 was erroneous and instead argued that the schedule contained a "mild ambiguity". One set of rates originated from the tender process, the other

contained Buckingham's best and final offer (BAFO) reflecting the parties' actual intentions.

The judge again sided with Peel and was satisfied that on a proper construction of the contract, the parties' intention was for schedule 10 to have legal effect (as opposed to a non-binding document) and the second set of (BAFO) rates was the correct set to be applied to the contract. The court recognised that the drafters may have taken a shortcut, copying the BAFO into schedule 10, but this did not amount to an error solely on the basis that the schedule then contained a redundant set of rates (the original tender set).

Uncertainty in calculating the rate of liquidated damages

Buckingham claimed it was unclear whether the percentage rate for LDs should be based on rates applied in the daily column in schedule 10 that linked to the actual contract sum or based on the lump sum amounts contained in the weekly rate column in schedule 10 even though they had been calculated on a contract sum analysis that was different from the one ultimately agreed.

Disputing this, Peel argued that there was no error in the contract, instead, the parties had simply agreed the weekly lump sum amounts set out in the relevant column in schedule 10. The judge once more favoured Peel's submissions and agreed it was clear that the applicable rate was the weekly rate in schedule 10, not the daily rate, albeit that LDs could be levied pro rata for part of a week.

No workable scheme for partial possession

Finally, Buckingham argued that schedule 10 was unenforceable by reason of its failure to provide a workable scheme for partial possession. Where a contract provides for partial possession, it should also provide a regime for an adjustment to be made to the applicable rate of LDs to reflect partial possession.

Buckingham submitted the parties must have intended to allow for partial possession since it was provided for in clauses 2.30 to 2.34 of the contract, which envisaged partial possession of all of the works or, in a contract which provides for sectional completion, for partial possession of a section. As schedule 10 made reference to "sectional milestones" the parties intended this to equate to "sections" under the contract, but the contract did not contain a mechanism to adjust the LD rates in line with partial possession of those sections.

Peel responded that clauses 2.30 to 2.34 made no reference to milestone dates and did not need to because the contract did not make provision for sectional completion.

In reaching his decision, the judge considered previous authorities where arguments about the uncertainty or inoperability of partial possession provisions were unsuccessful. Ultimately, he concluded that Peel was correct that the contract provided for a series of milestone dates that, if missed, attracted a liability for LDs. He commented that the achievement of a milestone was a step along the way but did not involve the transfer of possession of the works comprised within that

milestone in the way that completion of a defined section would do. Clauses 2.20 – 2.34 were not engaged because the parties had agreed a separate and bespoke LDs regime that operated by reference to milestones.

DOES A CAP ON DELAY LDS APPLY TO GENERAL DAMAGES FOR DELAY?

Although he decided that the LDs regime under the contract was certain and enforceable, the judge went on to consider obiter whether an LDs provision can be construed as a general limitation on liability even if the LDs provision itself is found to be void and penal.

The judge agreed with the previous authorities that if an LDs provision is void, it is wholly unenforceable. In addition, he also agreed that it is possible for a cap on LDs to run in parallel as a general limitation on liability which is enforceable even if the LDs are void or penal.

In considering whether a general limitation of liability applies, the language of the LDs provisions should be reviewed to ascertain if the wording is broad enough to encompass any alternative liability that could arise in respect of general damages.

Applying this logic to the case in hand, the judge noted that the language used – "cap on maximum LADS" – within schedule 10 (being a schedule solely connected with LDs) meant there was no cap on general damages.

CONCLUDING THOUGHTS

It is a well-established principle that the courts are typically reluctant to hold provisions of a contract void and/or unenforceable. LDs are agreed as part of the commercial "deal" and where a contract has been performed:

> *"the Court will strive if possible not to find a contract or contractual provision uncertain…"*

(Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries [1990] 2 Lloyd's Rep. 526 referred to in *Vinci Construction UK Ltd v Beumer Group UK Ltd*, paragraph 47, judgment). This case is no exception, and unsurprisingly, the court held that the contract was certain and enforceable and all of Buckingham's arguments that the provisions relating to LDs were unenforceable and uncertain were unsuccessful.

The possibility of an unenforceable and void LDs clause being interpreted as amounting to a cap on the recovery of general damages is a warning to employers and those drafting construction contracts.

When drafting bespoke LD provisions, this case is reminder of the following principles:

- Be specific and clear.

- Avoid the pitfall of including pre-contractual documentation in appendices or schedules.
- Ensure the contract particulars are cross checked and are consistent with other provisions of the building contract.

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