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Insights

FLEXIDIG V COUPLAND – CLAIMS IN ECONOMIC TORTS

Oct 17, 2019

SUMMARY

The recent TCC decision in Flexidig Ltd v A Coupland (Surfacing) Ltd piqued my interest. My first thought was why did Flexidig commence proceedings against Coupland, and why did it bring the claim that it did?

It provides a rare example of the tort of procuring a breach of contract arising in the construction context and contains helpful comments on the contractor's right to have "first refusal" on remedying defects.

The background

Flexidig was engaged under a sub-contract by M&M Contractors Europe Ltd (M&M) to carry out civil engineering works. The sub-contract was on M&M's standard terms, and included the following defects liability provision:

> "The sub-contractor shall … make good at the sub-contractor's own expense and at such times to be decided by the Contractor, any defects in or damage to the sub-contract Works, to the satisfaction of the Contractor and the Client, … for a period of two years following certification of completion … Where the sub-contractor does not make good any sub-contract Works to the satisfaction of the Contractor and Client, the Contractor may engage another contractor to or the Contractor may itself make good subcontract Works … and the Contractor may deduct any costs, expenses, losses or damages, which the Contractor suffers or incurs as a result of making good any sub-contract Works, from any monies due or…. recover such costs, expenses, losses or damages from the sub-contractor as a debt."

Many of us are familiar with this type of clause because it is a fairly typical provision across construction contracts generally.

Defects became apparent in Flexidig's works and were the subject of at least one adjudication, resulting in a decision in M&M's favour. Enforcement of the adjudicator's decision was stayed,

because M&M agreed to allow Flexidig back to site to repair the defects.

However, M&M stopped Flexidig's repair works because it wasn't satisfied with the standard of work. Flexidig was allowed to resume work again shortly afterwards, having assured M&M its standards would improve. It appears this was not the case and M&M once again stopped the works. Flexidig did not accept that M&M's concerns were justified and M&M therefore chose to engage another subcontractor, Coupland, to carry out the remedial works.

Flexidig alleged that M&M had engaged Coupland, in breach of contract, to carry out works that Flexidig had the right to carry out under its sub-contract with M&M. Flexidig commenced proceedings against Coupland seeking to restrain Coupland from performing these remedial works, on the basis that to do so would constitute the tort of procuring a breach of contract.

Tort of procuring a breach of contract

Inducing or procuring a breach of contract is one of the economic torts and is rare in the construction context. It involves:

- A person, "Z", inducing "X" to **breach its contract** with "Y".
- Z procuring or inducing the breach **intentionally** and without reasonable justification.
- Y **suffering economic loss** as a result of X's breach, in which case Y can sue Z for the loss.

Claims in economic tort tend to be made in those cases where there is no other cause of action and it is easy to see why. For Z to be liable:

- There must be a breach of contract (more on this below).
- Z must have knowledge of the contract between X and Y (although knowledge of the precise terms is not necessarily required).
- Z must know that it is inducing or procuring an act that was a breach of contract and, critically, intend to procure that breach. The evidential burden is high.

In this case, Flexidig argued that because it had told Coupland about its sub-contract with M&M and Coupland had continued to carry out the works instructed by M&M, Coupland satisfied the "knowledge" element.

On this point, the judge held that while Coupland was aware of the contract, it did not satisfy the requisite knowledge element. Although Flexidig had alleged that M&M was in breach, M&M had refuted this allegation. Coupland did not **know** whether M&M were in breach of contract, only that a breach was alleged. The judge drew the distinction between **facilitating** a breach and **inducing** one.

Was M&M in breach of contract by appointing another contractor to remedy defects?

Unsurprisingly, and as already mentioned, a necessary element of the tort is that there is a breach of the underlying contract. This posed an interesting question in this case. Was M&M in breach of its contract with Flexidig by arranging for an alternative contractor to carry out defect rectification?

This question required the court to interpret the defects liability clause (see above). The court concluded that while it was implicit in the clause that M&M should ask Flexidig to carry out rectification works if, subsequently, M&M wished to claim the third-party contractor's rectification costs from Flexidig, it did not give Flexidig the right to be offered the opportunity to rectify first in all cases.

The question is of wider relevance. Where works are found to be defective during the defects liability period, must the employer give the contractor the opportunity to fix the defects prior to it engaging an alternative contractor?

It depends on the wording of a particular contract. A contractor does not have the "right" to return to remedy a defect unless the contract expressly confers that right. Most construction contracts contain a defects liability provision that does give the contractor a right (and indeed an obligation) to return and remedy defects. If the employer refuses to allow the contractor back on site this may affect its ability to recover a third-party contractor's costs because there is an obligation on the employer to mitigate its loss. However, this is a different question from whether an employer can engage a third-party to remedy defects at the outset if it wants to do so.

Generally speaking, it will almost always cost the contractor less to rectify the defects than it would cost a third-party contractor. So from a practical perspective, in the normal course, requesting the original contractor to put right defects is preferable to instructing another contractor and then fighting about the cost afterwards.

If it decides to engage a third party, the employer must be prepared to defend that decision. This commonly happens where the contractor's repair works are inadequate and the relationship between employer and contractor breaks down because of concerns over the quality of the works.

The court has given guidance previously on this issue. In Oksana Mul v Hutton Construction Ltd (that Jonathan Cope blogged about), Mr Justice Akenhead discussed in what circumstances an employer might be justified in arranging for an alternative contractor to carry out remedial works. In his blog, Jonathan sets out several very sensible questions that employers (or contract administrators) should ask themselves before engaging a different contractor. The employer should ensure it has considered engaging the original contractor, and has justified reasons for not doing so, if it intends to try to claim back the cost in the future.

Conclusion

I remain slightly puzzled as to why Flexidig brought this action against Coupland, despite a suggestion in the judgment that Flexidig chose not to proceed against M&M because of concerns

about the time taken to obtain a hearing date for the injunctive relief against M&M in the Northern Irish Courts (the original sub-contract was governed by Northern Ireland law). I suspect the real reason was to try to avoid a claim by M&M for the cost of employing Coupland to carry out the rectification works (indeed the court alluded to this in its judgment).

It is an interesting tactic and one I have not seen before. In the circumstances of this case, it seemed to me to be a non-starter. The court effectively found that M&M was entitled to employ another contractor (especially given that Flexidig had tried and failed twice to carry out the rectification works itself). I don't expect to see a slew of other contractors employing this tactic.

Having said all this, I am conscious that only last year, in Palmer Birch (A Partnership) v Lloyd, the TCC upheld claims of inducing a breach of contract and unlawful means conspiracy by a contractor against two individuals who directed the affairs of the limited company with which the contractor had entered into a JCT contract. Perhaps these cases signal the start of something new – claims in economic torts on construction projects.

This article first appeared in Practical Law construction blog on 16 October 2019.

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