BCLP. Client Intelligent

Insights

TIMBERBROOK V GRANT LEISURE: STAGED PAYMENTS, VARIATIONS AND TERMINATION CLAUSE

Aug 10, 2021

Introduction

The recent English case of *Timberbrook Ltd v Grant Leisure Group Ltd* [2021] EWHC 1905 (TCC) (Date of Judgement: 16 July 2021), which was heard in the Technology and Construction Court, is a good illustration of the factors which contractors should consider when making post-termination claims against the employer.

This case also serves as a reminder to employers that termination under express contractual provisions might affect their entitlements to termination-related losses.

Background of this case

The Defendant (owner) owned and operated a zoo. The Claimant (contractor) specialised in installing and fitting out animal enclosures and related facilities at zoos and wildlife parks.

In January 2013, the owner engaged the contractor to demolish the existing orang-utan facility at the zoo and to install a new one. On 12 June 2013, this engagement was terminated. In January 2014, the contractor went into liquidation.

In June 2019, the contractor commenced proceedings to claim for (a) the value of work completed to the date of termination, and (b) variations and/or additional works performed at the owner's request[1]. The owner counterclaimed damages which allegedly were caused by the contractor's delays[2].

A special feature regarding the context in which the parties' contract was made was highlighted by the court. The court pointed out that, due to the contractor's need for funds and its desire to be appointed by the owner as contractor on another (larger and potentially more profitable) project, the contractor deliberately undertook the works for a low fixed price. In particular, although the contractor had identified several risk areas which could increase the costs to complete the works (one of which was the load-bearing capacity of the underlying ground) before signing the contract,

the contractor considered the risk to be low, and did not include any sum of money against these risks in the contract price.

Key clauses in the contract

The key clauses in the contract between the parties were as follows.

Regarding payment, clause 7.1 provided that the Services were being "*provided for a fixed price, the total price for the Services shall be the amount set out in the Project Plan*" and that:

> "*The total price shall be paid to [the contractor] in instalments, as identified in the cash flow forecast at schedule 3, with each instalment being conditional on [the contractor] achieving the corresponding progress against the forecast dates including materials off site where appropriate*".

There were two ways under the contract which provided for the owner's right to terminate:

> (a) Clause 4.2(a) provided that if the contractor failed to meet any performance dates or Project Milestones specified in the Project Plan, the owner may at its own discretion "*terminate this agreement in whole or in part without liability to [the contractor]*", but this clause did not specify a necessary period of notice.
>
> (b) Clause 10(1)(a) provided that the owner may terminate the contract on giving at least four weeks written notice if "*the performance of the Services is delayed, hindered, or prevented by circumstances beyond [the contractor's] reasonable control*". Clause 10.2 provided that such termination should not prejudice "*accrued rights of the parties as at termination*".

Contractor's claim for the value of work performed before termination

The contractor contended that it was entitled to be paid what it claimed was a reasonable sum for the value of the work done up to the date of termination to the extent that such work had not been remunerated already.

The court rejected the contractor's contention on the basis of the wording in clause 7.1. The court found that clause 7.1 clearly provided that payment was to be made in instalments, and that the right to payment of any given instalment was conditional upon the contractor achieving the corresponding progress against the forecast dates. Given that the contractor had not reached the relevant stage in the contract works, it was not entitled to payment of the work done under that partially completed stage.

The court also rejected the contractor's contention that there was an implied term that the contractor was to be paid for work done to the date of termination on a quantum meruit basis or by way of a proportion of the contract price. The court opined that there was no basis either on the ground of necessity or obviousness for the implication of such a term.

Contractor's variation claim

The contractor's variation claim was as set out in eight invoices.

The court stated that, in order to establish an entitlement to payment for additional work, the contractor had to show that (a) the work was performed, (b) the work was additional to what the contractor was required to do under the contract, (c) either that the owner agreed to the work being performed for a particular sum, or that the owner agreed to the work being performed knowing that it was additional to the contract works and was not being undertaken gratuitously[3].

Turning to each of the individual invoices, the court rejected each of the claims for the following reasons:

1. Invoices Z0449, Z0450 and Z0451: The alleged additional works were for the installation of electrical supplies, water supply and partitions. Referring to contemporaneous records, the court found that these items were works which the contractor was obliged to perform within the contract price or were additional works which the contractor agreed to undertake without additional payment.

2. Invoice Z0452: The contractor's claim for costs in installing the foundation to a ramp almost wholly was unparticularised, with no evidence to suggest that the alleged additional work was even undertaken.

3. Invoice Z0454: This invoice related to the alleged costs to install "*additional foundation, to carry out re-design and calculation checks*". After the excavation of the foundation, it was discovered that the existing paddock wall and the ground conditions were such that the steel frame could not be based on the wall and the foundations had to be redesigned. The court referred to pre-contract correspondence showing that the contractor did recognise that the ground condition was a risk. However, the contractor concluded that this risk was a low one. As a result, the contractor did not insist on there being an increase in the price in the contract to factor in this risk or an agreement that the sum payable would be increased if this risk materialised. The court therefore concluded that the contractor had no right to an additional payment.

4. Invoices Z0455, Z0456 and Z0457: These invoices related to alleged additional design work by the contractor. The court pointed out that the contract was a design and build contract and that it was the contractor's responsibility to complete the design work. To the extent that any additional re-design work was required, the court found that this was the result of the discovery of the inadequacy of the wall and the foundations to bear the steel frame. As explained above, the risk relating to the ground condition was one which was borne by the contractor.

The counterclaim

The owner raised a substantial counterclaim for damages arising out of delays caused by the contractor.

The court found that the owner chose to terminate the contract using the power given by clause 10.1, rather than clause 4.2. The court held that, by proceeding under clause 10.1(a), the owner accepted that the delay was caused by circumstances beyond the contractor's reasonable control (see wording of clause 10.1(a) above). The court therefore held that it was not open to the owner to argue that the delay was caused by the contractor and to claim damages in respect of it. Had the owner terminated under clause 4.2, it would have been entitled to claim for the delays from the contractor.

The court pointed out that the advantage of terminating under clause 10.1 was that it avoided any dispute as to whether the contractor was in breach of the contract (which the Defendant had to prove if it chose to terminate under clause 4.2 instead), and removed the risk of a finding that the termination had been wrongful.

Takeaway points

1. Contractors should consider carefully their entitlement to payment from the employer under the contract. A contractor should not assume that it will be paid for work done under a partially completed stage – whether it will be paid depends on the particular wording of the contract.

2. In the absence of a variation clause in the contract, if contractors intend to be paid for carrying out additional work, contractors only should carry out the work if the employer agrees to the work being performed for a particular amount, or at least agrees to proceed on the basis that the work was additional to the original contract scope and was not being undertaken gratuitously. Alternatively, the contractor should agree with the employer in the contract for a mechanism to increase the contract price if certain risks materialise.

3. Employers should be careful before selecting between conflicting contractual clauses to terminate a contract with a contractor. In this case, the owner was not entitled to claim damages for the contractor's delay after terminating on the basis that the contractor was not in delay – you cannot have your cake and eat it. The owner had elected to proceed with the "easier" termination option, but that came with important consequences about what claims the owner could raise.

---

1 The owner had raised a separate prolongation claim which was abandoned in the course of the trial.
2 Due to the contractor's liquidation, the owner accepted that the counterclaim only would operate as a set off.
3 In this case the contractor would be entitled to a reasonable sum for labour and materials in respect of the work.

RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Business & Commercial Disputes
- Construction Disputes
- International Arbitration

MEET THE TEAM

Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com
+852 3143 8450

Ian Cheng

Co-Author, Hong Kong SAR

ian.cheng@bclplaw.com
+852 3143 8455

professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.