Liberty Mercian Ltd v Dean & Dyball Construction Ltd [2008] Adj.L.R. 10/31

JUDGMENT : The Honourable Mr Justice Coulson: TCC. 31st October 2008

A. INTRODUCTION

1. By a claim form issued under CPR part 8, the claimant seeks declarations as to the proper construction of the building contract into which it entered with the defendant. The construction issues centre upon the sectional completion agreement and the accompanying schedule: was it workable and/or did it give rise to a penalty?

2. As a result of the diligence of counsel, the trial of these issues on 22.10.08 took less than half a day. At the end of the hearing I indicated to the parties my conclusions on certain matters, and I promised to provide a written judgment dealing with all of the issues as soon as possible. This is that judgment.

B. THE CONTRACT

3. The claimant engaged the defendant to carry out and complete the construction of 4 new retail units at Parc Avenue, Aberystwyth in South Wales. Unit A was going to be a new store for Somerfield, who were trading from another building on the site. It is not, I think, in dispute that an integral feature of the proposed project was the phased release of the site. Unit A was to be completed first, to allow Somerfield to carry out its fit-out works. That would then free up other parts of the site, which were occupied by the old Somerfield store and associated car parking. Thus, because Somerfield wished to continue to trade from the old store until the new building was ready for fitting out, phased possession of the various parts of the site was always going to be necessary.

4. The Contract incorporated the JCT Standard form of Building Contract, 1998 edition 2003 revision. It was dated 15th August 2005 and incorporated the amendments required by the parties' sectional completion agreement. There were also a number of '*homemade*' amendments to the JCT terms and conditions, entitled '*Modifications'*.

5. In the Appendix to the Contract, against the words *'Date for completion of section'*, the parties wrote 'See *attached sectional completion details'*. This was a separate document entitled *'Details of the Sectional Completion Arrangements'*. That document provided as follows:

DETAILS OF THE SECTIONAL COMPLETION ARRANGEMENTS					
Section Number	Phase title	Content (refer to the accompanying text)	Liquidated & Ascertained Damages per week or part thereof	Date of Possession	Date of Completion
1	1A	Completion of the new retail units A, B, C and D to a stage to enable access for the tenants' fit-out (but this is not deemed to be practical completion)	£12,000.00	6 June 2005	10 February 2006
2	1B	Completion of the remaining works to section 1 and completion of the external works and car park providing the initial 87 spaces, all to a stage of Practical Completion,	£1,500.00 in addition to the above	Upon completion of Section 1, Phase 1A to the required stage.	7 April 2006
3	1C	To complete the extended car park providing a total of 195 spaces	£2,000.00	Upon completion of Section 2, Phase 1B to the required stage.	5 May 2006
4	2A	Completion to the refurbished and extended existing retail unit to a stage to enable access for the tenant's fit-out (but this is not deemed to be practical completion)	£7,000.00	After pc of section 3 phase 1C	3 November 2006
5	2B	Completion of the remaining works to Section 4 and completion of the external works, all to a stage of Practical Completion.	£1,000 in addition to the above	The date of possession as Section 4, Phase 2A	3 November 2006
	Notes Section 2 cannot achieve practical completion until 8 weeks after Section 1 achieves practical completion.				

6. The same document was also identified in the Appendix as providing the rate or rates of liquidated and ascertained damages.

7. I should make brief mention of one or two of the other clauses of the contract. Clause 2.2.1 provided that nothing within the specification and similar documents should override or modify the application or interpretation of the articles of agreement and the conditions. Clauses 24 and 25 were concerned with damages for non-completion and extensions of time. Those clauses were amended to reflect the sectional completion agreement. Amongst the relevant events that might trigger an extension of time were clauses 25.4.12 (failure by the claimant "*to give in due time ingress to or egress from the site of the works or any part thereof through or other any land, buildings, way or passage adjoining or connected with this site and in the possession and control"* of the claimant), and clause

25.4.13, concerned with the deferment by the claimant of giving possession of the site or parts of the site. Clause 23.1.2 allowed the claimant to defer the giving of possession of the site or part of the site for a period not exceeding 6 weeks.

8. The specification included a variety of separate documents, including the lengthy document containing a large number of *"Modifications"* to the JCT standard form. This included a new clause 25.3.4.3 which provided as follows;
"Save where clause 24.5.3 applies, the contractor shall not in any event be entitled to an extension of time to the extent that the delay in the progress of the Works is caused to by any negligence, breach of statutory duty, omission or default of the contractor, his servants or agents or of any person employed or engaged upon or in connection with the Works or any part thereof, his servants or agents other than the employer or a tenant or any person employed or engaged by any of them".

C. THE DISPUTE

9. Section 1 was delayed by a period of 8 weeks. The defendant sought an extension of time in relation to that period. The claimant's architects granted an extension of time of 4 weeks and indicated that there was therefore a period of culpable delay of 4 weeks attributable to the defendant on section 1. Liquidated damages in the sum of £48,000 were deducted in consequence of this culpable delay.

10. The disputes between the parties arose as a result of the knock-on consequences of the delay on section 1 to sections 2-5. The architect granted extensions of time of 4 weeks in relation to each of sections 2-5, on the basis that the 4 week non-culpable delay to section 1 had caused a similar delay on sections 2-5, and that this was a delay for which the defendant was entitled to an extension of time under the contract. That left a period of delay of up to 4 weeks on each of sections 2-5 (depending on the delay to completion of each section caused by the 4 week delay in possession) in respect of which the architect did not award an extension of time. Thus the 4 week culpable delay on section 1 was not the subject of any extension of time under sections 2-5. The defendant maintained that, because possession on sections 2-5 had been delayed by 8 weeks, it was entitled to an extension time of 8 weeks in respect of each of sections 2-5, regardless of the circumstances in which that delay had arisen under section 1.

11. On the 14th July 2008 the solicitors acting for the defendant wrote to the claimant seeking to refer to adjudication the issues on the contract. They identified those issues as follows;
   a) The sectional completion schedule was void for uncertainty because there was no provision in the contract which addressed the impact of delayed completion upon the remaining sections of the works;
   b) The sectional completion schedule was to be disregarded, and time was to be regarded as being at large, because the schedule failed to identify the date *for* completion in respect of each section, and instead referred to the date of completion, which was not a term defined in the contract.
   c) The architect had been wrong to grant an extension of time of only 4 weeks in relation to sections 2-5. Since the date of possession for each of those sections was dependent upon practical completion of a preceding section, the defendant was entitled to a full extension of time of 8 weeks on each subsequent section.
   d) The liquidated damages constituted a penalty because the defendant was repeatedly penalised for the same delay by the deduction of the liquidated damages in respect of each section and/or because the delay on section 1 was then the subject of liquidated damages in respect of the remaining sections. This became known as the '*cascade*' argument.

12. The parties agreed that these contractual issues should be the subject of a CPR part 8 claim so that the TCC could rule on them. Thereafter, on the basis of that ruling, the parties could then refer the outstanding time and money claims to the adjudicator.

D. THE LAW

13. The courts have always been wary of allowing one party to a contract to avoid the consequences of a liquidated damages provision freely entered into. In ***Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd*** [1915] AC 79, the House of Lords held that where a single sum was agreed to be paid by way of liquidated damages on the breach of a number of stipulations of varying importance, and the damage was the same in kind for every possible breach, and was incapable of being precisely ascertained, the stipulated sum, provided it was a fair pre-estimate of the damage and not unconscionable, would be regarded as liquidated damages and not as a penalty.

14. In more recent years, arguments as to whether or not the sum in question was or might be a penalty have often turned on the clumsy drafting of the contract in question which, so it was argued, could give rise to sums that would not be a genuine pre-estimate of loss. An example of this 'mathematical' approach in a building case, where the court declined to construe the provisions as a penalty, was ***Philips Hong Kong v The A-G of Hong Kong*** (1993) 61 BLR 49.

15. However, there are building cases in which that contention has been successful. In ***Bramall and Ogden Limited v Sheffield City Council*** (1983) 29 BLR 73, His Honour Judge Hawser QC held that the contractual arrangement was a penalty because the sums payable by way of liquidated damages could substantially exceed the actual loss suffered. The difficulty in ***Bramall and Odgen*** was that the contract did not provide for sectional completion, although that was what was happening on the ground. As a result, because the contract simply provided that damages might be recoverable at the rate of £20 per week for each dwelling, there was a risk that liquidated damages could be levied in relation to properties that had already been completed and handed over. The

learned editors of the BLR comment that this was a rather strict construction of the contract provisions. It led directly to the amendments to the JCT forms which expressly allowed for sectional completion.

16. An argument that a liquidated damages provision was, in reality, a penalty arose very recently in the TCC. In ***Braes of Doune Windfarm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*** [2008] EWHC 426 (TCC) Akenhead J was dealing with an appeal from an arbitrator who had found that the provisions of the contract were not capable of generating with certainty liquidated damages flowing from an identified breach by the contractor, and that therefore the relevant clause should not be enforced. Akenhead J initially thought that it was at least arguable that the arbitrator was obviously wrong because, as he observed, it was unusual for liquidated damages clauses freely agreed by the parties to be regarded as unenforceable. However, having worked his way through the contractual provisions, the learned judge concluded that not only was the arbitrator not obviously wrong but that his decision was ultimately right. The problem in that case was that, because of how it was drafted, the liquidated damages clause could well impose a liquidated damages liability on the contractor in respect of delays to individual wind turbines which were caused by another contractor altogether.

17. Of course, another way in which it can sometimes be argued that the liquidated damages provisions constitute a penalty is the situation where the employer has prevented completion and could be said to be seeking to take advantage of that wrong by levying liquidated damages in respect of the delay. It was the proliferation of such arguments which gave rise to extension of time provisions in the first place, in order to ensure that the contractor was not penalised for delays which were not his responsibility, but that an employer could be compensated by way of liquidated damages for those delays for which the contractor did bear the risk under the contract. The decision of the Court of Appeal in ***Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*** [1970] 1 BLR 111 is an example of a case in which the liquidated damages provision was not found to be operable because the particular extension of time mechanism under consideration there did not allow a proper extension of time to be granted in relation to delays for which the employer was to blame.

18. With those principles in mind, I turn to address the particular issues that arise in the present case.

E. DATES *OF/FOR* COMPLETION

19. I shall deal first with the argument that the sectional completion agreement was unenforceable and that time was therefore at large (the issue identified at paragraph 11(b) above). As Mr Henderson fairly accepted, this is really a technical point. The sectional completion schedule (paragraph 5 above) refers to five dates *of* completion, which is not an expression identified in the contract. The contract, of course, refers to dates *for* completion. Mr Henderson submitted that, whilst the date *for* completion was the anticipated date on which each of the sections would be completed, the date of completion was undefined and therefore unclear. He suggested that the date of completion might be the actual date of completion, whether that was the anticipated date or a later date.

20. As I indicated at the conclusion of the hearing, I do not believe that there is anything in this point. I must construe this contract in a common sense and purposive way. I do not believe that the ordinary reader would have any difficulty in concluding that the dates of completion in the sectional completion schedule were precisely the same as the dates *for* completion referred to in the contract. Furthermore, those dates must be the anticipated dates on which the parties were agreeing that the works would be completed because, at the time that the contract was made, no other dates could be relevant. The dates could only be the subject of a contractual promise; they could not be a matter of fact, because they had not yet occurred.

21. Accordingly, I do not consider that this wording gives rise to any difficulty in the operation of the sectional completion agreement or the schedule. The five dates identified there were the dates on which the defendant promised (and was obliged) to complete each of those sections. Each of those dates was, of course, capable of being extended pursuant to clause 25.

F. PENALTY

22. Mr Henderson helpfully illustrated his next argument (the point identified at paragraph 11(d) above) by reference to the facts. He took as his example the 4 weeks culpable delay on section 1. For that delay, liquidated damages of £48,000 have been deducted. But, because on the architect's interpretation of the contract the 4 weeks delay on section 1 had been '*cascaded*' down through sections 2, 3, 4 and 5, further liquidated damages, amounting to £38,000 odd, had also been deducted in relation to those subsequent sections. Mr Henderson submitted that, in this way, the liquidated damages had become a penalty and were therefore unenforceable.

23. Attractively though this point was argued, I do not accept Mr Henderson's submission. It seems to me that it shies away from the critical feature of this contract, namely that the building works were always going to be carried out sequentially, and that the work on one section could not start until the work on the previous section had reached practical completion or (in certain instances) the stage of completion identified in the sectional completion schedule. It is plain from that schedule, and from the sectional completion agreement as a whole, that both sides were aware that a culpable delay of 4 weeks on section 1 would automatically mean that work on sections 2, 3, 4 and 5 would start 4 weeks late.

24. I accept Mr Henderson's submission that the contract does not say in express terms that a culpable delay under section 1 would give rise to a culpable delay (and therefore the deduction of liquidated damages) on sections 2, 3, 4 and 5. That is the issue identified at paragraph 11(a) above. However, I am satisfied that, when construing the contract as a whole, that is what the parties intended to achieve. I consider that this is the only sensible construction of the sectional completion agreement and the schedule at paragraph 5 above, and the only

construction which gives effect to the words used. What is more, such a result cannot be regarded as unfair. On the contrary, if the contractor is in culpable delay for 4 weeks in relation to section 1, which inevitably means that section 2 is also going to start 4 weeks late, so that the contractor's default has caused that delay to section 2, he should therefore be liable for the liquidated damages that will flow in consequence.

25. I should make one further point on the schedule. I consider that Mr Lofthouse QC is right to point out that the amount of liquidated damages varied from one section to another, to reflect the different work involved in each section, and the different losses that would flow if one particular section was delayed. That is strong support for the proposition that these sums do not represent a penalty, but are instead a genuine pre-estimate of the specific loss that would be suffered in the event that the particular section in question was delayed.

26. In the light of those views, it is perhaps unnecessary for me to go on to consider in detail Mr Lofthouse QC's alternative arguments, to the effect that any other result would mean that the defendant was seeking to take advantage of his own wrong and/or that the defendant's argument was contrary to clause 25.3.4.3 (paragraph 8 above). However, I should say that, in my judgment, both of those submissions are right, for the reasons outlined briefly below.

27. I deal with the argument in relation to clause 25.3.4.3 first. I cannot see any reason for finding that clause 25.3.4.3 was not part of the contract, since it was one of the expressly agreed modifications to that contract. The fact that it was physically included within the specification document was an administrative matter, and nothing more. I consider that the modifications themselves were part of the agreed terms and conditions, and therefore not caught by the hierarchy provisions of clause 2.2.1. In any event, I am unaware of anything within the contract terms and conditions which was altered or modified by the new clause 25.3.4.3. It was an additional provision, no more or no less. In truth, it did no more than make express what will often be implied into contracts of this sort. The term was therefore part of the contract and provides another reason why the defendant's argument cannot succeed.

28. Secondly, I conclude that, if the liquidated damages were not recoverable in the way that I have explained, the defendant would be taking advantage of his own default: he would be starting section 2, say, 4 weeks late, because of his own default, and yet he would be seeking to be excused from paying liquidated damages for that period. That is contrary to the proper operation of the contract.

29. For all of those reasons, I conclude that the sectional completion agreement was not void for uncertainty and the liquidated damages set out in the schedule did not amount to a penalty.

G. THE PROPER OPERATION OF THE SECTIONAL COMPLETION AGREEMENT

30. As an alternative argument, Mr Henderson maintained on behalf of the defendant that the dates of possession for sections 2-5 were the actual dates for possession and, to the extent that those had been delayed, then the defendant was entitled to an extension of time for the period of that delay. This was the point identified at paragraph 11(c) above. He relied on relevant event 25.4.12 (about which I am doubtful, given that it is very specific and refers to ingress or egress from adjoining land) and clause 25.4.13, dealing with the deferment in giving possession.

31. As I have already indicated at paragraphs 22-29 above, the difficulty with this argument is not the date of possession, which is a matter of historical fact, but the correct approach to the date *of/for* completion, and the possible extension to those dates. As Mr Lofthouse QC correctly noted, extensions of time and liquidated damages concern completion dates, not dates for possession. In essence, therefore, the defendant is here seeking a full extension of time for the deferred possession. But since the deferred possession in respect of sections 2, 3, 4 and 5, only arose because of the 4 week culpable delay on the part of the defendant in relation to section 1, it would be a nonsense to reward the defendant for that 4 week delay by giving him a full extension of time for it on the subsequent sections.

32. I repeat what I have said above as to the way in which the contract was intended to operate. I am in no doubt that the parties intended that any extension of time granted to the defendant on section 1 would follow through to the subsequent sections; that was fair and appropriate, and in accordance with the contract provisions. Similarly, I am in no doubt that the parties intended that any period of culpable delay on section 1 would give rise to a similar period of culpable delay (and liability for liquidated damages) under sections 2-5; that too was also fair and appropriate. It has the effect of attributing the delay (and the loss caused thereby) to the party responsible for it.

H. CONCLUSIONS

33. For all those reasons, I have concluded that the contract was entirely workable as it was. There is no question of there being any penalty. I have been through the declarations sought by the claimant in paragraph 15 of its part 8 claim form document. It seems to me that, in the light of my conclusions, I ought to grant the claimant the declarations there set out. I would ask the parties to agree the form of order consequential upon this judgment.

Mr Simon Lofthouse QC (instructed by Morgan LaRoche) for the Claimant
Mr Simon Henderson (instructed by Clarke Willmott) for the Defendant