

Legal update — February 2017

Dispute resolution and litigation

Octoesse LLP v Trak Special Projects Ltd [2016] EWHC 3180 (TCC)



Construction contracts often include a provision that requires the contractor to pay liquidated damages to the employer as a remedy for contractor caused delay beyond the stipulated date for sectional completion or completion of the whole project.

Simple liquidated damages provisions are based on a pre-estimate of the loss the employer would incur as a result of the contractor failing to meet the completion date. They are generally set as a fixed daily or weekly sum and may include sums for loss of rent, financing charges, and any costs associated with delayed completion that the employer anticipates will be incurred.

The standard form contracts and in particular the JCT suite of contracts requires certain notices to be served before the employer is able to start levying liquidated damages against payments otherwise due to the contractor or collect liquidated damages as a debt. If that contractual process is not followed, the damages cannot be levied. Octoesse LLP engaged the contractor, Trak Special Projects Limited for the construction of residential and retail units in Long Acre, London WC2. The contract used for the project was the Standard Form JCT Intermediate Building Contract (IC 2011). The initial date for completion, 22 September 2013, was extended to 29 September 2013 due to a delay in the commencement of the works; however, the works remained incomplete. On 3 October 2014, the contract administrator issued a certificate of non-completion and on 13 February 2015, the works were certified as practically complete.

On 3 July 2015, Trak submitted a claim for an eighteen week extension of time. In response, the contract administrator granted Trak a nine and a half week extension of time on 9 November 2015 which did not obviously cover the whole period of delay. No further certificate of non-completion was issued. On 4 May 2016, the final certificate was issued for payment and

on 16 May 2016 Octoesse issued a pay less notice deducting liquidated damages of £89,250.

Trak commenced an adjudication claiming that Octoesse claiming that further monies were due to them and the adjudicator found that Octoesse was not entitled to deduct liquidated damages, that the pay less notice was invalid and that Octoesse should pay Trak £59,991.83 plus interest and other sums. Octoesse did not comply with the decision and applied for a declaration on the law in respect of clauses 2.22 and 2.23 of the contract. In her judgment on 15 December 2016, Mrs Justice Jefford held that the recoverability of the liquidated damages turned on the proper construction of clauses 2.22 and 2.23 of the contract:



Source: Fotolia

*"Clause 2.22 If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Architect/Contract administrator **shall** issue a certificate to that effect. If an extension of time is made **after** the issue of such certificate, the extension shall **cancel** that certificate and the Architect/Contract Administrator shall where **necessary** issue a **further** certificate."*

It was an express condition of Octoesse's entitlement that it had given notice under clause 2.23.2 and that the contract administrator had issued a certificate pursuant to clause 2.22. Trak argued that this condition had not been met because the certificate of non-completion issued in October had been cancelled when a further extension of time had been granted in November 2015.

Published by
Trowers & Hamlin

Trowers & Hamlin LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

Trowers & Hamlin LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamlin LLP is authorised and regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamlin LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlin LLP's affiliated undertakings. A list of the members of Trowers & Hamlin LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlin LLP has taken all reasonable precautions to ensure that information contained in this document is accurate but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlin LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

Clause 2.22 required the issue of a further certificate to allow Octoesse to levy the liquidated damages.

Octoesse submitted that it was not necessary for the contract administrator to issue a further notice of non-completion because practical completion had already taken place prior to an extension of time being granted. This meant that Trak was fully aware of its potential liability for liquidated damages. However, Justice Jefford held that Octoesse's argument had failed to give effect to the mandatory requirement established by the word shall in Clause 2.22. Indeed, as the extension of time cancelled the previously issued certificate, absent such a certificate the requirements of the contract were not fulfilled and Octoesse was not entitled to deduct liquidated damages.

This case stresses the importance of the preconditions to the valid levy of liquidated damages and should certainly prompt employers and those acting as consultants to employers to make sure that if an extension of time is given that does not encompass the whole period of delay that a further certificate of non-completion is issued. To fail to do so removes the employer's right to liquidated damages even when there is no defence to culpable contractor delay.

This article first appeared in Construction Manager on 2 February 2017.

February 2017 © Trowers & Hamlins

For more information please contact

Theresa Mohammed
Partner
t +44 (0)20 7423 8279
e tmohammed@trowers.com

Zoeyah Shaheen
Solicitor
t +44 (0)20 7423 8633
e zshaheen@trowers.com