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Insights

DESIGN RESPONSIBILITY: THE NEED FOR CLARITY

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SUMMARY

In this Insight, Shy Jackson and Rebecca Maxwell consider what we can learn from the case of Workman Properties Ltd v Adi Building & Refurbishment Ltd [2024] EWHC 2627 (TCC) which provides a salient reminder of the importance of making sure the contract reflects the terms of the parties' agreement.

The recent case of Workman Properties Ltd v Adi Building & Refurbishment Ltd [2024] EWHC 2627 (TCC) provides a salient reminder of the importance of making sure the contract reflects the terms of the parties' agreement, especially when amending the standard JCT Design and Build provisions. It also provides useful guidance on the use of Part 8 proceedings for declarations relating to adjudication.

WHAT HAPPENED?

Workman Properties Ltd (Employer) and Adi Building and Refurbishment Ltd (Contractor) entered into a bespoke amended JCT Design and Build Contract 2016 for the design and construction of the expansion of existing facilities at Cotteswold Dairy, Tewkesbury.

The dispute at the heart of this case arose because of the disagreement as to who was contractually responsible for completing the design of the works up to RIBA Stage 4 / BSRIA Stage 4(i) (Stage 4/4(i)).

The Employer's Requirements contained the following statement at paragraph 1.4: "*significant design has been developed to date which has been taken to end of RIBA Stage 4 with some parts of contractor specialist design elements together with Services design to Stage 4 (i)…*" .

The Contractor argued that this statement constituted a contractual warranty that the Employer had completed the design to Stage 4/4(i) and that the Employer had breached this warranty by not having completed the design to Stage 4/4(i). Therefore the Contractor was entitled to claim damages, additional time and costs as a result of the breach.

The Employer disagreed. It said that the statement meant that the Contractor had inherited responsibility for the existing design contained in the Employer's Requirements and had therefore accepted responsibility for completing the design.

THE TWO ADJUDICATIONS

The dispute in question was subject to two adjudications commenced by the Contractor.

In the first adjudication, the Contractor sought a decision on the correct interpretation of paragraph 1.4. The adjudicator decided that it did amount to a contractual warranty that the design had been completed to Stage 4/4(i). Therefore, the Employer was in breach of contract by having not completed the design to Stage 4/4(i).

In the second adjudication the Contractor challenged the gross valuation of the prior payment certificate together with a claim for extensions of time, loss and expense. The adjudicator awarded the Contractor c. £3m, which included the delay and loss and expenses related to the Employer's failure to complete the design to Stage 4/4(i).

THE SCOPE OF DESIGN RESPONSIBILITY

Prior to the second adjudication, the Employer made a Part 8 application to the Technology and Construction Court (TCC) to challenge the decision of the first adjudication and claimed that the Contractor had agreed to accept full responsibility for the design.

Not surprisingly, the Employer relied on the wording stating that the Contractor is to be "*fully responsible for the complete design … of the works*" while the Contractor relied on the wording that stated that "*significant design has been developed to date*", "*which has been taken to the end of RIBA stage 4"* and "*together with services design to stage 4(i)"* in order to deliver what the Employer requires.

The judge stated that *"all of the relevant contract terms point firmly towards the [Employer's] case*" but the ultimate question was whether the second paragraph of 1.4 of the Employer's Requirements was clear enough to amount to a contractual warranty that the existing design had been completed in all respects up to Stage 4/4(i).

Looking at the bespoke amendments, the judge noted that Recital 3 was amended to state that "*the Contractor has examined the Employer's Requirements and has agreed to accept full responsibility for any design contained in them and acknowledges that the Employer's Requirements form part of the Contractor's Design Documents*", unlike the standard wording which contains no such express agreement. Similarly, the amended clause 2.17.1 headed "*design work – liabilities*", under which the Contractor was to be "*fully responsible in all respects for the design of the Works including all design work proposed by or on behalf of the Employer on or before the date of this Contract forming part of the Employer's Requirements"* and (by clause 2.17.2 and amended clause 3.3)

including design work carried out by consultants and sub-consultants, whether before or after the date of the contract. Again, this was materially different from the standard clause 2.17.

The judge observed that the words used were "*nowhere near sufficient to require the other unequivocal contract provisions to be read as so heavily qualified*" and found that this did not negate the Contractor's contractual responsibility to satisfy themselves that what was in the existing design was sufficient in all respects.

It was therefore held that paragraph 1.4 of the Employer's Requirements did not constitute a contractual warranty from the Employer.

Although the Employer was successful in overturning the outcome of the first adjudication, at the time of the decision the Employer had already paid the amount awarded in the second adjudication. The judge pointed out that had the Employer issued the claim in a more appropriate TCC location based on proximity to both the Employer and Contractor, rather than in the London TCC, the Part 8 claim would almost certainly have determined before the second adjudication decision and therefore the Employer would not have had to make payment. This was however a case where this issue was one of many, and it appears that at the time of the judgment the works have still not been completed, the Contractor was no longer on site and there were disputes concerning outstanding defects.

THE PART 8 PROCEEDINGS

In addition, the Contractor argued that the case at hand was unsuitable for the Part 8 procedure as it raised disputed factual issues relating to the interpretation of a construction contract and would be inappropriate to make the declarations sought without a full Part 7 process at which all factual and legal issues would be addressed and dealt with.

The court rejected the Contractor's claim on the basis that "*nothing identified added anything material to what was in the contract documents or was in dispute*". It also observed that, in circumstances where the Contractor chose to refer to adjudication, a claim on a matter of contract interpretation which did not turn on the resolution of disputed facts, it could then complain that it is somehow unjust for the other party to bring Part 8 court proceedings.

The judge also noted the substantial costs incurred by the parties, which he suggested could have been reduced if the parties had followed the guidance given in the TCC Guide and the authorities regarding PD57AC. As he noted, this was not a case where the Part 8 proceedings were being brought for a declaration as a pre-emptive response to an anticipated application to enforce the decision. This affected whether witness statements had to comply with PD57AC but the judge also suggested that the disagreements between the parties could have been addressed by the parties applying to the court for directions.

COMMENTARY

It is common in design and build contacts for employers to provide a design that has been progressed to a certain level so that the contractor can complete and develop the design. When that is done, it is important to be very clear to what extent a contractor can rely on the design provided by the employer.

In this case, it was held that very clear words were needed before the express wording used could be seen as a warranty by the employer. This is consistent with the approach in Co-operative Insurance Society Ltd v Henry Boot Scotland Ltd and others EWHC 1270 (TCC), which the Employer relied on, where it was held that the contractor, in fulfilling its duty to exercise reasonable skill and care, is required to examine and ensure that the conceptual design of the employer is appropriate so that they can develop the conceptual design into a completed design capable of being constructed.

This case deals with a bespoke amendment to the standard JCT terms but the wider point is that any amendments as to the design provisions need to be carefully considered and be drafted clearly so as to reduce the risk of uncertainty which may result in disputes. As noted above, the judge noted a few substantial amendments to the standard JCT wording as well as the novation provisions as supporting his decision when interpreting paragraph 1.4. As he also pointed out, in the standard provisions the contractor is not responsible for the contents of the Employer's Requirements or verifying the adequacy of any design contained within them (clause 2.11), and any correction required due to any design inadequacy in them is to be treated as a contract change in the contractor's favour.

This is a useful reminder that under the standard JCT wording, while the contractor is responsible for completing the design, it is not responsible for the Employer’s Requirements. This leads to further amendments where employers look for the contractor to have single point design responsibility, and this is where clear drafting can reduce the types of arguments that came up in this case.

This article was co-authored by Trainee Solicitor, Rebecca Maxwell.

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