CONSTRUCTION FOCUS

Construction focus: 2021 in selected highlights

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Dan Cudlipp and Hannah Coupe recap a selection of the legal developments of particular interest and importance to construction professionals

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The High Court has had to turn its attention to the application of standard terms and conditions, and in the first section below, we recount useful guidance issued by the court. We also discuss a couple of significant cases from the Supreme Court, and we end by looking at government guidance and legislation.

Standard terms & conditions

Each of the three following cases concern a supplier attempting to rely on its own standard terms and conditions (T&Cs) in order to avail itself of some benefit contained within those terms. For varying reasons, each of those attempts failed, and the travails of the suppliers provide a helpful lesson for the rest of us.

Phoenix Interior Design Ltd v Henley Homes plc and another [2021]

In *Phoenix*, Freedman J was asked to consider the application of the Unfair Contract Terms Act 1977 (UCTA) to an exclusion clause within a supplier's T&Cs in a business-to-business contract, which read as follows:

> *… the Seller shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price of the Goods has not been paid by the due date for payment.*

Freedman J held that the clause could not be enforced as it did not satisfy the requirement of reasonableness under UCTA for a number of reasons, including;

- there was no good explanation why, in place of the exclusion clause, it would not

have sufficed to have a clause preventing the purchaser from setting off any claims for breach of the warranty against the seller's fees;
- the clause was:

> *… tucked away in the undergrowth of the Standard Terms and Conditions without any particular highlighting of the consequences of even the slightest delay in payment';*

- the clause was 'potentially exorbitant', as the consequence of the slightest delay or deduction might bar all of the purchaser's rights of redress against the supplier relating to the quality of the goods supplied; and
- the clause was difficult to apply due to lack of clarity over the meaning of 'due date'.

Although this case does not create any new law, it is a helpful factual example of how a clause may fall foul of UCTA. It serves as a reminder that, in order to satisfy the test of reasonableness, as well as avoiding excessively wide drafting or ambiguous wording, a party should ensure that its exclusion or limitation clauses are clearly visible. It is therefore important to take extra measures to draw the other party's attention to unusual clauses in standard T&Cs.

Blu-Sky Solutions Ltd v Be Caring Ltd [2021]

In *Blu-Sky Solutions*, HH Judge Stephen Davies was requested to consider whether a supplier's standard T&Cs, and in particular, a harsh cancellation clause, had been incorporated into a business-to-business contract by reference. Blu-Sky, a mobile phone supplier, had offered to supply Be Caring, a social care provider, with 800 mobile phone connections at a monthly rental fee of £9,600 for a minimum period of 48 months. As is commonplace when making purchases online, Be Caring signed an electronic purchase order which had been provided by Blu-Sky in an email. The order form contained wording at the bottom that stated that Be Caring acknowledged it had accessed and read the T&Cs on the Blu-Sky website.

HH Judge Stephen Davies found that Blu-Sky's T&Cs had been incorporated by reference, with the exception of an 'onerous' clause, which required Be Caring to pay an 'administration charge' of £225 per connection if it cancelled the order before connection. That clause was deemed to be particularly onerous, in part because the amount of the 'administration charge' bore no relationship to any actual administration costs incurred or likely to be incurred. It was held that Blu-Sky had not fairly and reasonably brought this clause to Be Caring's attention, for a number of reasons, including:

- prior to receiving the order form, Be Caring was not told, and had no reason to expect, that it would be exposed to a very substantial contractual liability if it decided against entering into the contract;
- the order form 'positively obfuscated' the nature of the contract. Be Caring was misled into believing it was simply signing an order form as a precursor to entering into a contract for mobile phone connections, rather than entering into a contract which made it liable to pay a cancellation charge if it did not do so;
- it would have been perfectly feasible to include the T&Cs as part of the order form;
- no attempt whatsoever was made to highlight the offending clauses to Be Caring – instead, the clauses were:

> *… cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate.*

Though it did not involve UCTA, like *Phoenix* above, the case emphasises that when attempting to incorporate standard T&Cs by reference, care should be taken to ensure that a meaningful attempt is made to draw customers' attention to any particularly onerous clauses to ensure that those clauses can be enforced when needed later down the line.

Balfour Beatty Regional Construction Ltd v Van Elle Ltd [2021]

Balfour Beatty is a case that we have covered previously in this column (see the May 2021 edition, PLJ387, link here), but this cautionary tale warrants a recap. In this case, the contractor (Balfour Beatty) engaged the sub-contractor (Van Elle Ltd) to undertake piling works on a project, and a distinct portion of Van Elle's works had been largely completed prior to the parties agreeing a formal sub-contract. Balfour Beatty later sought to recover remediation costs from Van Elle in respect of defects in the latter's works.

Van Elle argued that said distinct portion of its works were not governed by the formal sub-contract between the parties and that instead, the contract governing that portion of the works was a written quotation from Van Elle which incorporated its own standard T&Cs and which had been sent to Balfour Beatty some time earlier. Van Elle's T&Cs provided that any liability on its part to Balfour Beatty, if established, would be significantly limited so far as recoverable losses were concerned.

Waksman J held that there was only one contract governing the works, namely the formal sub-contract between the parties. In reaching that decision, it was noted that Van Elle had accepted Balfour Beatty's proposal to enter a letter of intent and that neither that letter, nor the contemplated formal sub-contract, incorporated Van Elle's T&Cs. Further, both parties agreed during the case that the common intention at the outset of their dealings in respect of the piling works was for those dealings to be governed by *one* sub-contract, and the court noted that the parties operated throughout their relationship, including by their invoicing process, as if there was just one contract (crucially one contract number was used). Additionally, Mr Justice Waksman noted that the description of the works used in the formal sub-contract was:

> *The provision of all necessary services and supervision to undertake the design, supply and installation of the CFA Piling Works.*

This case highlights the importance of being explicit over the terms that apply to the relationship between different parties. If a single set of terms is to apply, then a clear entire agreement clause should be incorporated into any contract that is entered into following other, less formal arrangements, which explicitly excludes previous terms. Alternatively, if the intention is that different elements of the works are to be governed by different terms, the formal contract should contain a clause excluding elements of the works (after clearly defining them) that are not intended to be governed by the new contract.

The bottom line from these three cases is that parties should be open about, and clearly

record, the terms under which they are operating, which should not be obscured, unnecessarily ambiguous or unjustifiably onerous.

Significant Supreme Court decisions

We have chosen two decisions from the Supreme Court this year which deal with two issues that construction professionals will frequently encounter, particularly the latter: limitation and liquidated damages.

Matthew and others v Sedman and others [2021]

In the case of *Matthew*, the Supreme Court gave some useful guidance on the calculation of limitation periods. The appellants alleged that the respondents had negligently, in breach of trust and in breach of contract, failed to make a claim under a scheme of arrangement by midnight on the last day for submitting claims, namely Thursday 2 June 2011. The appellants excluded Friday 3 June 2011 from the calculation of the limitation period and took Saturday 4 June 2017 as the expiry of the limitation period. Accordingly, they issued a claim form on Monday 5 June 2017 – that being the next day when the court office was open. The question for the Supreme Court was whether, in so called 'midnight deadline' cases, the day which commenced at or immediately after the midnight hour (ie Friday 3 June 2011) should be included or excluded in the calculation of the six-year limitation period.

The general rule when calculating limitation is that where a cause of action accrues part-way through a day, that day is not counted as part of the limitation period: the law rejects fractions of days in order to prevent a claimant being prejudiced by part of a day being counted as a whole day. However, the Supreme Court explained that in a midnight deadline case, even if the cause of action accrued at the beginning of the day following midnight (ie Friday 3 June 2011), that following day remains a complete, undivided day for practical purposes. Accordingly, it was held unanimously that the day following expiry of the deadline (ie Friday 3 June 2011) should be included in the calculation of the limitation period. If it was not, the limitation period would be six years and one complete day which the court said would:

> *… unduly distort the six-year limitation period laid down by Parliament and would prejudice the defendant by lengthening the statutory limitation period by a complete day.*

In our experience, it is not uncommon for circumstances to be such that protective proceedings are issued, or standstill agreements completed, right at the very end of the limitation period, and this case should be borne in mind when claimants are operating so close to the wire.

Triple Point Technology Inc v PTT Public Company [2021]

This case was covered by us in greater depth earlier in the autumn (see the September 2021 edition, PLJ390, link here). It is of significance as it returns some welcome certainty to the application of liquidated damages upon termination.

In *Triple Point,* the Supreme Court confirmed that:

- in circumstances where termination of a contract occurs after the contractual completion date, then absent clear words to alter the position, an employer will be entitled to recover liquidated damages for the period between the contractual completion date and termination date. Thereafter, the employer will be entitled to general damages for any losses following termination; and
- in circumstances where termination occurs before the contractual completion date, in the normal course, the employer will have no right to liquidated damages. That is because liquidated damages will not have accrued prior to termination, as there was no contractual delay to trigger them, and they cannot accrue following termination as the contract is at an end and the clause will no longer apply. Nevertheless, the employer can still seek to pursue a claim for general damages for any losses arising out of the termination (and any other breaches).

Legislative changes and guidance in the construction sector

The review and achievement of fire safety has remained a central theme of 2021, and so our selection in this section focuses on the progression of legislation and guidance on that topic.

Fire Safety Act 2021

The Fire Safety Act 2021 (FSA) received Royal Assent on 29 April 2021 after being introduced in March 2020 and has come into force incrementally throughout the year (with section 3 not yet in force at the date of this article). The FSA is a short piece of legislation which amends the Regulatory Reform (Fire Safety) Order 2005 (RRO) by widening the scope of domestic premises to which it applies. The RRO places extensive fire safety duties upon the (broadly defined) 'responsible person' for a property. Further to the FSA, all buildings containing two or more sets of domestic premises shall be covered by the RRO, which shall now apply to the building's structure, external walls (including doors and windows therein and attachments thereto), and common parts, as well as all doors between the domestic premises and common parts.

Building Safety Bill

No review of the year would be complete without mention of the Building Safety Bill (BSB), which we covered in detail in the November 2020 edition, PLJ382.

The BSB, which purports to introduce many changes to the existing building safety regime, is currently at Report stage, having undergone first and second readings in the Commons this year, and passed the Committee stage. The legislation will require building owners to manage safety risks and is intended to introduce clear lines of responsibility for safety during design, construction, completion and occupation of high-rise buildings. The legislation introduces a golden thread of information that considers safety at every stage of a building's lifetime, as well as a demonstration by building owners that they have effective and proportionate measures in place to manage the risks associated with a building.

From our initial experience working with experts in this field, despite the BSB being some way from receiving Royal Assent, it is advisable for parties to pay heed to the BSB's requirements and presently take steps to collate the required information. It is also apparent that a significant amount of information will need to be collated at the design stage and maintained throughout, and following, the works, which will require a healthy measure of proactivity from parties on all sides.

Finance Bill 2021-22

In the autumn Budget, the government announced that from 1 April 2022, a new tax would be introduced (via the Finance Bill 2021-22) on companies or groups of companies undertaking UK residential property development with annual profits in excess of £25m. The tax will be charged at 4% on profits exceeding an annual allowance of £25m and is intended to ensure that the largest developers make a fair contribution to help pay for building safety remediation.

EWS1 forms

For the past couple of years, EWS1 Forms have caused increasing distress to leaseholders in low and medium-rise buildings under 18m in height. Such leaseholders have been struggling to sell or re-mortgage their homes, or face the daunting prospect of paying the often significant cost of remediation works.

EWS1 Forms were introduced by the RICS and two key UK mortgage lending bodies (the Building Societies Association and UK Finance) in December 2019 to provide a framework for surveyors to assess the safety of a building's façade. Since their introduction, EWS1 Forms have become an increasingly prevalent requirement for more and more buildings under 18m, and that has served to deliver considerable chaos to the property market. However, relief may be in sight.

On 21 July 2021, following advice from an independent expert group, the government announced that, going forward, EWS1 Forms should not be requested for buildings below 18m, and a group of major high-street lenders committed to review their practices. Notwithstanding, the RICS position on the use of EWS1 Forms is at odds with the government's position. The RICS Guidance Note from March 2021 (written with reference to the Government's Consolidated Advice Note for Building Owners of Multi-storey, Multi-occupied Residential Buildings, published by the MHCLG in January 2020) has not been updated and still requires an EWS1 Form for buildings of less than six storeys in certain circumstances (interestingly, it also frames the form's scope in terms of storeys, not metres). The RICS state on their website that their March 2021 guidance remains in effect and that it will only be reviewed once the RICS have considered the impact of the new announcement with expert stakeholders (fire safety bodies, lenders, valuers, insurers, leaseholders and others). In addition to, and perhaps as a result of, the RICS maintaining its guidance, differences in approach have remained across the lending market with EWS1 Forms not yet exclusively confined to buildings over 18m.

Nevertheless, speaking in front of the Housing, Communities and Local Government Committee on 8 November 2021, Michael Gove (the Secretary of State for Levelling Up, Housing and Communities) teased further changes before Christmas this year. That ominous deadline, paired with the inherent credibility issues faced by this government, may not deliver great confidence, but Mr Gove told the committee that he wanted to

update January 2020’s Consolidated Advice Note (which it is the government’s intention to withdraw) before Christmas 2021.

As a result, there remains noteworthy guidance and legislation to watch out for next year, and the judiciary will no doubt continue to offer its wisdom on myriad issues.

Cases Referenced

- Balfour Beatty Regional Construction Ltd v Van Elle Ltd [2021] EWHC 794 (TCC)
- Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)
- Matthew and others v Sedman and others [2021] UKSC 19
- Phoenix Interior Design Ltd v Henley Homes plc and another [2021] EWHC 1573 (QB)
- Triple Point Technology Inc v PTT Public Company [2021] UKSC 29

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