Take priority but be reasonable

On 20 January 2016, Mr Justice Edwards-Stuart handed down his judgment on preliminary issues in *Commercial Management (Investments) Limited v (1) Mitchell Design and Construct Limited, and (2) Regorco Limited*[1].

The case is a warning to contracting parties to make sure that it is clear which set of standard terms and conditions prevails. It is also a reminder to consider whether the Unfair Contract Terms Act (UCTA) will apply. If it does, a clause limiting liability has to be practicable to be reasonable.

The facts

Mitchell Design, a contractor, was engaged to design and build a warehouse in Kent. In April 2002, Regorco (formerly Roger Bullivant Limited) entered into a sub-contract with Mitchell Design for the provision of vibro compaction works and piling for the warehouse.

On 13 March 2002, Regorco provided an estimate for the work to Mitchell Design. Regorco referred to and enclosed its standard terms and conditions of contract. Clause 12(d) of these terms provided that all claims must be notified in writing within 28 days of the appearance of any alleged defect or the event complained of, and would be deemed to be waived and absolutely barred unless so notified within one calendar year of the date of completion of the works.

Mitchell Design responded, confirming that it intended to place an order. The works were then carried out and, subsequently, Mitchell Design sent a purchase order to Regorco, which had its standard terms and conditions printed on the reverse.

The Mitchell Design standard terms and conditions included two relevant clauses. Clause 14 provided that the terms of the order and its conditions "shall be deemed to override any terms and conditions of your tender". Clause 15 provided that the sub-contractor would indemnify Mitchell Design against loss arising out of the performance of the sub-contract.

Regorco amended clause 14 to read "The terms of this order and its conditions shall be deemed to override any terms and conditions of your tender, where applicable, otherwise Roger Bullivant Conditions apply" before signing and returning the purchase order to Mitchell Design.

In November 2011, the Claimant, who was in occupation of the warehouse and was the beneficiary of a warranty, complained of settlement to the slab beneath the production area.

Findings

Mr Justice Edwards-Stuart considered how the contract had been concluded. He found that Mitchell Design was aware of the amendment that Regorco had made to clause 14 and had accepted Regorco's counter-offer. He then found that the Mitchell Design terms would prevail not where there was inconsistency between the two sets of rival terms, but rather "where applicable". "Applicable" is the opposite of "not applicable" and the latter

Any comments or queries?

Alexandra Anderson
Partner
+44 20 3060 6499
alexandra.anderson@rpc.co.uk

Helen Mitchell
Senior Associate
+44 20 3060 6920
helen.mitchell@rpc.co.uk

1. [2016] EWHC 76 (TCC).

would be used to indicate, for example, that a question in a form is irrelevant. As such, a term that is relevant to performance of the sub-contract or the remedies under it is, by definition, applicable.

In Mr Justice Edwards-Stuart's view, clause 12(d) of the Regorco terms covered the same subject matter as clause 15 of the Mitchell Design terms, because clause 12(d) could apply where there was a claim for an indemnity. As such, clause 12(d) would be overridden by clause 15 of the Mitchell Design terms.

Obiter, Mr Justice Edwards-Stuart went on to consider UCTA. He concluded that Regorco's standard terms and conditions were subject to UCTA. The contract did not need to incorporate Regorco's standard terms and conditions in their entirety for UCTA to apply. Mr Justice Edwards-Stuart found that clause 12(d) did not satisfy the UCTA test of reasonableness. He considered the most powerful factor in reaching this conclusion was that it was not reasonable to expect, at the time when the sub-contract was made, that compliance by Mitchell Design with the 28-day time limit and the requirement to make a claim within a year would be achievable, let alone practical. Mr Justice Edwards-Stuart commented that it is the nature of ground compaction work and piling that defects usually do not appear until sometime after the work has been carried out. There can also be a lapse of time between any visible cracking and the cause of that cracking being established. Mitchell Design was also not going to be the user of the warehouse, so would not be there to observe any cracking.

As an afternote, Mr Justice Edwards-Stuart commented on the skeleton arguments. He referred to paragraph 15.2.1 of the TCC Guide that provides "in general terms, all opening notes should be of modest length and proportionate to the size and complexity of the case". He said that a skeleton argument running to more than 25 pages, with normal formatting is not of modest length and usually makes it difficult for the reader to identify the real issues and follow the argument. He also encouraged counsel not to cite several cases where one or two will do and not to cite authorities which simply illustrate the application of a well-known principle to particular facts.

Comments

The case is of interest for several reasons. It is a warning to construction professionals to ensure that the priority of contractual terms, particularly competing standard terms and conditions, is understood before concluding a contract. Both parties may have a set of standard terms and conditions and it should be clear which prevails. It is also a warning that UCTA is likely to apply if the terms are not specifically negotiated and, if so, the test of reasonableness must be satisfied. If a term is not thought to be practicable at the time of the contract, it is unlikely to be reasonable.

Mr Justice Edwards-Stuart's comments on skeleton arguments are also worthy of note. More than 25 pages would not be of "modest length" and Counsel should only cite necessary authorities.

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Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

8 Marina View #34-02A
Asia Square Tower 1
Singapore 018960
T +65 6818 5695