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Construction Newsletter - Summer/Autumn Edition

Buildlaw

Welcome to the Summer/Autumn 2011 edition of the Ashfords' Construction Newsletter.

Changes to the Housing Grants Construction & Regeneration Act 1996 will come into force on 1 October 2011 by virtue of the Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 2) (England) Order 2011.

The changes relate to issues such as the notice and payment provisions in construction contracts and to adjudication. Of particular importance is the change in the law so that the full amount of an application for payment can become due for payment if notice is not served wiithin prescribed time limits. Further details of the forthcoming changes were set out in our Jan/Feb 2010 Buildlaw (which can be accessed at www.ashfords.co.uk/news/buildlaw_jan10).

The detail of the changes and what they mean for businesses will be addressed in our Autumn seminars. If your organisation would be interested in a bespoke seminar on the new provisions please contact Emma Clark on e.clark@ashfords.co.uk.

Contents

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Retention of title clauses and ownership of materials

On a construction project, deciding which party owns which goods and materials at any given time can be a difficult task. In the present economic climate with insolvency as an ever present threat, ownership of goods and materials has become more of an issue.

Retention of title clauses (**"ROT clauses"**) may afford an element of protection to those parties who supply goods and materials.

Where goods have been supplied under a contract of sale, the Sale of Goods Act states that title to the goods passes from the seller to the buyer when the parties intend it to pass. In general this will be, if there are no indications to the contrary, at the point of delivery.

Many construction contracts, however, are for the supply and fitting of goods, rather than contracts of sale, and these contracts are usually subject to the Supply of Goods and Services Act. Unless there are express provisions to the contrary, ownership of the goods will remain with the supplier until the goods are incorporated into the works when title will pass to the owner of the property in which they are incorporated.

It is common for a contractor, sub-contractor or supplier to include an ROT clause in its terms and conditions. ROT clauses are based on the principle that a buyer cannot transfer the title to goods and materials that it does not have. ROT clauses seek to amend the statutory position described above by leaving ownership with the seller until full payment has been made for the goods.

Be aware, though, that in order for an ROT clause to be effective it needs to be carefully drafted and the goods and materials subject to the clause need to be easily identifiable or separate from other goods. ROT clauses that are only detailed on an invoice and not in the contract are likely to be ineffective against a buyer, as by the time of the invoice it is usually too late to add new contract terms.

Furthermore, ROT clauses generally only bind the contracting parties and, although useful for protecting a supplier's position, even the best drafted ROT clauses may be of no effect if the buyer has annexed the goods to the land, used the goods in a manufacturing process, or sold the goods on to a third party, who purchased in good faith.

Therefore ROT clauses should be seen as another layer of protection for a supplier but should not be relied on as complete protection against a buyer who becomes insolvent or refuses to pay for the goods supplied.

Interest - what is a substantial remedy?

Yuanda (UK) Co Ltd v WW Gear Construction Ltd TCC [2010] EWHC 720 (TCC)

In this case, which was heard in 2010, the Hon Mr Justice Edwards-Stewart considered what constitutes a "substantial remedy" for the purposes of the Late Payments of Commercial Debts (Interest) Act 1998.

Yuanda (UK) Co Ltd ("Yuanda") was engaged by WW Gear Construction Limited ("Gear") to provided glazed curtain walling for a luxury hotel in London. Disputes arose between the parties and Yuanda issued a claim seeking various declarations as to the effect of certain clauses in the contract between Yuanda and Gear.

There were various issues before the Judge, including the question of whether a provision in the contract that interest would be paid on late payments at the rate of 0.5% above base rate was void by reason of the Late Payment of Commercial Debts (Interest) Act 1998 (the "Act").

The contract between the parties was based on a JCT Trade Contract with substantial amendments set out in a Schedule of Amendments. The wording in the JCT form provided for interest on late payments at the rate of 5% over Base Rate. However, in the Schedule of Amendments this was changed to 0.5%.

In respect of interest, the issue to be decided by the judge was *"Does clause 4.11.2 provide a substantial remedy for late payment within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998 or should the statutory rate be substituted for it?"*

Yuanda relied on section 8(1) of the Late Payment of Commercial Debts (Interest) Act 1998 and claimed that the contractual rate of 0.5% was not a substantial remedy within the meaning of the Act and was therefore void. Yuanda said that as a result it was entitled to interest at the statutory rate which was 8% over base rate.

Section 8 (1) of the Act provides *"Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to a debt, unless there is a substantial remedy for late payment of the debt."*

Section 9(1) of the Act provides that a contractual remedy for late payment of a debt shall be regarded as a substantial remedy unless:

"(a) the remedy is insufficient either for the purpose of compensating the supplier for later payment or for deterring late payment; and
(b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) vary the right to statutory interest that would otherwise apply in relation to the debt."

Section 9(2) provides that *"In determining whether a remedy is not a substantial remedy, regard shall be had to all the relevant circumstances at the time the terms in question are agreed."*

Section 9(3) provides that in determining whether it would be fair or reasonable to allow the remedy to be relied on or oust the statutory interest that would otherwise apply consideration should be given to the following matters:

(a) The benefits of commercial certainty;

(b) The strength of the bargaining positions of the parties relative to each other;

(c) Whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and

(d) Whether the supplier received an inducement to agree to the term.

Hon Mr Justice Edwards-Stewart held *"Taking into account all the factors that I have mentioned, it is clear to me that 0.5% over base rate as a rate of interest for late payment cannot be regarded as a substantial remedy within the meaning of the Act in the absence of special circumstances relating to the parties and the making of the contract."*

The Judge also held that he could see no reason why it would be fair or reasonable to allow Gear to rely on it to oust the statutory rate and as such the Judge concluded the clause in question was void insofar as it provided for a contractual rate of interest of 0.5%.

Avaliable remedy

What legal remedies are available if I feel pressured by the other party to a contract into accepting less favourable contractual terms than those which were agreed?

In these recent uncertain economic times, a contract that once looked commercially sound may actually be less economically viable for one party than it would have been when signed, and the disadvantaged party may put pressure on the other party to renegotiate terms. If this has happened to you, then the recent case of *Kolmar Group AG ("Kolmar")v Traxpo Enterprises PVT Ltd ("Traxpo")* provides an insight into potential legal remedies available when the disadvantaged party refuses to abide by the contract terms and pressures the other party into a renegotiation of the contract in the disadvantaged party's favour.

The facts of the case

Kolmar had entered into a contract with Traxpo to buy a quantity of methanol at a set price, which Kolmar was sourcing for one of its important US customers who needed the methanol urgently. After the contract with Traxpo was signed the price of methanol increased dramatically. Traxpo, facing a loss over the sale, decided to apply pressure to Kolmar to pay more which, after protracted negotiations, ended in Traxpo giving Kolmar a "take it or leave it" ultimatum for a reduced quantity of product at a higher price.

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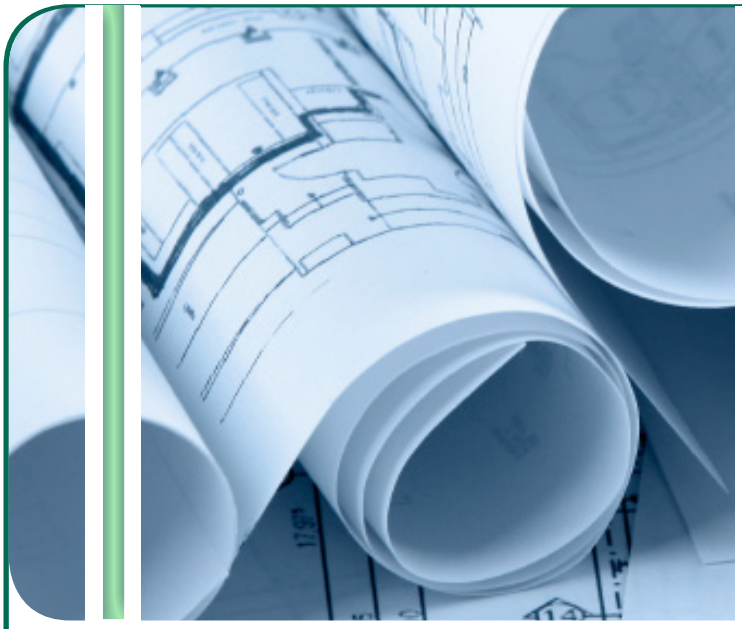
Chambers Guide to the Legal Profession

"Ashfords' in-depth knowledge and expert advice on the NEC form of contract put us one step ahead of the competition and let us proceed with confidence along this procurement route. Their training session was tailored to our needs and very user friendly. I wouldn't hesitate to recommend them."
Steve Foxon - Taylor Lewis



Kolmar protested, but faced with no other choice and the prospect of potential liabilities to its customer and the shipping company, accepted Traxpo's demands. Once the methanol had been secured, Kolmar commenced proceedings arguing that it had been put under economic duress and that Traxpo had exerted intimidation in the negotiations.

The case came before the High Court and the judge decided in Kolmar's favour and an order for damages was made.

Economic duress and intimidation

For a claim for economic duress to be successful, the defendant must:

- Exert economic pressure which is illegitimate; and
- "But for" the illegitimate economic pressure exerted the claimant would not have entered into the disputed contract.

A threat to break a contract, such as that made by Traxpo, will generally be regarded as illegitimate. On the facts of this case, the Court decided that pressure from Traxpo put Kolmar in a situation whereby it had no real choice but to accept Traxpo's demands.

The legal wrong of intimidation is established where:

- The defendant makes a demand backed by a coercive and unlawful threat; and
- The claimant complies with that demand because of the coercive and unlawful threat; and
- The defendant knows or should have known that compliance with its demand will cause loss or damage to the claimant: and
- The defendant intends its demand to cause loss and damage to the defendant.

Traxpo's demands backed up by the unlawful threat to not perform its contractual obligations were sufficient to satisfy the requirements of the legal wrong of intimidation.

What this means for you

This case illustrates that in contractual situations the courts expect the parties to honour the agreed obligations. The economic impact of a subsequent change in market conditions cannot be countered by one of the contracting parties seeking to amend the agreed terms through the use of illegitimate pressure or coercive threats.

However, before seeking a claim for economic duress or intimidation, potential claimants need to be certain that it is illegitimate pressure or coercive threats, and not fair commercial negotiation, that has led to the other party's actions. Businesses need to ensure that the demands that they make are lawful and should also consider whether the effect of their demands on a third party may be considered to be exploitation and not fair commercial negotiation.

Forthcoming Seminars

Exeter - 29th September 2011
Plymouth - 6th October 2011
Taunton - 10th November 2011

Topics to be covered will include changes to the Construction Act.

Our speakers are specialist construction lawyers.

All seminars will begin at 5:30pm and will be followed by drinks and light buffet.

For information on all Seminars and Events, please contact Emma Clark on +44 (0)1392 333615 or e.clark@ashfords.co.uk.

Alternatively, please visit our website at www.ashfords.co.uk/events