Positional sense

28 June 2016

Laurence Cobb considers the liabilities of project monitors and construction professionals, plus the validity of liquidated and ascertained damage provisions

---

There is a view that the role of the project monitor is a bit of an easy ride when it comes to balancing risk against reward, but the recent case of Lloyds Bank Plc v McBains Cooper Consultancy Ltd [2015] EWHC 2372 (TCC) shows that such a view is mistaken.

In this case, the bank agreed to lend in excess of ?2.5m to the borrower, Miracle Signs & Wonders Ministry Trust, to redevelop a church. However, after 21 months the development was unfinished and the money was all but gone. The borrower was unable to complete so Lloyds sold the property and was left with the loss of about ?1.4m.

Lloyds sought to recover its losses from McBains Cooper, alleging inaccurate progress reports, lack of site visits, failure to discuss shortfalls in funding with the borrower, and failing to inform Lloyds that the third floor of the property was being developed.

The court found that a significant proportion of the losses were the responsibility of McBains Cooper. Its lack of site visits and early notifications of variations meant that the bank was exposed to losses from cost overruns. However, the bank was also at fault owing to its own negligence from internal errors, so it was found responsible for a third of its losses. Clearly, as project monitor, playing an active role and knowing your brief is vital to avoiding claims, and it is best to make sure that your client understands what is happening on the project.

Global claim

Another recent case looking at claims against construction professionals was William Clark Partnership Limited (WCP) v Dock St PCT Ltd [2015] EWHC 2923 (TCC) . WCP was retained by Dock St to provide quantity surveying and project management services regarding the construction of a primary healthcare centre. Dock St claimed that a cost overrun in excess of ?700,000 was a result of WCP?s failings. WCP brought proceedings for the balance of unpaid professional fees and Dock St, as part of its counterclaims, sought recovery of the cost overrun and abatement or reduction of fees due to poor performance.

Although WCP was found to have failed to provide adequate cost reports and to have performed poorly, the cost overrun claim failed because of causation issues. It was a global claim ? in itself not fatal, but the route taken instead of advancing a properly detailed case. However difficult it might have been such a case could still have been put forward, in the court?s view.

As to the abatement issue, the general rule is that abatement, which reduces a sum otherwise payable due to defective performance, does not apply to professional services contracts. An exception is when an identifiable element of the services? scope can be shown to be worthless, as was found regarding a failure to provide monthly cost reports.

This case offers a mixed picture for construction professionals. While pursuing them is often not straightforward, global claims can in principle be brought; however, if claims can be detailed, then a global claim is likely to fail, and hopeless services can lead to abatement against elements of fees.

Penalty rule

Finally, if only because of the press coverage these cases received, I cannot ignore the recent Supreme Court decision in Cavendish Square Holding BV v El Makdessi and Parkingeye Ltd v Beavis [2015] , which has reformulated the penalty rule. This moved away from a validity test on whether the pre-estimate of loss is genuine to a broader test as to the innocent party?s legitimate interest in the performance of the contract, including its nature as a deterrent. It is now much less likely that a liquidated and ascertained damage claim will be found to constitute a penalty.

These cases offer a simple but important message to surveyors to be aware of what they are signing up for, as any failures can be expensive ? whether or not you wanted those terms in the first place.

Laurence Cobb is Partner at law firm Taylor Wessing

Further information

- See related case law features:
  - Construction case law: importance of checking contract details
  - Construction case law: meaning of ?construction operations?
  - Construction case law: terms of work
  - Construction case law: payment notices
  - Construction case law: Building Regulations and giving expert advice
- Related competencies include Legal/regulatory compliance , Dispute resolution and conflict avoidance
- This feature is taken from the RICS *Building surveying journal* (May/June 2016)