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1. BNP Paribas Depository Services Ltd & Anor v Briggs & Forrester Engineering Services Ltd [2024] EWHC 2903 (TCC), 2. A & V Building Solution Ltd v J & B Hopkins Ltd [2024] EWHC 2914 (TCC)

1. *BNP Paribas Depository Services Ltd & Anor v Briggs & Forrester Engineering Services Ltd* [2024] EWHC 2903 (TCC)

Date: 18 November 2024

Key Words:

JCT, Design & Build Contract 2016; Contract Interpretation; Asbestos Removal Works (ARWs); Structural Strengthening Works; Impediment, Prevention, and Default, clause 8.9.2; Repudiatory Breach; Shorter Trials Scheme; Control of Asbestos Regulations 2012 (CARs); Approved Code of Practice and Guidance (COPAG); Litigation

Summary

This case concerns a dispute under a design and build contract for stair pressurisation works at City Tower, Manchester. BNP, acting as trustees for the property, contracted B&F for the design and construction of the works. Disputes arose over B&F's responsibility for asbestos removal and structural reinforcement, leading to B&F suspending and later terminating the contract. The court ruled against B&F, concluding that these issues were within their contractual responsibilities and that their termination constituted a repudiatory breach. BNP was granted the declarations sought.

Key Themes:

1. *Contract Interpretation in Design and Build Contracts*
2. *Allocation of Risk for Unforeseen Site Conditions*
3. *Statutory Obligations -v- Contractual Responsibilities in Asbestos Removal*
4. *Repudiatory Breach of Contract through Wrongful Termination*

Background

BNP engaged B&F to upgrade the stair pressurisation system at City Tower. This involved replacing the existing system, with asbestos known to be present. While the contract included asbestos removal works (ARWs), disagreements arose over their scope. B&F claimed their obligations were

limited to works outlined in a subcontractor's quotation based on a pre-contract asbestos survey. BNP argued B&F was responsible for all necessary surveys and ARWs.

Structural deficiencies in riser floors were later identified, requiring reinforcement. B&F argued this fell outside their remit. Work was suspended in December 2021, and in February 2023, B&F terminated the contract, citing BNP's failure to provide additional asbestos surveys and instructions for reinforcement. BNP countered, asserting B&F's termination was a repudiatory breach.

Legal Issues and Analysis

Issue 1: Responsibility for Further Asbestos Refurbishment Surveys:

- **B&F's Position:** Their asbestos obligations were limited to the subcontractor's quotation based on a pre-contract survey (Eton RAS) [120-121].
- **BNP's Position:** B&F was responsible for all necessary surveys and ARWs to meet statutory requirements [52, 53, 142, 143].
- **Court's Analysis:** The court favoured BNP's interpretation. It held that B&F accepted a broad design and build responsibility, including compliance with asbestos regulations. Several contract clauses reinforced this, notably clause 2.40, which placed the risk of unforeseen site conditions, including the presence of asbestos, squarely on B&F [145-150]. The court found no evidence of a clear contractual carve-out limiting B&F's asbestos removal obligations to the specific areas identified in the initial survey or the subcontractor's quotation [151-160]. The inclusion of a provisional sum for potential additional asbestos removal in tenant areas further supported the notion that the broader risk for unforeseen asbestos remained with B&F [164-169].

Issue 2: Responsibility for Structural Strengthening Works:

- **B&F's Position:** Structural deficiencies were outside their contractual obligations [173-174].
- **BNP's Position:** Rectification of structural defects was part of B&F's design and build responsibility as part of their design and build obligation to deliver a fully functional stair pressurisation system.
- **Court's Analysis:** The court again sided with BNP. The judgment emphasised the wide-ranging design and build responsibility assumed by B&F under the contract. Clause 2.40 allocated the risk of unknown site conditions, including structural defects, to B&F [175]. Additionally, the Employer's Requirements stipulated "all incidental sundry components necessary for the complete execution of the work," implying that any necessary structural reinforcement fell within B&F's scope [183]. The court dismissed B&F's reliance on the contra proferentem principle, as the risk allocation clauses were specifically negotiated and not part of the standard JCT contract [184].

Issue 3: Entitlement to Terminate the Contract:

- **B&F's Position:** B&F relied on clause 8.9.2, claiming BNP's failure to act prevented project completion [188-190].
- **BNP's Position:** BNP argued that B&F's suspension and termination were wrongful, constituting a repudiatory breach. They contended that the responsibility for both asbestos and structural works rested with B&F, and their refusal to proceed demonstrated a clear unwillingness to fulfil their contractual obligations.
- **Court's Analysis:** Based on its findings regarding the allocation of responsibility for asbestos and structural works, the court concluded that B&F's reasons for suspending and terminating

the contract were invalid. As the issues cited were within B&F's scope of work, their actions constituted a default on their part, not an impediment or prevention by BNP [209-210]. The court considered B&F's refusal to proceed considering their contractual obligations to be a repudiatory breach [211-212].

Conclusion

BNP was entitled to declarations confirming B&F's wrongful suspension and termination. The court found B&F responsible for asbestos removal and structural reinforcement, invalidating their reliance on clause 8.9.2.

Key Takeaway:

This judgment reinforces the importance of precisely drafted risk allocation clauses in design and build contracts. It highlights the need for contractors to carefully assess their contractual obligations and the potential implications of unforeseen site conditions before relying on contractual provisions to suspend or terminate a project. In this case, B&F's failure to appreciate the full scope of their responsibility for design, survey, and remediation under the contract ultimately led to a finding of repudiatory breach on their part.

Ratio Decidendi & Obiter Dicta:

Ratio:

- **Broad Design and Build Responsibility:** B&F was required to conduct further asbestos surveys and structural works under clause 2.40 [141-186].
- **No Limitation by Eton RAS or Subcontractor Quotation:** No contractual carve-out exempted B&F from broader asbestos responsibilities.
- I**nvalid Termination under Clause 8.9.2:** The cited issues were within B&F's scope, making their actions a repudiatory breach.

Obiter:

- **Discussion of whether B&F was a 'duty holder' under the Control of Asbestos Regulations 2012:** While the judge ultimately determined that B&F was not a duty holder, this analysis was not crucial to the outcome of the case, as the primary focus was on the contractual allocation of responsibility between BNP and B&F [196-199].
- **Analysis of the 'causation' argument regarding B&F's entitlement to suspend and terminate:** The judge acknowledged BNP's argument that B&F could not demonstrate that substantially the whole of the uncompleted works was suspended due to BNP's actions. However, he stated it was unnecessary to definitively resolve this issue as the decision on contractual responsibility already determined the outcome.
- **Consideration of other potential work items remaining to be done:** The judge refrained from making determinations on these specific factual issues as they were not explicitly pleaded by BNP and would have extended the scope of the Shorter Trials Scheme.

The judge's decision to not draw an adverse inference from B&F's lack of witness evidence, while relevant to the case, doesn't fall neatly into the category of ratio decidendi or obiter dicta. It reflects a procedural decision based on the specific circumstances of the case and the applicable legal principles.

Overall, the judgment in BNP v B&F offers a clear example of how courts interpret design and build

contracts, particularly in situations involving unforeseen site conditions. The focus on the specific contract wording and the allocation of risk highlights the importance of careful drafting and a thorough understanding of contractual obligations for all parties involved in construction projects.

Parting Thoughts

The judgment in BNP Paribas Depository Services Ltd & Anor v Briggs & Forrester Engineering Services Ltd underscores a crucial lesson for parties involved in construction contracts, especially those utilising design and build arrangements: a comprehensive understanding and allocation of risk is paramount. While unforeseen circumstances are common in construction projects, relying on assumptions or incomplete assessments of risk can have significant consequences. As seen in this case, B&F's misinterpretation of their contractual obligations regarding asbestos surveys and structural work, despite the presence of clauses like 2.40 clearly allocating these risks, led to their downfall. The judgment emphasises the importance of scrutinising contract terms, seeking clarification where necessary, and appreciating the full extent of one's responsibilities before invoking termination clauses. Ultimately, a proactive and thorough approach to risk management is vital for successful project execution and for avoiding potentially costly legal disputes.

2. *A & V Building Solution Ltd v J & B Hopkins Ltd* [2024] EWHC 2914 (TCC)

Date: 15 November 2024

Key Words:

Costs; Part 36 Offers; Litigant in Person; Costs Management Orders; Construction Industry Scheme (CIS); Set-off; Adjudication; Enforcement; Repudiatory Breach

Summary

This judgment addresses the allocation of costs following adjudications and court proceedings between A&V and J&BH regarding a construction project. Deputy High Court Judge Roger ter Haar KC examined offers, counter-offers, and legal arguments to determine costs allocation, ordering J&BH to pay A&V a net sum of £26,638.42 after accounting for costs, set-off, and a statutory deduction under the Construction Industry Scheme (CIS).

Key Themes:

1. ***Offers of Settlement and Costs Consequences:*** *The judgment emphasises the impact of Part 36 offers versus general discretion under Part 44.*
2. ***Litigant in Person Costs:*** *It highlights CPR 46.5's application to recoverable costs for litigants in person.*
3. ***Costs Management Orders:*** *The court stresses the "good reason" standard for departing from approved costs budgets.*
4. ***Construction Industry Scheme:*** *The CIS's impact on final judgment sums is addressed.*
5. ***Set-off and Equitable Considerations:*** *Cross-judgments were balanced using equitable jurisdiction for fairness.*

Background

A&V alleged J&BH failed to pay for completed works and variations under a sub-contract. Two adjudications yielded conflicting outcomes. Subsequent court proceedings led to appeals and a five-day trial. The court issued judgments on various aspects of the dispute, culminating in cost

allocation.

Legal Issues and Analysis

- **Part 36 Offers:** The court differentiated between the strict "unjust" test under Part 36 and broader discretion under Part 44. Non-compliance with Part 36 formalities influenced costs.
- **Litigant in Person Costs:** CPR 46.5 limits litigants in person to recovering two-thirds of what a represented party could claim. The absence of detailed time records reduced A&V's recoverable costs.
- **Costs Management Orders:** J&BH sought upward departures from their costs budget, citing unforeseen events. The court rejected claims lacking robust justification under CPR 3.18.
- **Construction Industry Scheme:** The court acknowledged J&BH's statutory obligation to remit 20% of the judgment sum to HMRC but clarified this did not reduce J&BH's overall liability.
- **Set-off:** Cross-judgments were set off equitably to ensure fairness and practicality, requiring only a net payment.

Conclusion

The court allocated costs after considering Part 36 offers, litigant in person costs, Costs Management Orders, and the CIS. J&BH was ordered to pay A&V a net sum, emphasising fairness and proportionality in cost allocation.

Key Takeaway:

Carefully evaluating settlement offers, especially under Part 36, is essential to mitigate costs exposure. The judgment also stresses adherence to costs budgets and thoughtful cost management to avoid adverse consequences.

Ratio Decidendi & Obiter Dicta:

Ratio:

Part 36 Offers: Rejecting reasonable offers risks significant cost penalties, even with a favourable trial outcome [112-113].

Litigant in Person Costs: Recoverable costs require evidence of effort, even for litigants in person [127-133].

Costs Management Orders: Departures from approved budgets need robust justification [176-182].

Obiter:

Construction Industry Scheme: CIS remittance does not reduce overall liability [74-80].

Interest under Late Payment Legislation: Observations on including interest in court fees were not central to the decision [146].

Parting Thoughts

A key insight emerging from the A&V Building Solution case is the critical importance of thoughtfully engaging with settlement offers, especially those made under Part 36 of the Civil Procedure Rules. Even if a party ultimately secures a marginally better outcome at trial, the financial repercussions of

rejecting a reasonable Part 36 offer can be substantial. As this case demonstrates, a party's failure to beat such an offer often leads to adverse cost consequences, potentially negating the benefit of any slight increase in damages awarded. This principle, which forms part of the ratio decidendi of the judgment, underscores the need for parties to carefully evaluate the risks and potential costs associated with proceeding to trial. The case serves as a reminder that litigation is not solely about "winning" but also about achieving a commercially sensible and cost-effective resolution to a dispute.

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