All England Reporter/2018/November/GPP Big Field LLP and another v Solar EPC Solutions SL (formerly known as Prosolia Siglio XXI) - [2018] All ER (D) 53 (Nov)

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GPP Big Field LLP and another v Solar EPC Solutions SL (formerly known as Prosolia Siglio XXI)

[2018] EWHC 2866 (Comm)

Queen's Bench Division (Commercial Court)

Richard Salter QC (sitting as a deputy judge of the High Court)

7 November 2018

Contract – Penalty – Penalty clause

Abstract

Contract – Penalty. The claimant companies' claim succeeded, in a dispute concerning five contracts to construct solar power generation plants in the UK. The Commercial Court held that the claimants were entitled to judgment against the defendant company, which was the parent of the insolvent company with whom the claimants had originally contracted. The claimants were entitled to the sum of £565,445.80.

Digest

The judgment is available at: [2018] EWHC 2866 (Comm)

Background

The proceedings concerned five engineering, procurement and construction (EPC) contracts relating to the construction of five solar power generation plants in the UK (the Hamptworth, Beaford Brook, Rookery Farm, Bidwell and Lower March Farm contracts). The contracts were made by the first or second claimant company (Big Field and Langstone respectively) and Prosolia Ltd as contractor (the contractor).

The contractor was presently insolvent. The defendant was the contractor's parent company. It was sued as guarantor and/or indemnifier of the contractor's obligations under four of the EPC contracts.

(1) Whether Big Field was entitled to liquidated damages regarding the Hamptworth contract, owing to the

contractor's failure to achieve the commissioning of the plant by the required date. Solar contended that, among other things: (i) cl 21.5 of the contract was a penalty clause and was, therefore, unenforceable; and (ii) under cl 21.3 the contractor had in any event been relieved of its obligation to achieve 'commissioning' by the contractual date because a substantial part of any relevant delay had been caused by force majeure.

Clause 21.5 of the Hamptworth contract did not constitute an unenforceable penalty. Delay damages provisions of that kind were common in construction contracts, and Big Field and the contractor had been experienced and sophisticated commercial parties, of equal bargaining power, who had been well able to assess the commercial implications of cl 21.5. The sum specified in cl 21.5 did not exceed a genuine attempt to estimate in advance the loss which Big Field would be likely to suffer from a breach, and that that sum was not in any way extravagant or unconscionable in comparison with the legitimate interest of Big Field in ensuring timely performance (see [67] of the judgment).

While the evidence suggested that something had prevented the contractor from continuing its work, the evidence did not establish that the cause of that delay had been 'disturbance, commotion or civil disorder' or 'acts of .. sabotage' within the meaning of cl 21.3. Instead, it showed that the delay had been caused by the contractor's assessment that, given the strength of the local opposition to the project, it was unlikely to get the necessary planning permissions and other consents for its originally intended substation location and cable route, as required by the contract. The risk that they could not be obtained had therefore been the contractor's (see [98] of the judgment).

Consequently, the delay had not been caused by force majeure (see [101] of the judgment).

Webster v Petre [1879] LR 4 Ex D 127 considered; *Duncan, Fox, & Co. v North And South Wales Bank* (1880) 11 Ch D 88 considered; *Royal Bank of Scotland v Etridge (No 2) and other appeals, Barclays Bank plc v Coleman, Bank of Scotland v Bennett, Kenyon-Brown v Desmond Banks & Co (a firm)* [2001] 2 All ER (Comm) 1061 considered; *Associated British Ports (a company created under statute) v Ferryways NV* [2009] All ER (D) 198 (Mar) considered; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2011] 2 All ER (Comm) 307 considered; *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] 2 All ER (Comm) 1024 considered; *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] All ER (D) 47 (Nov) considered; *ZCCM Investments Holdings plc v Konkola Copper Mines plc* [2017] All ER (D) 132 (Dec) considered; *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] 4 All ER 21 considered.

(2) Whether Langstone was entitled to liquidated damages regarding the Beaford Brook contract, owing to the contractor's failure to achieve the commissioning of the plant by the required date. Solar contended that: (i) cl 21.5 of the contract was a penalty clause, and was therefore unenforceable; (ii) the Beaford Brook project had in fact been delivered on time; and (iii) Langstone had elected to waive any right to liquidated damages that it might have had, by making no deductions from the contractor's invoices and/or by entering into two deeds of amendment.

The waiver argument would be rejected for the same reasons as given regarding the Hamptworth development (see [192] of the judgment).

On the evidence, the project had not been delivered on time. There had been a 44 day delay (see [199] of the judgment).

Langstone's failure to deduct its delay damages from the invoices had not amounted to a waiver of its rights. The matters agreed to by Langstone in the deed of amendment were consistent with it maintaining a continuing right to damages for delay (see [203], [206] of the judgment).

Taking into account all the relevant factors, the sum of £110,131.11 would be brought into account by way of credit to Solar (see [223] of the judgment).

China National Foreign Trade Transportation Corpn v Evlogia Shipping Co SA of Panama, The Mihalios Xilas [1979] 2 All ER 1044 considered.

(3) Whether Langstone was entitled to liquidated damages regarding the Rookery Farm contract, owing to the contractor's failure to achieve the commissioning of the plant by the required date. Solar contended that: (i) cl 21.5 of the contract was a penalty clause, and was therefore unenforceable; and (ii) Langstone had elected to waive any right to liquidated damages that it might have had, by making no deductions from the contractor's invoices and/or by entering into two deeds of amendment.

The provisions of cl 21.5 of the contract that were allegedly penal were similar to those in the Hamptford and Beaford Brook contracts, and it was not been explained what made the Rookery Farm version penal, where those had not been (see [230] of the judgment).

The penalty argument would be reject for the same reasons as given regarding the Beaford Brook development (see [233] of the judgment).

Langstone was entitled to delay damages of £447,068 and common law damages of £645,000. Subject to set-off, Solar was entitled to £754,513.51 on its counterclaim (see [427], [428] of the judgment).

(4) Whether Langstone was entitled to the sum of £611,600 which, it claimed, was due from the contractor under cl 21.5 of the Bidwell contract by way of liquidated damages for the contractor's failure to achieve the commissioning of the plant by the date specified in the contract. In addition to its basic claim for delay, Langstone also claimed damages to compensate it for the loss that, it alleged, the delay had caused it, because the delay had resulted in it securing a lower rate of renewables obligation certificates than that to which it had been contractually entitled. Solar counterclaimed for the balance due to the contractor under the Bidwell contract.

On the correct interpretation of the start and end dates, a period for delay damages arose of 229 days. That produced a figure for damages of £700,282, which was above the £611,600 cap. It followed that the contractor was liable for £611,600. Taking into account further costs required to complete the Bidwell project, the contractor was liable for £989,699. Taking into account the counterclaim, that sum would be reduced by the balance of the total contract price, leaving a sum payable of £313,0784.58 (see [306], [307], [380], [387] of the judgment).

Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98 applied; *Hall v Van der Heiden* [2010] All ER (D) 79 (Nov) considered; *Rainy Sky SA v Kookmin Bank* [2012] 1 All ER 1137 applied; *Wood v Capita Insurance Services Ltd* [2017] 4 All ER 615 applied.

(5) Whether Solar was entitled to certain sums concerning Lower Marsh Farm. Langstone made no claim in relation to Lower Marsh Farm, but asserted a right to set off damages owning to expenses it had incurred.

On the evidence, the overall balance of indebtedness was significantly in favour of Langstone, not of the contractor. Taking into account the various aspects of the claim, Langstone was entitled to set off a number of elements against the counterclaim by way of damages for the contractor's failure to complete the work,

including claims for CCTV and security guards at the site. That resulted in a net counterclaim of £565,445.80 (see [407], [420], [432] of the judgment).

The claimants were entitled to judgment against Solar for a total of £1,123,711.16 (see [437] of the judgment).

Royal Brompton Hospital NHS Trust v Hammond [2001] All ER (D) 308 (May) considered; *L-B (children) (care proceedings: power to revise judgment), Re* [2013] 2 All ER 294 considered.

Matthew Parker and Pia Dutton (instructed by NewLawsLegal) for the claimants.

Richard Walford (instructed by James Burkett Solicitor) for Solar.

Toby Frost Barrister.