

Gwynt y Mor OFTO plc v Gwynt y Mor Offshore Wind Farm Ltd and other companies

[2020] EWHC 850 (Comm), [2020] All ER (D) 74 (Apr)

Court: CommICt

Judgment Date: 07/04/2020

Catchwords & Digest

CONTRACT - CONSTRUCTION – INDEMNITY CLAUSE

Background

By a sale and purchase agreement (the SPA), the defendants agreed to sell and the claimant agreed to buy the business of owning, maintaining and operating the electrical transmission link between a **wind farm** and the national grid. The business' assets included four subsea export cables. In February 2015, the transaction completed, at which point title to the assets passed to the claimant.

In March 2015, one of the cables failed and, in September, a second cable failed. In each case the claimant undertook urgent repairs. On examination, the excised section of each cable could be seen to have suffered from severe corrosion, dating back months or years.

The claimant issued proceedings, claiming the reinstatement costs from the defendants, relying upon an indemnity in cl 8.2 of the SPA, which provided that 'if any of the assets are destroyed or damaged prior to completion (pre-completion damage), then, following completion, the defendants shall indemnify the claimant against the full cost of reinstatement of any assets affected by pre-completion damage'.

Issues and decisions

(1) Whether the phrase 'prior to completion' in cl 8.2 had been unqualified, such that the natural and ordinary meaning of the indemnity had been that it applied if any of the assets had been damaged at any time before completion, including before the execution of the SPA.

While the claimant was correct that the phrase 'prior to completion' in cl 8.2 was not juxtaposed with an expressly identified starting point, it was necessary to consider the sentence in which it was used as a whole and, in particular, the tense used, in determining the timeframe of the indemnity. The SPA had to be interpreted as at the date it had come into force, so the natural and ordinary meaning of the phrase 'if any of the assets are destroyed or damaged prior to completion' was that it applied to destruction or damage which occurred thereafter, namely, after execution. Such wording, on its face, did not include damage which had already occurred at the date of the SPA (see [37] of the judgment).

Further, the vendors had given a specific warranty as to the absence of damage to the assets as at the date of the SPA (save as disclosed). The warranty had been **limited** to what had been discovered and had been reasonably likely to cause material disruption to the **offshore** transmission system. Furthermore, on the claimant's case, the indemnity (on its face) would apply to damage occurring before the signing of the SPA, but which had been disclosed by the vendors and so had been excluded from the scope of the warranty (see [39], [40] of the judgment).

Accordingly, both the specific wording of cl 8.2 and the broader structure, provisions and commercial sense of the SPA supported the defendants' case that the indemnity related only to damage occurring between the execution of the SPA and completion. The vendors had given the warranty in relation to the period up to the SPA, the indemnity for the period between execution of the SPA and completion and a further indemnity in respect of ongoing works (see [44] of the judgment).

(2) Whether, while resulting from the latent defect, the corrosion which had occurred in the cables by the date of the SPA meant that they had been damaged as at that date (and that such damage had

been continuing throughout the period between the execution of the SPA and completion), an adverse change in its condition going beyond wear and tear, falling within the wording of cl 8.2.

There was no basis for confining the phrase 'are destroyed or damaged' to entirely new damage, or to damage caused by an external event. Had one of the cables failed during the period covered by the indemnity, the relevant section of the cable would plainly be described as having been destroyed or damaged, albeit by the culmination of corrosion resulting from a latent defect. The phrase required damage to be patent, in the sense of being readily observable or discoverable (and so did not include undiscoverable corrosion which had not adversely affected performance of the relevant asset). It followed that, on a textual reading of the SPA, corrosion of cables as had occurred in the present case did not fall within cl 8.2 (see [57]-[59] of the judgment).

(3) Whether compliance with the obligation on the claimant, if it became aware of any pre-completion damage which might give rise to a claim, to give written notice to the defendants, to give them reasonable access to the affected asset and to permit them to replace or repair that asset, was a condition of the claimant's entitlement to claim under the indemnity or whether (if different) the indemnity was dependent upon the exercise of the mechanism in cll 8.3 to 8.5.

The indemnity in cl 8.2 was expressed in unconditional terms, giving rise to a liability on the part of the defendants to indemnify the claimant against full cost of reinstatement of any assets affected by pre-completion damage. There was not any wording in cl 8.3 (or in 8.4 and 8.5) which suggested that the provisions of those clauses gave rise to a condition precedent to the defendants' liability under the previous clause. It was difficult to see how a clause which was designed to permit the defendants to carry out repair work could be a condition of the defendants' obligation to indemnify the claimant against the costs of reinstatement, namely, costs incurred by the claimant (see [71] of the judgment).

Failure of certain assets might require urgent work to restore full electrical transmission capability in the interests of the claimant, the defendants and third parties, such urgency being inconsistent with the scheme set out in cll 8.4 and 8.5 and, yet further, arising in circumstances in which it was not possible to know the cause of failure and whether or not it had amounted to pre-completion damage. Those factors heavily weighed against the claimant's rights under cl 8.2 being conditional upon compliance with the subsequent provisions in cll 8.3 to 8.5. Accordingly, cll 8.3 to 8.5 had not been conditions precedent to the indemnity under cl 8.2, nor had the obligations been interdependent (see [72], [73] of the judgment).

Claim dismissed.

Cases considered by this case

Annotations: All Cases **Court:** ALL COURTS

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Treatment	Case Name	Citations	Court	Date	
Considered	Astrazeneca UK Ltd v Albemarle International Corporation	[2011] EWHC 1574 (Comm), [2012] Bus LR D1, [2011] All ER (D) 162 (Jun)	Comm Ct	21/06/2011	
Considered	Pilkington UK Ltd v CGU Insurance plc	[2004] EWCA Civ 23, [2005] 2 All ER 283, [2005] 1 All ER (Comm) 283, [2004] Lloyd's Rep IR 891, [2004] BLR 97, [2004] All ER (D) 272 (Jan)	CACivD	28/01/2004	
Considered	Quorum A/S v Schramm (No 2)	[2002] 2 All ER (Comm) 179, [2002] 2 Lloyd's Rep 72, [2002] Lloyd's Rep IR 315, [2001] All ER (D) 304 (Nov)	Comm Ct	21/11/2001	
Considered	Promet Engineering (Singapore) Ltd v Sturge, The Nukila	[1997] 2 Lloyd's Rep 146, (1997) Times, 10 April, [1997] Lexis Citation 11	CACivD	26/03/1997	

Document information

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