JUDGMENT : The Hon. Mr. Justice Ramsey: TCC. 15th February 2007

Introduction

1. This is an appeal by Chattan Developments Limited ("Chattan") under section 69 of the Arbitration Act 1996 on a question of law arising out of a preliminary issue determined by the Arbitrator in an award dated 18 August 2006 ("the Award"). The appeal is brought in relation to an agreement entered into between Chattan and Reigill Civil Engineering Contractors Limited ("Reigill") for the construction of 14 homes and associated site works on a site in Trawden, Lancashire. It is common ground that the agreement incorporates a provision by which the parties consented under Section 69(2) (a) of the Arbitration Act 1996 to an appeal on any questions of law arising out of an award.

2. In the Award, the Arbitrator determined a number of preliminary issues and, in particular, Preliminary Issue 2 which was formulated in these terms: "*Arising from the delay to the completion of the Works, Chattan claims the sum of £328,276.07 as interest in relation to the development at Trawden. Does the exclusion of liquidated and ascertained damages from the Contract have the effect of preventing Chattan from being able to recover from Reigill unliquidated damages relating to that delay?*"

3. Certain issues concerning the scope and extent of the agreement between Chattan and Reigill ("the Contract") were the subject of the Arbitrator's first award dated 6 June 2005 in which he found that the terms of the Contract were concluded at a meeting on 10 July 2002 and were referred to in Reigill's letter to Chattan of 11 July 2002. He also found that the Contract incorporated certain terms of the JCT Standard Form of Building Contract 1980 Edition Private With Quantities with Amendments 1-18 inclusive.

4. At paragraph 114 of the first award the Arbitrator set out certain of those terms. In particular, in respect of Clause 24, dealing with liquidated and ascertained damages, he stated "*Clause 24 Deleted*" and briefly set out his reasons as "*Mr Bossom's witness statement, LB1, paragraph 25(b);Reigill letter dated 11 July 2002; not controversial*".

5. The Arbitrator then stated at paragraph 116: "*With regard to the terms which I have found were agreed in respect of liquidated and ascertained damages, I record here by this Award No 1 no determination is made in respect of any entitlement which Chattan may have to recover sums as unliquidated damages as a result of any delays to the completion of the Works for which Reigill may be liable to Chattan.*"

6. Preliminary Issue 2 which fell to be determined by the Arbitrator therefore dealt with this issue and, as can be seen, depended on what had been agreed between the parties at the meeting on 10 July 2002. The result of that meeting was recorded in Reigill's letter of 11 July 2002 where the following was set out: "*Liquidated and Ascertained Damages-n/a All Relevant Events and List of Matters to remain unaltered.*"

7. The Arbitrator answered Preliminary Issue 2 in the affirmative and said: *"on the facts of the case, the exclusion of liquidated and ascertained damages from the Contract has the effect of preventing Chattan from being able to recover form Reigill unliquidated damages relating to delay to the completion of the works.*"

Submissions by Chattan

8. Mr Anthony Edwards who appeared on behalf of Chattan submitted that the effect of the oral agreement concluded on 10 July 2002 was that the provision in Clause 24 of the JCT Standard Form of Building Contract was deleted but that the other provisions of that standard form were retained, in particular Clauses 23 and 25. In particular, Clause 25 was relied on, on the basis that, as set out in the letter of 11 July 2002, "*All Relevant Events and List of Matters to remain unaltered* ".

9. In such circumstances Mr Edwards contended that the rights under Clause 23 were retained, including at Clause 23.1.1 the following provisions: "*On the Date of Possession possession of the site shall be given to the Contractor who shall thereupon begin the works, regularly and diligently proceed with the same and shall complete the same on or before the completion date.*"

10. Accordingly, Mr Edwards submitted that while Chattan's entitlement to liquidated and ascertained damages was defeated, Chattan retained its right to claim unliquidated damages under Clause 23 for a breach of contract by Reigill in failing to complete the works on or before the Completion Date.

11. In relation to this he referred me to the decision of the House of Lords in ***Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd*** [1974] AC 689 at 717 where Lord Diplock said this: "*It is of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties (cf.Sale of Goods Act 1893, section 55). But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.*"

12. The decision in ***Gilbert-Ash*** had, in fact, been raised by the Arbitrator in the course of his consideration of Preliminary Issue 2. Mr Edwards relied on the passage from the speech of Lord Diplock and contended that clear words were needed to exclude the remedy of unliquidated damages for breach of contract and that, in the absence of such words, the right to claim unliquidated damages for breach of clause 23 was retained.

13. Mr Edwards submitted that there was nothing in the findings of fact by the Arbitrator which detracted from that argument. He also sought to challenge, as a matter of law, certain of the Arbitrator's findings in paragraphs 84 and 85 of the Award.

14. In Paragraph 84 of the Award the Arbitrator said this: "*Mr Edwards points out that in Reigill's letter of 11 July 2002 to Chattan no mention is made of unliquidated damages. I would concur that the position could have been put beyond argument if that letter had expressly stated that unliquidated were also excluded. However, I do not accept that because no statement to that effect was included, it is fatal to Reigill's case. As has been argued for Reigill, the letter was intended to record the terms of the Contract but that is not the contract itself. I would also observe the fact of there being no mention in the letter of 11 July 2002 of unliquidated damages is consistent with Mr Bossom's evidence about his view of it being necessary in the circumstances of this case to write them in.*"

15. Mr Edwards submits that the Arbitrator in the last sentence made an error of law in agreeing that it would be necessary to write in a right to unliquidated damages whereas the contrary was true, the remedy of unliquidated damages arose by operation of law and would have to be excluded by clear words.

16. In paragraph 85 of the Award the Arbitrator had said this: "*Looked at from Chattan's point of view, it seems to me that whilst ordinarily it would be difficult to see why an employer should agree to give up its right to damages for delay to completion, in this case there were sound commercial reasons for Mr Cattanach being prepares to so agree. The commencement of the Works had already been delayed by approximately 6 months because of demolition work on the site taking longer than expected. Reigill's tender had been the subject of negotiation and savings. There were significant delays expected on account of the revised design of the foundation, revisions to the drainage layout and the substitution of natural instead of artificial stone. In those circumstances it would have been apparent to Mr Cattanach that if Chattan was unable to reach an agreement with Reigill on contract terms, it could have been faced with further delays whilst an alternative contractor was found and the risk of a higher contract sum than had been negotiated with Reigill.*"

17. Mr Edwards submitted that there was no evidence to support the findings in the last sentence and that this whole aspect was not raised by the Arbitrator with the parties. He submits that this amounts to an error of law and relies on the decision of His Honour Judge Thornton QC in ***Fence Gate Limited v NEL Construction Ltd*** [2001] 82 Con L.R. 41 at 43 and 44 where he said: "*I conclude that if it can be shown that there was no evidence of any kind to support an arbitrator's finding, including an absence of evidence admissible by virtue of the relaxation of the strict rules of evidence, at least where the finding amounted to the taking into account of factors that should not have been taken into account, or was a mixed finding of fact and law or was part of the exercise of a discretion whose consequent exercise led to an error of principle, an absence of supporting evidence can give rise to a question of law. However, even if the arbitrator's finding was susceptible to an appeal, a court should give full weight to that finding since the arbitrator is the person whom the parties have chosen as the final determiner of fact. Only if that finding is nonetheless both material and clearly lacking any factual basis should a court consider allowing an appeal on the resulting question of law.*"

18. Mr Edwards therefore submitted that there were erroneous findings by the Arbitrator and that, as a matter of law, the deletion of Clause 24 of the JCT Standard Form removed the right to liquidated damages but left Chattan's entitlement to receive unliquidated damages, particularly when those erroneous findings were discounted.

Submissions by Reigill

19. Mr Neil Berragan who appeared for Reigill submitted that Mr Edwards's analysis of the situation failed to take account of the Arbitrator's findings of fact which were determinative of the question in Preliminary Issue 2.

20. Mr Berragan emphasised that, as was accepted by the Arbitrator in paragraphs 74 and 75 of the Award, it was at the meeting of 10 July 2002 that an oral agreement which formed the Contract was reached and that the letter of 11 July 2002 was only evidence of what was agreed but was not the Contract itself.

21. Mr Berragan refers to and relies on certain findings of fact by the Arbitrator which he says, establish that it was the intention of the parties that all damages, liquidated and ascertained or unliquidated, were to be excluded.

22. The first finding of fact relied upon by Reigill is at paragraph 77 of the Award where the Arbitrator accepted the evidence of Mr Bossom on behalf of Reigill that "*he was not prepared to put Reigill in a position whereby it would be exposed to the risk of damages for late completion from day one of the Contract* ". In paragraph 79 of the Award, the Arbitrator stated that whilst Mr Cattanach on behalf of Chattan agreed that these matters were known, he said that they were not the reason for agreeing to exclude liquidated and ascertained damages. However the Arbitrator did not accept Mr Cattanach's evidence which he described as "*implausible*". The Arbitrator therefore found that the commonly known purpose of the agreement was that Reigill were not to be put in a position where it would be exposed to the risk of damages for late completion.

23. The second finding of fact is at paragraph 81 of the Award where the Arbitrator accepted Mr Bossom's evidence when he said "*I believe we were talking about all damages - liquidated and unliquidated*" when asked whether the discussion was about damages in general or just liquidated and ascertained damages.

24. The third finding of fact is at paragraph 82 of the Award where the Arbitrator said: "*In this instance I consider that when Mr Bossom and Mr Cattanach agreed that liquidated and ascertained damages would not apply it is more likely that they intended there would be no right to damages at all for late completion, that is to say, either liquidated*

or unliquidated, than that liquidated damages would not apply but that there would be a right to unliquidated damages."

25. Whilst at paragraph 80 of the Award the Arbitrator accepted that "*unliquidated damages*" were not actually discussed, Mr Berragan submits that this does not affect the position because the intention was for Reigill not to be exposed to the risk of damages for late completion.

26. Mr Berragan therefore submits that the Arbitrator found, as a matter of fact, that the agreement between the parties was to exclude liquidated and unliquidated damages for late completion. The agreement is not therefore just a mater of considering the JCT Standard Form with Clause 24 deleted and with Clause 23 retained. Rather, it is a question of determining what agreement was, as a matter of fact, reached on 10 July 2002. Because this is a finding of fact to which the Arbitrator correctly applied the law, Mr Berragan submits that the Arbitrators decision cannot be appealed as a question of law.

27. I therefore now turn to consider the submissions.

Decision of the Question of Law

28. It is clear that the agreement which was formed in this case was made orally at the meeting on 10 July 2002 and that whilst the letter of 11 July 2002 might be evidence the terms of that agreement, it does not stand as a written agreement. In this case, the parties did not subsequently enter into a written agreement or produce a copy of the JCT Standard Form to which they worked.

29. The nature of the provision for liquidated and ascertained damages was considered by the Court of Appeal in ***Temloc Ltd v. Errill Properties Ltd*** (1987) 39 BLR 30

30. The essential point was that where the parties had intended to apply unliquidated and ascertained damages, even of "£nil", there was no ability to recover unliquidated damages for that breach: see per Croom-Johnson LJ at 38 and per Nourse LJ at 40.

31. As a result, when there is a valid and enforceable liquidated and ascertained damages clause within an agreement, those damages are the sole remedy for the particular breach to which they relate, commonly delay in completion. Unliquidated damages are not recoverable because the parties' agreement of liquidated damages replaces the remedy which would otherwise be available for breach. As can be seen from ***Temloc,*** the question of whether unliquidated damages could be recovered was a matter of the interpretation of the agreement from which it was possible to find a clear intention to exclude that remedy. In the case of a written agreement, that clear intention can be usually derived by construing the terms of the written agreement as a whole. For example, it was not necessary in Temloc for there to be an express exclusion clause to preclude the remedy of unliquidated damages.

32. In this case, it was for the Arbitrator to find, as a fact, what was said and done by the parties at the meeting of 11 July 2002 and then to apply the law to those findings to ascertain what objectively was the intention of the parties.

33. In essence, there were two possibilities as to the intention of the parties. First that the parties had intended to delete the provision for liquidated and ascertained damages and to leave Chattan with the ability to recover whatever unliquidated damages for delay it could prove. Secondly, that the parties had intended to exclude all damages, liquidated or unliquidated, so that Chattan could not recover damages for delay.

34. In the Award the Arbitrator set out the factual background, including the finding at paragraph 77 to which I have referred. He made findings as to what was said at the meeting, including those in paragraphs 80 and 81 referred to above. He correctly rejected evidence of Mr Bossom's subjective intention at paragraph 82.

35. Having done so, he then came to the conclusion in paragraph 82 as to the intention of Mr Bossom and Mr Cattanach that "*it is more likely that they intended there would be no right to damages at all for late completion, that is to say, either liquidated or unliquidated, than that liquidated damages would not apply but that there would be a right to unliquidated damages*."

36. In my judgement, the Arbitrator made the relevant findings of fact and applied the correct principles of law in coming to this conclusion. I do not consider that express reference to or exclusion of unliquidated damages was necessary, given the background and the facts as to the meeting found by the Arbitrator. There was therefore no error of law in this respect.

37. However, Mr Edwards also raises two matters where he submits that the Arbitrator made further errors of law. For the reasons set out below, I do not consider that they do amount to errors of law nor do I think that they are relevant to the outcome.

38. In relation to the first matter raised by Mr Edwards in relation to paragraph 84 of the Award, the Arbitrator was there referring to Mr Bossom's view that it was necessary to write into a contract a right to unliquidated damages for those to be recovered. The Arbitrator was not saying that he agreed with that view and the Arbitrator did not apply that erroneous view of the law. He was relying on Mr Bossom's erroneous view of the law to explain why Mr Bossom did not record in the letter of 11 July 2002 that unliquidated damages were to be excluded. If the letter of 11 July 2002 had formed rather than evidenced the agreement then the fact that it only mentioned liquidated and ascertained damages would have provided Mr Edwards with a more powerful argument. In the event, there is no error of law by the Arbitrator in paragraph 84.

39. Mr Edwards raises, secondly, the Arbitrator's finding in paragraph 85 of the Award that there were sound commercial reasons for Chattan being prepared to agree to give up its right to damages for delay to completion. In this paragraph the Arbitrator was applying what is often colloquially described as a "reality check". He had reached a conclusion in paragraph 82 that it was the intention of the parties that "*there would be no right to damages at all for late completion*". Here he was applying his experience as a Chartered Quantity Surveyor to the facts of the case to see whether a contractor in the position of Chattan might be prepared to give up liquidated damages. I consider that this is precisely what arbitrators experienced in the construction industry should do.

40. The factual position as found by the Arbitrator and as set out in paragraph 85 was that:

    (1) The commencement of the Works had already been delayed by approximately 6 months because of demolition work on the site taking longer than expected.

    (2) Reigill's tender had been the subject of negotiation and savings.

    (3) There were significant delays expected on account of the revised design of the foundation, revisions to the drainage layout and the substitution of natural instead of artificial stone.

41. Those findings of fact cannot be and are not challenged. On that basis, the Arbitrator concluded that it "*would have been apparent to Mr Cattanach that if Chattan was unable to reach an agreement with Reigill on contract terms, it could have been faced with further delays whilst an alternative contractor was found and the risk of a higher contract sum than had been negotiated with Reigill.*" That is an observation on what would have been the position. There is no error of law in this observation or in anything contained in paragraph 85.

42. I therefore do not consider that Chattan has established that there was any error of law.

43. Whilst there would be much force in the submissions of Mr Edwards had the parties expressed their intention by entering into a written agreement in an amended JCT Standard Form with Clause 24 deleted and Clauses 23 and 25 left applicable, those arguments lose their force where, as here, the parties entered into an oral agreement. The Arbitrator made unimpeachable findings of fact and correctly applied the law to those facts. As a result, his conclusion that it was the intention that there would be no right to damages at all for late completion, either liquidated or unliquidated, cannot be faulted.

44. In the circumstances, I dismiss Chattan's appeal against the Arbitrator's decision in relation to Preliminary Issue 2.

Mr Anthony Edwards (instructed by Michael A Loverage, Clitheroe LANCS) for the Claimants
Mr Neil Berragan (instructed by Kershaw-Abbott) for the Defendants