VOISIN LAW

Say what you mean and mean what you say: Jersey Addendums to construction contracts | 1

It's not that often we have a construction contract dispute come before the Royal Court of Jersey and it is one of the 'usual suspects' – the interpretation of amendments to a standard form contract – which has reared its head, once again.

Sharon Campbell v Cape Construction Limited [2022] JRC 291

Background: SC had entered into a JCT Minor Works Building Contract 2005 (Revision 2 2009) (the JCT Contract) with Cape, to rebuild her home following catastrophic damage caused by a fire. SC brought a claim for damages against Cape alleging the new house was defective as it was not insulated adequately, a wet room was not finished to an adequate standard and there were a number of cosmetic defects which required rectification.

Cape argued that the Royal Court of Jersey did not have jurisdiction to hear this matter because the JCT Contract gave exclusive jurisdiction to the English Courts (under Article 8). Accordingly, SC's case should either be set aside or stuck out.

SC's professional advisors had prepared the draft JCT Contract, which had been altered in certain material respects, and Clause 1.7 had been manuscript amended to read: "This contract shall be governed and construed in accordance with the law of Jersey." In the usual manner, references to UK statutes throughout the JCT Contract had also been altered to refer to their Jersey equivalents.

If Cape's argument was correct, the combined effect of Article 8 and Clause 1.7 was that the JCT Contract would be governed by Jersey law but a claim under it could only be brought in England, not in Jersey.

Article 6 allowed either party to refer the matter to adjudication but the corresponding Clause (Clause 7.2) had been scored through.

Article 7 provided, in the standard way, that any dispute or difference between the parties of any kind whatsoever arising out of or connection with the JCT Contract would be referred to arbitration in accordance with Schedule 1 and the JCT 2005 edition of the Construction Industry Model Arbitration Rules.

There was also a new Clause 7.4 added which read: "Notwithstanding anything herein contained to the contrary, the interpretation of this contract and all matters arising thereunder shall be governed by the laws and customs of the island of Jersey, and the contractor and all sub-contractors shall file with the employer an address for [the] service within the jurisdiction."

The issues before the Royal Court: The Royal Court found there was little doubt that Article 8 in the JCT Contract granted jurisdiction to hear the case to the Courts of England. The questions before the Royal Court were therefore: (1) whether Article 8 does provide exclusive jurisdiction to the English Courts; and (2) if it is determined that Article 8 amounts to an exclusive jurisdiction clause, whether the Royal Court has a discretion to permit the claim to continue in Jersey and, if so, what factors should be taken into account when exercising that discretion.

The well-known Jersey maxim 'la convention fait la loi des parties' (the Court will pay particular regard to the bargain struck by the parties and will enforce its terms unless there is a good reason in law not to) was

put before the Royal Court by both parties but was found not be of assistance in deciding whether Article 8 was or was not an exclusive jurisdiction clause. There is no settled Jersey authority on what amounts to an exclusive jurisdiction clause so the Royal Court went on to consider a number of Jersey and English cases concerning contractual interpretation and the evidence of the parties themselves.

What did the Royal Court decide? Although it was clearly important to both parties to ensure the JCT Contract was altered to make it work as a matter of Jersey law, it did not appear likely that either party gave substantial, if any, care to the effect of Article 8 and Article 8 had not been specifically drawn to either party's attention. Further, it would not have been a surprise for the Royal Court to have been given exclusive jurisdiction because the parties and some witnesses were located in Jersey, the subject matter of the dispute was in Jersey and the governing law of the contract was expressly stated to be Jersey law. It was also anticipated that the service of proceedings would be affected within the Island by the new Clause 7.4 which required the Defendant and any sub-contractor to provide an address for service in Jersey.

The Bailiff concluded that Article 8 permitted the parties to sue in the Courts of England but did not require them to do so. It was not an exclusive jurisdiction clause. Further, even if Article 8 had been found to be an exclusive jurisdiction clause, there were still very strong reasons indeed for Jersey being the natural and appropriate forum to hear those proceedings.

As Annex 7 of the JCT Contract applied Article 7 and Schedule 1 of the JCT Contract, the matter was stayed in order to be referred to arbitration.

Concluding thoughts: Although the Royal Court's decision was undoubtedly sensible given the connection this contract had to Jersey, this case serves as a reminder to those using standard-form construction contracts and their advisors to give proper consideration to the purpose and effect of any amendments made (and any impact those changes will or should have upon related clauses). As the Courts are hesitant to save a party from poor drafting or imply terms, no matter how obvious those implied terms may seem, a failure to correctly amend or populate a standard form construction contract can result in a party not having the contractual terms it may have intended or desired.