

Claims on performance bonds Ziggurat and Yuanda

Society of Construction Law

David Brynmor Thomas QC – 39 Essex Chambers

Ziggurat (Claremont Place) LLP v HCC International Insurance Company PLC [2017] EWHC 3286 (TCC)

Default by Contractor – Clause 8.4

1 If, before practical completion of the Works, the Contractor:

- 1 without reasonable cause wholly or substantially suspends the carrying out of the Works or the design of the Contractor's Designed Portion; or
- 2 fails to proceed regularly and diligently with the Works or the design of the Contractor's Designed Portion; or
- 3 refuses or neglects to comply with a notice or instruction from the Architect/Contract Administrator requiring him to remove any work, materials or goods not in accordance with this Contract and by such refusal or neglect the Works are materially affected; or

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...

the Architect/Contract Administrator may give to the Contractor a notice specifying the default or defaults (the 'specified default or defaults').

·2 If the Contractor continues a specified default for 14 days from receipt of the notice under clause 8·4·1, the Employer may on, or within 21 days from, the expiry of that 14 day period by a further notice to the Contractor terminate the Contractor's employment under this Contract.

·3 If the Employer does not give the further notice referred to in clause 8·4·2 ... but the Contractor repeats a specified default ..., then, upon or within a reasonable time after such repetition, the Employer may by notice to the Contractor terminate that employment.

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Insolvency of Contractor - Clause 8·5

- 1 If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor's employment under this Contract.
- 2 The Contractor shall immediately notify the Employer if he makes any proposal, gives notice of any meeting or becomes the subject of any proceedings or appointment relating to any of the matters referred to in clause 8·1.
- 3 As from the date the Contractor becomes Insolvent, whether or not the Employer has given such notice of termination:
 - 1 clauses 8·7·3 to 8·7·5 and (if relevant) clause 8·8 shall apply as if such notice had been given;
 - 2 the Contractor's obligations under Article 1 and these Conditions to carry out and complete the Works and the design of the Contractor's Designed Portion shall be suspended; and
 - 3 the Employer may take reasonable measures to ensure that the site, the Works and Site Materials are adequately protected and that such Site Materials are retained on site; the Contractor shall allow and shall not hinder or delay the taking of those measures.

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Consequences of termination under clauses 8·4 to 8·6 - Clause 8·7

If the Contractor's employment is terminated under clause 8·4, 8·5 or 8·6:

·1 the Employer may employ and pay other persons to carry out and complete the Works and/or (where applicable) the design for the Contractor's Designed Portion and to make good any defects of the kind referred to in clause 2·38

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·4 following the completion of the Works and the making good of defects in them (or of instructions otherwise, as referred to in clause 2·38), an account of the following shall within 3 months thereafter be set out in a certificate issued by the Architect/Contract Administrator or a statement prepared by the Employer:

·1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 8·7·1 and, where applicable, clause 8·5·3·3, and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise;

·2 the amount of payments made to the Contractor; and

·3 the total amount which would have been payable for the Works in accordance with this Contract;

·5 if the sum of the amounts stated under clauses 8·7·4·1 and 8·7·4·2 exceeds the amount stated under clause 8·7·4·3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor.'

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Bond language

‘(1) The Guarantor guarantees to the Employer that in the event of a breach of Contract by the Contractor the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the losses and damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provision of or by reference to the Contract and taking into account all sums due or to become due to the Contractor.

(2) The damages payable under this Guarantee Bond shall include (without limitation) any debt or other sum payable to the Employer under the Contract following the insolvency (as defined in the Schedule) of the Contractor.’

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‘what is required to trigger a claim under the Bond is the completion of the ascertainment exercise under clause 8.7. Once that has happened, a claim can be made under the Bond ... Any other result would destroy the commercial value and purpose of the Bond. The Bond is required to provide the claimant with the ability to recover at least some of its losses against a solvent party. It would circumvent that commercial purpose if the claimant was then required to issue separate proceedings against that insolvent party (and get the necessary permission to do so) and/or to reach an agreement with the insolvent party, in order to establish either liability or quantum under the Bond’

Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd [2020] EWHC 468 (TCC)

Bond:

‘The Guarantor guarantees to the Contractor that in the event of a breach of the Contract by the Sub-Contractor, the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Contractor as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Sub-Contractor’

Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd [2020] EWHC 468 (TCC)

‘Firstly, Multiplex is not a decision-maker (in the sense that Jackson J was using the term in Scheldebouw), and cannot certify (in the sense that word is used and understood in the industry) sums due to itself by way of issuing certificates. Secondly, and equally powerfully (if not entirely determinative of this point), the sub-contract does not have any contractual mechanism whereby “certificates” in this sense are issued in any event ... ‘a mere statement or assertion by Multiplex to Yuanda that a sum is due to Multiplex by way of LADs cannot be, without more, treated as though it were a certificate, nor can it be equated to the establishment and ascertainment of damages due to Multiplex pursuant to and in accordance with the terms of the sub-contract’

‘The important point to remember is that the adjudication is an express contractual mechanism for the resolution of disputes under the contract. It is included in Section 8.2 of the sub-contract terms’

Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd [2020] EWHC 468 (TCC)

‘My decision in this case is not contrary to the decision of Ziggurat, far from it. I consider my decision that the contractual mechanism is what is required to establish and ascertain the amount that can be the subject of a valid demand on the Guarantee to be entirely consistent with the decision in Ziggurat. The only difference is that in Ziggurat there was a termination following an insolvency, and there were unmeritorious arguments raised by County which simply sought to dispute a certified sum was due’

‘The conclusion that I have reached is entirely consistent with the ratio of Ziggurat. Guarantees that are drafted in this form (and the bespoke amendment to the instrument in Ziggurat does not dilute this conclusion, as that amendment dealt with insolvency) require establishment and ascertainment in accordance with the mechanism in the underlying contract, which in the instant case is the sub-contract between Multiplex and Yuanda’

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