

## Construction Law Update

### Quality Obligations in Design and Build Contracts

Design and build contracts often impose a number of different obligations on contractors with regard to the quality of their works. When there are defects, it can be difficult to know how a series of separate obligations should be interpreted; is the contractor required to comply with all the obligations separately, or do some obligations override and cancel out others? This issue arose in the recent case of *125 OBS (Nominees 1) v Lend Lease Construction (Europe) Ltd.*

#### Background

125 OBS (Nominees 1) was a special purpose joint venture which engaged Lend Lease to redevelop 125 Old Broad Street, London, into prestigious office and retail space. The contract was a JCT Standard Form of Building Contract With Contractor's Design 1998 edition with bespoke amendments. The works included an external curtain walling system of framed glass panes.

Practical completion occurred in July 2008, but shortly afterwards, glass panels on the building's exterior began to break. These incidents varied in severity, with one breakage in particular ending up in the national press because two pedestrians were injured by falling glass. Typically, each time a breakage occurred, the road had to be closed and a police cordon established whilst a clean-up operation took place. In total, there were 17 breakages over a four year period, causing significant disruption to the surrounding area. In 2009, scaffolding was erected around the building to protect the public and this scaffolding had to be repeatedly expanded as the breakages became more serious.

Ultimately, the building owners decided to have all external glazing removed and replaced at a cost of £8.7m. The building owners brought proceedings against Lend Lease to recover the costs incurred.

#### The terms of the contract

The contract required Lend Lease to subject the outer glass panes of the curtain walling system to 'heat

soaking' in accordance with European Standard EN14179 2005 (the '2005 Standard'). The aim of heat soaking was to prevent breakages in the panels caused by nickel sulphide particles. However, whilst the 2005 Standard involved the glass panels being heated for two hours, the contract required this heating period to last for four hours. Heat soaking could not eliminate the risk of breakages entirely, but the expert evidence was that it should have reduced the likelihood of breakages to 5 or 6 at most.

The contract imposed a number of other obligations on Lend Lease, including:

- An obligation to carry out and complete the works in accordance with the Employer's Requirements and the Contractor's Proposals.
- An obligation to provide materials which were of good quality, appropriate for their purpose, to the reasonable satisfaction of the Employer and in accordance with the Contractor's Proposals and/or the Employer's Requirements and any performance specification.
- Within the Employer's Requirements, a requirement for a service life of no less than 30 years for the glass in the curtain walling.
- Within the Contractor's Proposals, a requirement for the outer panes of glass in the curtain walling to have a design life of at least 30 years.

#### What did the contract require?

Lend Lease argued that the only effective obligation under the contract was to install glass that had been heat soaked in accordance with the 2005 Standard (but with a heating period of four hours instead of two) and that it had complied with that obligation. Lend Lease's case was that the building owners had agreed to bear the residual risk of any breakages which occurred notwithstanding the heat soaking treatment.

In considering Lend Lease's defence, the court had to determine whether the obligation to heat soak the glass in accordance with the 2005 Standard (plus the

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extra two hour heating period) was additional to the other obligations imposed by the contract, or whether it qualified or superseded those other obligations. To do this, the court was required to identify what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. This is done by focussing in particular on the natural and ordinary meaning of the words, the facts known by the parties when the contract was entered into and commercial common sense. Where contractual provisions focus on similar issues and can be interpreted as being mutually consistent, *“good reason will be required before the court holds that one clause is effective to the exclusion of the other”*.

Considering the terms of the contract, the court found that there was *“no intrinsic inconsistency between the contractual obligation to heat soak and the other obligations”* and stated that *“the contract makes sufficiently clear the existence of separate and discrete obligations”* arising in the Employer’s Requirements, the Contractor’s Proposals and other clauses. Furthermore, the fact that there remained a residual risk of breakages after heat soaking *“may be said to reinforce the commercial sense (or even necessity) supporting the inclusion of other effective obligations upon the contractor to provide a satisfactory outcome”*. Applying the ‘reasonable person’ test, the court decided that a reasonable person would understand the contract to impose several other obligations in addition to the obligation to heat soak.

### Was Lend Lease in breach of contract?

The court found that Lend Lease was in breach of contract, primarily because Lend Lease was unable to prove that the necessary heat soaking had been carried out. The contract required Lend Lease to provide full heat soaking records, but the limited records provided did not relate to all the glass used in the works, appeared to have been at least partially fabricated and were *“compelling evidence”* that about 35-40% of the glass had not been heat soaked at all. The court described this as a *“breach of extreme seriousness”*.

In addition:

- The glass did not meet the requirement for a 30 year service life because the rate of failure of the panels required excessive expenditure on maintenance and repair.
- Due to the failure to heat soak, the quality of the glass as installed did not meet the 30 year design life requirement.
- The glass was not of good quality because it had not been heat soaked as required.

The court emphasised that even if the glass had been heat soaked as required by the contract, but had still failed to the extent it did, Lend Lease would still have been in breach of contract because the obligation to provide materials which were of good quality and appropriate for their purpose was a separate and discrete obligation to the obligation to heat soak.

Lend Lease was therefore liable to pay damages to the building owners for the cost of replacing the curtain walling system and other related costs.

### Analysis

This case demonstrates that where a contract imposes multiple different obligations, the contractor must assume it is required to satisfy each of those obligations separately. It appears that an individual obligation will only cease to apply where it is directly contradicted by another obligation, and the courts are likely to try to interpret multiple obligations collectively, especially on prestigious and high quality developments.

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