Robert Akenhead returns to these pages after some years away (including time running the TCC) with a column on a recent case which examined the issue of 'total cost' or 'global' claims

A GLOBAL VIEW

THE SUCCESS OR FAILURE OF THESE 'TOTAL COST' CLAIMS CAN HAVE GREAT FINANCIAL SIGNIFICANCE. ANY GUIDANCE FROM THE COURTS IS PORED OVER BY LAWYERS AND THE INDUSTRY

In many projects it becomes evidentially difficult, even impossible, to attribute particular elements of loss and expense to particular causes for which the employer is responsible. Claims are frequently presented on the basis that the total amount by which the contractor's cost has exceeded the amount to which it might otherwise be entitled to be paid is attributable to a variety of matters for which a contractor is entitled to claim further payment. The success or failure of these "global" or "total cost" claims can have great financial significance. Understandably, any authoritative guidance from the courts on this method of presenting and proving claims is pored over by lawyers and the industry alike.

A recent decision, John Sisk & Son Ltd vs Carmel Building Services [2016] in the Technology and Cosntruction Court (TCC), revisits the subject. The contractor, John Sisk & Son, terminated its amended JCT subcontract with its subcontractor, Carmel. It was contractually entitled to do so because Carmel entered into administration. In a subsequent arbitration between the parties, John Sisk & Son claimed loss and expense under the subcontract. It presented that claim in two alternative ways. The primary (and higher value) claim was for the whole amount of the losses John Sisk & Son claimed to have sustained as a result of the termination. The lower value alternative formulation was an itemised claim for costs caused by termination.

The arbitrator decided John Sisk & Son's primary claim (which he labelled, "for convenience", the "total costs claim") was not a "global" claim, but nonetheless concluded that Carmel's evidence had cast "sufficient doubt" on the accuracy of that claim to justify its rejection. Sisk appealed to the TCC. It said the arbitrator had: (i) wrongly treated "global" and "total cost" claims as different; (ii) wrongly decided Sisk's claim was a global claim; and (iii) incorrectly interpreted the decision in Walter Lilly & Company Ltd vs Mackay as imposing a greater burden of proof on a party making a global claim, and requiring that party to prove the validity of the cost it says would have been incurred were it not for the matters giving rise to the claim.

Olivia Tassell Build to Rent is a nascent but growing sector that could help solve the housing crisis and give construction a boost. But do we need new planning legislation to accommodate it?

AN UNKNOWN QUANTITY

Large scale purpose-built Build to Rent developments are increasingly seen as one of the solutions to the current housing crisis. Offering both flexibility and a sense of community, these developments are likely to prove attractive to the younger generation, who increasingly find themselves priced out of the housing market. But do such schemes need a dedicated use class or a covenant to rent?

Financial viability has long proved a concern for both developers and investors. Build to Rent schemes generate a much lower rate of return than the traditional build to sell model, which has tight profit margins based on income rather than capital release. For this reason, unpredictable costs such as planning obligations can prove one risk too far.

Some local planning authorities seem to be beginning to recognise the benefits of long term Build to Rent schemes. These developments can assist regeneration and place making, while also delivering substantial numbers of homes quickly and stimulating employment. Yet if local authorities are to be persuaded to reduce planning obligations for rental schemes, they will be understandably concerned to ensure that the proposed rental use is maintained.

Discussion has focused on two possible planning solutions – the creation of a new use class and the use of rental covenants.

The term "rental covenant" in this context refers to a restrictive covenant imposed by the local authority, as a condition of granting planning permission, requiring the units to be used only for short-term rentals (and therefore prohibiting sale of the individual units) within a defined period.

Proponents of a new Build to Rent use class cite student accommodation as an example of how long-term planning constraints can attract activity and investment into an area, while at the same time providing local authorities

John Sisk & Son's appeal failed. The court decided that arbitrator had not treated global and total costs claims as though they were separate concepts (implicitly acknowledging that to do so would have been incorrect) nor had he treated John Sisk & Son's claim as a global claim. The arbitrator had recognised that even if the firm's claim was global, that would not preclude it from succeeding, but had (correctly, the court cautioned) said that a party endeavouring to prove a global or total costs claim would carry a greater burden than a party endeavouring to prove the same claim on an itemised basis. As the court put it: "There are added evidential difficulties in proving a global or total costs claim." Those difficulties were explored in more detail in Walter Lilly.

The case provides a timely reminder that it is likely to be a far easier task for a defendant to attack and undermine a tribunal's confidence in a global claim. Where it is possible (and, admittedly, it will not always be possible) contractors and subcontractors will undoubtedly put themselves in a much better position by presenting an itemised claim, with identified causal links between their losses and the employer's actions.

THE CASE PROVIDES A TIMELY REMINDER THAT IT IS LIKELY TO BE A FAR EASIER TASK FOR A DEFENDANT TO ATTACK AND UNDERMINE A TRIBUNAL'S CONFIDENCE IN A GLOBAL CLAIM

The decision also provides some useful guidance on the perhaps less glamorous subject of claims for interest. When putting together claims, interest is all too often an afterthought to be tacked on the end without careful consideration. In high value claims particularly, it can merit greater thought and attention. Contractual rates under the JCT suite are typically 5% above base, unless amended by the parties. By contrast, where the Late Payment of Commercial Debts (Interest) Act 1998 (the "Debts Act") applies, the rate is rather higher: currently 8% above base, plus a small amount of statutory compensation.

The question for the arbitrator, and subsequently the court, was whether clause 4.10.5 of the subcontract (under which interest at 5.5% would have been due) provided a "substantial remedy" for late payment of the sums due to Carmel under clause 7.7.4 of the JCT conditions. The arbitrator found it did not, such that Carmel was entitled to interest under the Debts Act at the rate of 8.5%. The court agreed with that decision, but for a different reason: it found that clause 4.10.5 of the JCT conditions applied only to late interim payments due under clause 4.10.1. It did not cover late payment of sums due under clause 7.7.4.

In this time of perennially low base rates, both the contractual and statutory rates exceed the amount one might expect to pay under a commercial loan arrangement. But the application of the Debts Act can prove especially valuable. The court's decision may prompt amendments to the JCT forms, whether by the parties or, indeed, by its publisher.

Nevertheless, whatever the form of contract, astute claimants will always take the time to examine whether the substantial interest rate applicable under the Debts Act, instead of any lesser contractual rate, might be relied upon.

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with sufficient comfort for the future.

A new use class would certainly demonstrate that the government is serious about encouraging Build to Rent, in the wake of its ongoing home ownership initiatives. Furthermore, it would leave local authorities free to tailor planning conditions to the proposed rental scheme, in the knowledge that none of the units can be sold without a further planning permission – with a further set of conditions.

Yet in a nascent market like Build to Rent, many believe that a new use class would be a step too far. There is no apparent shortage of developers and investors keen to test the Build to Rent market, but the concept largely remains an unknown quantity in England. Flexibility therefore remains key to the overall risk profile.

Set against this background, rental covenants hold many advantages. Firstly, they are available for use now by local authorities and require no new legislation. Indeed, a number of Build to Rent schemes in London and elsewhere have already been consented on the basis of a rental covenant. In addition, details of the covenant can be varied between individual sites while still maintaining certainty for the local authority; factors such as the length of the required rental commitment and the proportion of market rent versus affordable/discounted rents will differ depending on the location and the community involved.

DISCUSSION HAS FOCUSED ON TWO POSSIBLE SOLUTIONS – A NEW USE CLASS AND THE USE OF RENTAL COVENANTS

In the event that a developer wants even greater flexibility, a local authority may agree to financial clawbacks, allowing some or all of the units to be sold off prior to the end of the covenant on payment of a calculable, index linked sum per unit sold. For investors, a rental covenant provides a get-out clause; if the rental market has a downturn, or becomes less attractive following a legislative change, they will still have the ability to sell at the end of the covenant without the uncertainty of a further planning application.

As examples of successful Build to Rent schemes increase, we can only hope that more developers, investors and local authorities will be prepared to take the plunge and work together to achieve the perfect planning solution. If local authorities are prepared to listen to developers' concerns and use their existing tools flexibly, there should be no need for further changes in the law.

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