

Leaving loose ends - a case of negligence?

What happens if a consultant agrees to “prepare contract documentation and arrange for such documents to be executed by the parties thereto” and then fails to deliver on this promise?

In a recent case¹, an Employer’s Agent under the JCT 2005 Design and Build Revision 1 2007 agreed to deliver this service. He then failed to procure a performance bond, and guess what: the Contractor went into liquidation leaving the Employer without the benefit of the performance bond.

The Employer’s Agent had made it an obligation under the building contract to provide a performance bond, he had kept the Employer informed of the lack of bond and the consequences thereof, and consistently chased the contractor for the bond. The court had to decide whether all these actions were irrelevant because there was an absolute obligation to provide a bond, or whether the obligation to arrange for the execution of a bond was limited to the taking and exercise of reasonable care. The court looked at the contract wording as it always does, and found that the word “*arrange*” did not mean “*ensure*” so it was not an absolute obligation.

The court found that the Employer’s Agent had not been negligent. The court did not think that the Employer’s Agent should have withheld payment to incentivise the Contractor to provide the bond. However this conclusion was made in the context of the fact that the Contractor was being underpaid on the job, the contractor was progressing the works well and had provided assurances that the bond would be provided. Interestingly, the Employer’s Agent’s appointment was terminated prior to the point where it may have become necessary, in the court’s view, to withhold money. The court commented that it thought it was perfectly legal under the JCT to withhold the entire amount of the performance bond under an interim payment.

There are some very important lessons to be learned for Employer’s Agents, Contract Administrators, project managers, quantity surveyors and architects all of whom administer projects and agree to provide documents and arrange for their execution and the lessons are:

¹ Sweett (UK) Limited (formerly Cyril Sweett Limited and Michael Wight Homes Limited in the Exeter County Court sitting in Plymouth dated 23 February 2012.

- Make sure that you agree to “arrange” for the execution of documents; do not agree to “ensure” that documents are executed.
- Include the provision of documents as an obligation in the building contract.
- Advise the client in writing of the risks of not obtaining a performance bond (or any other document such as a warranty), if it is not forthcoming.
- Chase the performance bond and do not give up.
- When considering whether to withhold monies to incentivise the provision of a performance bond, weigh up all the factors and apply common sense. There are a number of ways to put pressure on a contractor to provide documents; normally discussions with the Contractor are the first course of action, which if unsuccessful can then lead to withholding payments.

Kim Teichmann

Senior Associate, Thomas Eggar LLP

