

Assign of the times? JCT clause 7.2

TCC strikes out wrongly assigned claim

Aviva Investors and others -v- Shepherd Construction Ltd [2021] EWHC 1921 (TCC)

The TCC (Jefford J) has had to consider the longstanding but little used JCT provision permitting an employer to assign the right to bring proceedings in the employer's name to a purchaser of the building. [James Leabeater QC](#), instructed by Dan Preston and Craig Longhurst of Fieldfisher, successfully applied to strike out a claim in which subsequent purchasers claimed to be able to sue the contractor for their alleged losses under a wide ranging purported assignment. The case illustrates the pitfalls of the JCT assignment provisions, and underlines the requirement to give notice, if notice is required, prior to trying to take an assignment.

Background

Shepherd was engaged by Camstead Limited as the 'Contractor' under an amended JCT Design and Build 2005 form of contract to carry out the demolition of an existing building and the construction of new self-contained student apartments in Cambridge. The Works were divided into five Sections, with the first two being certified as practically complete in September 2008 and the final section achieving practical completion on 5 April 2009.

Camstead Limited conveyed its freehold interest in 2009 and that interest was sold again in 2021 to the Claimant Aviva entities ("**Aviva**"). On 24 September 2020 Aviva and Camstead entered into a deed of assignment (**DOA**) and Aviva issued a claim against Shepherd in the TCC seeking recovery of circa £4.5m of damages arising from alleged defects in the design and/or construction of the Works. Notice of the purported assignment was not given to Shepherd until 13 October 2020.

The claim was served on Shepherd on 19 January 2021 with Aviva accepting that there had been no valid legal assignment before the proceedings were commenced for want of notice – legal assignments taking effect on notice. Notwithstanding this, Aviva claimed that there had been a valid equitable assignment and, two weeks before service, on 5 January 2021 Aviva issued an application to add the original Employer (Camstead) as a party to the proceedings. Shepherd contested the validity of the assignment and, on 10 February 2021, issued a cross-application to strike out Aviva's claim on the basis that the Claim Form and Particulars of Claim disclosed no reasonable grounds for the Claimants to bring the claim as there was no valid assignment and, consequently, Aviva had no cause of action.

The applications were heard together on 10 May 2021.

The assignment clauses

There were two relevant assignment clauses under the Contract. Clause 7.1 provided Camstead with the right "*upon giving the Contractor 14 days' written notice of its intention to do so, to assign the benefit of this contract by absolute assignment to any person (save any to whom the Contractor makes reasonable objection in writing before the expiry of the said period of 14 days)*". Clause 7.2 (which was unamended from the standard form) provided that:

"in the event of transfer by the Employer of his freehold or leasehold interest in or of a grant by the Employer of a leasehold interest in the whole of the premises comprising the Works or (if the Contract Particulars so state) any Section, the Employer may at any time after practical completion of the works or of the relevant Section grant or assign to any such transferee or

lessee the right to bring proceedings in the name of the Employer (whether by arbitration or litigation whichever applies under this Contract) to enforce any of the terms of this Contract made for the benefit of the Employer

The clause had been introduced in the 1987 form of contract and despite commentary in the JCT Guidance, there had been no sustained consideration of it in case law.

The dispute

Despite the DoA being drafted as a purported assignment of the full benefit of the contract, Aviva accepted that no prior notice had been given to Shepherd and, consequently, argued that the assignment was valid under clause 7.2. In doing so, Aviva relied on leading cases on contractual construction and business common sense to question the meaning of the clause and strive for an interpretation which would have resulted in the DoA effecting a valid assignment (as between Camstead, Aviva and Shepherd). In response, Shepherd argued, amongst other matters that:

1. clause 7.2 only envisaged assignment to the immediate (or first) assignee;
2. the clause only allowed proceedings to be commenced in the name of the original Employer (i.e. Camstead); and
3. any proceedings could only be for losses suffered by the original Employer.

Judgment

In agreeing with Shepherd, Mrs Justice Jefford, at paragraph 22 of her Ladyship’s judgment, held relevantly:

- *“all that can be assigned, as the clause [7.2] says, is the right to bring proceedings in the name of the Employer”* and so any claim would have had to have been brought in the name of Camstead; and
- *“There is no wording that would encompass a subsequent transfer by [the transferee of the original Employer]”* as in the clause *“[t]he words “any such” plainly refer to the person to whom an interest has been transferred or granted by the Employer”* (i.e. not by any other party). Therefore, only the first transferee/assignee, Hotbed, could bring such a claim in the name of the Employer.

Having found in Shepherd’s favour on these points, the Judge did not continue to consider the types of losses that could be recovered under clause 7.2, noting that *“more detailed consideration of this part of the clause must await a case in which it is relevant on the facts”*.

Having found there was no claim in contract for Shepherd to answer, Mrs Justice Jefford went on to consider possible claims in tort which were captured by the purported DoA. Whilst stating that a *“contractor is inherently unlikely to owe a duty of care to the employer to prevent or avoid economic loss”* the Judge found that any tortious claim would have arisen out of the contract and, as such, assignment of the same was caught by clause 7.1.1.

The judgment concludes that Aviva’s *“application to join Camstead fails”* and Shepherd’s *“application to strike out succeeds”*.

You can read the [full judgment here](#).

This article is co-authored by [James Leabeater QC](#) (of 4 Pump Court), Dan Preston and Craig Longhurst (of Fieldfisher LLP) who were instructed on behalf of Shepherd in the case.