LEGAL BRIEFING

Robin and Barbara Bache and others v Zurich Insurance Ltd

[2014] EWHC 2430 (TCC), Mr Justice Akenhead

The Facts

Mr and Mrs Bache and 21 other purchasers ("the Purchasers") entered into Agreements for Lease with Gold Homes (The Wave) Ltd ("Gold") for flats to be built in Middlesbrough. The Purchasers each paid a 10% deposit to Gold who was required to construct and complete the flats and common parts of the development. Following delays to completion to the development, the Purchasers wrote to Gold in February 2010 purporting to accept its failure to complete the development as a repudiation of the Agreements for Lease and seeking return of the deposits of £357,800. Gold entered administration in April 2011 and was dissolved in January 2013.

Each of the Purchasers had an insurance policy with Zurich Insurance Ltd ("Zurich") which provided 10 years cover for new built dwellings. The Introduction to the policy said "The policy protects you if your developer goes into liquidation … against the loss of contract exchange deposit…" and Section 1 said that the lost deposit would be paid to the Purchasers where "due to the developer's bankruptcy, liquidation or fraud, the developer fails to complete the construction of the new home".

Gold did not accept that it was in breach of contract and when the Purchasers claimed on their policies, Zurich refused cover. This refusal was first said to be because Gold was in administration, not liquidation. Zurich later stated that "*should the company enter dissolution, the policy will engage*" but sought to withdraw that admission in the proceedings.

The Issues

Two agreed preliminary issues were formulated on the first day of the hearing.

(i) Were the Purchasers entitled to claim under the policy if:

  a) They accepted Gold's repudiatory breach (for failing to complete the development within a reasonable time); and

  b) Following that acceptance, Gold entered liquidation or dissolution; and

  c) At the date of the acceptance, Gold was as a matter of fact insolvent and such insolvency was the reason why it had not completed the development?

(ii) Would the answer be different if at the time of the acceptance Gold was not insolvent?

The Decision

The Judge decided that the Purchasers were entitled to claim under the policy (subject to proving their case at a full trial) and decided the preliminary issues as follows:

(i) (a) & (b) The Purchasers' acceptance of Gold's repudiation of the Agreements for Lease was not a bar to recovery under the policy, neither was the fact that following that acceptance Gold entered liquidation or was dissolved.

  (c) Whether or not Gold was in fact insolvent at the date of the acceptance of the repudiation and/or whether such insolvency was the reason why it had not completed the development was also not in itself a bar to recovery under the policy.

(ii) The answer was the same whether or not Gold was insolvent at the time of the acceptance of the repudiation.

The Judge considered the principles set out in *Cornish v Accident Insurance Co* (1899) 23 QBD 452 and more recently in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 where Lord Steyn indicated that "the law generally favours a commercially sensible construction" which meant that insurance policies should be interpreted in the light of the commercial object of the insurance.

The Judge recognised the commercial reality which must have been envisaged by, and was therefore foreseeable to, the parties when the policy was formed, namely that the circumstances which would most likely give rise to the right to secure the return of the deposits was a repudiatory failure by the developer to start or complete the development. The foreseeability of the insolvency of the developer was clear and the primary reason it might "fail to complete" the development was its insolvency or financial inability to fund the works.

The Judge rejected Zurich's argument that the Purchasers were required to wait until Gold was liquidated or dissolved before claiming on the policy. The Judge recognised that in most cases the cause of a developer's inability to complete will be the actual or impending insolvency of the developer, leading to a creditor, lender or the developer itself taking steps for its winding up or administration. It was therefore not a "commercially sensible construction" of the policy to require the insured to wait for liquidation.

Commentary

This case summarises the general principles of contract interpretation and of insurance policies in particular. Zurich's arguments on the meaning of "fails to complete the construction" in the policy were rejected by the Court because they ran against the commercial reality of the purpose of the policy.

The Judge recognised that the commercial reality is that it is not the event of the liquidation or dissolution of a developer (or contractor) which means a development cannot be started or completed, but rather the manifestation of financial difficulties on site which causes steps towards liquidation or dissolution to be taken and works to stop.

David Toscano
July 2014