PRIME PROPERTIES LIMITED

and

MAIN CONTRACTORS LIMITED

CONFERENCE NOTE

Disclaimer: This note has been prepared for illustrative purposes, and in the context of a simplified mock conference. It is not presented as legal advice, and should not be relied on as such.

INTRODUCTION

1. I am asked to advise Prime Properties Limited ("**PP**") in connection with a potential dispute against Main Contractors Limited ("**MC**"), in relation to a building contract for works carried out at 40-50 Murray Mews, London, W1 (the "**Development**").

2. On 15 October 2018, PP (as Employer) entered into a contract with MC (as Contractor) that incorporated the terms of the JCT Design and Build Contract 2016, which was amended by a Schedule of Amendments (the "**Building Contract**"). Pursuant to the Building Contract MC agreed to construct a commercial hotel at the Development. Insurance "Option B" was selected. PP owns the site and the Development is a new build.

3. I am advised of the following amendment to the JCT D&B 2016 terms:

   "*The Building Contract also includes a clause that MC is not entitled to claim for an extension of time or for loss and expense in relation to any matter of event caused by a Specified Peril for the first four weeks where it is caused as a result of the MC's default"*

4. The facts relevant to the potential dispute between PP and MC are set out in "Instructions to Counsel to Advise" prepared by Charles Russell Speechlys LLP and dated 26 April 2020.

5. Save for the amendment outlined in paragraph 3 above, I note that I have not seen the Schedule of Amendments or the insurance policy taken out by PP. Accordingly, this note, and the advice given in conference, are based on the terms of the unamended JCT D&B 2016 and the terms of a typical all risks insurance policy (ie. the type of policy required pursuant to Option B).

6. This document is presented as a short note of the matters discussed in conference, and not as a detailed written opinion.

QUESTION 1

1. I am asked:

"*There has been a flood and the project is now in delay. The client has notified insurers. What should our client do now?"*

2. Assume insurance obligations fulfilled, in short:
    a. JCT D&B 2016, Insurance Option B, B1:

        "*The Employer shall effect and for the period specified in clause 6.7.2 maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees)"*

    b. cl 6.7.2: maintain "*Works Insurance Policy"*, "*up to and including the date of issue of the Practical Completion Statement, or last Section Completion Statement, or (if earlier, the date of termination"* except "*in relation to a Section after the date of issue of its Section Completion Statement"* and "*if partial possession is taken under clause 2.30"*.

    c. cl 6.8:

        i. "All Risks Insurance" = cover against physical loss or damage to works executed and Site Materials and reasonable cost of removal and disposal of debris and shoring and propping the Works. Exclusions include: defects due to wear and tear and the like and loss/damage caused by defects in design, plan, specification, material or workmanship.

        ii. "Joint Names Policy" = includes the Employer and Contractor as composite insured "*under which the insurers have no right of recourse against any person named as insured"* (see also Petrofina (UK) Ltd v Magnaload Ltd [1984] 1 QB 127).

        iii. "Specified Peril" = includes "flood" and "escape of water from any water tank, apparatus or pipe".

            1. NB. Held that "flood" connotes the invasion of the property by a large volume of water caused by a rapid accumulation or sudden release of water from an external source, usually but not necessarily confined to the result of a natural phenomenon such as a storm, tempest or downpours. It did not include, for example, the escape of a large quantity of water from a sprinkler system because a Subcontractor dropped a heavy purlin on it (Computer & Systems Engineering v John Lelliott (1990) 54 B.L.R. 1 CA).

    d. cl 6.9: recognise each Subcontractor as an insured, or include a waiver of rights of subrogation in respect of loss or damage caused by a Specified Peril (includes "flood" pursuant to cl 6.8).

3. PP has received a notice from MC pursuant to cl 6.13.1 ("*loss or damage affecting any executed work or Site Materials"* + "*occasioned by any of the risks covered by the Works Insurance Policy"* + *"forthwith upon it occurring or becoming apparent"* + notice to Employer "*of its nature, location and extent"*).

4. Next steps:
    a. **Investigate cause of flood**: See Q4.

    b. **Consider terms of policy**: Likely to be excluded if MC caused the flood? NB. If prima facie covered, insurer no subrogated right to recover costs from MC.

    c. **MC to reinstate and carry on with the Works:** Cl 6.13.4: Where loss or damage occasioned by risk covered by Works Insurance Policy, after any inspection required by insurer, with due diligence, "*restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris (collectively 'reinstatement work') and proceed with the carrying out and completion of the Works"*. Unless material damage to any existing structures (cl 6.14).

    d. **Reinstatement work treated as a Change:** Cl 6.13.6: "*reinstatement work shall be treated as a Change"*. JCT D&B 2016 not clear if Employer's instruction required but wording of cl 5.2 (a "deemed" change) and cl 4.12.2.4 (payment predicated on treatment as a deemed Change, not instructed Change) suggests not.

    e. **Contractor to authorise insurance payment to Employer**: Cl 6.13.3 "*shall authorise the insurers to pay to the Employer all monies from such insurance …"*.

    f. **Employer not to deduct from sums due**: Cl 6.13.2 "*… the occurrence of such loss or damage … shall be disregarded in calculating any amounts payable to the Contractor under this Contract"*.

    g. **Value Change/Pay**:

        i. Try to agree valuation is insurance valuation (cl 5.2);

        ii. In the absence of agreement, arguably falls under cl 5.7.1 "*a fair valuation shall be made"*, and insurance payment would be fair.

        iii. No prolongation cost allowance: cl 5.7.2 "*No allowance shall be made under the Valuation Rules for any effect upon the regular progress of the Works or of any part of them …"*.

        iv. NB. JCT D&B Guide 2016, at 130:

> *"If the Employer is exempt from VAT registration or if supplies made by him in the course of the business are wholly or partially exempt, the Employer should include in his calculation of the reinstatement cost not only the normal VAT-exclusive cost of reinstatement (adjusted for interim increases in those costs) and the percentage to cover professional fees, but also the amount of the VAT chargeable on the work of reinstatement, to the extent that he would not be able to recover it."*

h. **Pay**: Contract Sum adjusted by amounts agreed in respect of Changes (cl 4.2.1). NB. payment for reinstatement works "*not subject to Retention*" (cl 4.12.2.4 (if Alternative A) or cl 4.13.2.4 (if Alternative B)).

QUESTION 2

5. I am asked:

> *"The client requires the contractor to carry out certain remedial works, which will be instructed under the contract. The client has been advised to ensure the claim for an EOT and a claim for the remedial works are dealt with separately. Should the client be looking to recover these losses under the policy?"*

6. Remedial works, yes. EOT and/or a claim for loss and expense and/or PP's consequential losses unlikely to be covered. Separate cover required for financial or consequential costs/losses due to delay to completion.

7. Re claim for EOT:
   a. **Notice and particulars**: Contractor needs to give:
      i. notice "*whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed*". Notice of material circumstances, cause or causes of delay, and any event the Contractor considers to be a Relevant Event (cl 2.24.1).

      ii. particulars, with notice or as soon as possible thereafter, of "*expected effects"* (cl 2.24.2).

   b. **Relevant Event?** Relevant Events include (cl 2.26):
      i. **The reinstatement works**: A Change (NB. reinstatement works treated as a Change, cl 6.13.6).

      ii. **The flood itself:** "*loss or damage occasioned by any Specified Peril"* (NB. "flood" is a Specified Peril).

   c. **Extension of time:**
      i. not for first 4 weeks if caused by MC's default;

ii. a "*fair and reasonable"* extension to Completion Date if: notice; a Relevant Event; and completion delayed beyond Completion Date (cl 2.25.1). Whether or not an extension is given, notify Contractor of decision within 12 weeks of particulars (cl 2.25.2).

8. Re potential claim for loss and expense:
    a. **Notice and assessment:** Contractor needs to give notice (cl 4.20):
        i. Give notice as soon as likely effect on regular progress "*becomes (or should have become) reasonably apparent"*. Set out likely effect of a Relevant Matter on regular progress;

        ii. Initial assessment of loss and/or expense (with notice or "*as soon as reasonably practicable"*);

        iii. Update at monthly intervals.

    b. **Relevant Matter?**
        i. Reimbursement of loss and/or expense if regular progress of the Works has been or is likely to be materially affected by any Relevant Matter (cl 4.19.1);

        ii. Relevant Matters include (cl 4.21):

            1. **The reinstatement works:** A Change (NB. reinstatement works treated as a Change, cl 6.13.6).

            2. **The flood itself?** Depends on cause. Relevant Matters include "*impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person"* (cl 4.21.5). NB. different to time.

    c. **Employer's assessment**: within 28 days of Contractor's initial assessment, and within 14 days of each update, notify Contractor of ascertained amount of loss and/or expense. Not for first 4 weeks if caused by MC's default.

QUESTION 3

9. I am asked:

"*To what extent is the insurance claim impacted by any contractual claim?"*

10. Depends on terms of the policy. As in joint names, insurer no right to subrogated claim against Main Contractors.

11. NB. House of Lords in Cooperative Retail Services Ltd v Taylor Young Ltd [2002] 1 WLR 1419. Re Cl 22A.4 of the JCT 1980 form, which is now cl 6.13.1 – 6.16.5. A fire, which caused extensive damage before Practical Completion. Employer alleged that fire resulted from the negligence or

breach of contract of architect and M&E engineers (who had entered into warranties with the Contractor). The Contractor, architect and M&E engineers were insured under a joint names policy. Employer claimed the cost of reinstatement works, associated professional fees and losses consequential on delay to the project. Held:

> "*[26] The effect of these clauses is that the contractor is not liable to pay compensation to the employer for loss and damage to the works which may have been caused by the fire prior to the date of practical completion … even though the fire was caused by his negligence, breach of statutory duty or default. Instead the funds necessary to pay for the restoration of the physical damage caused to the works by fire, including the associated professional fees, are to be provided by means of insurance under the joint names policy. As for delay caused by the fire, the contract leaves it to each party to bear its own losses arising from the delay* [NB. fire was a Specified Peril]. *The employer cannot claim damages from the contractor for any delay which the fire may have caused to the completion of the works. This is because the contractor is entitled to an extension of time for their completion under clause 25. The additional cost of extending the period for the completion of the contract works falls on the contractor, as he is not entitled to payment for this additional loss and expense under clause 26* [which did not include "Specified Perils"]*"*
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> …
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> "[47] *The effect of Clause 22A.4 may be summarised in this way. On the one hand there is the position of the Employer. He is not entitled to deduct anything from the sums payable to the contractor under or by virtue of the contract as compensation for any loss and damage which he has sustained due to the fire. This is so even if the fire was caused by the contractor's act or omission or default or by anyone else for whose acts, omissions or defaults he would otherwise be responsible. Clause 22A.4.2 provides that the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the contractor under or by virtue of the contract. On the other hand, there is the position of the contractor. Clause 22A.4.3 requires him with due diligence to restore the work that has been damaged by the fire, to replace or repair any site materials that have lost or damaged by it and to proceed with the carrying out and completion of the works. Clause 22A.4.4 requires him to authorise the insurers to pay all monies that are payable from the insurance in respect of the fire to the Employer, who is required in his turn to use the money for the purpose of paying the contractor and associated professional fees for the restoration work. Clause 22A.4.5 provides that the contractor is not to be entitled to any payment for the reinstatement work other than the monies received under the insurance policy. As the contractor is entitled to an extension of time under Clause 25, he is not liable to the Employer for losses due to any delay caused by the fire in the completion of the works under the contract.*"

QUESTION 4

12. I am asked:

> "*The contractor disputes liability and has prepared an expert's report. How can this be addressed?"*

13. Suggest PP:
    a. gathers evidence (photographs, daily diaries, those on site to write down recollections, investigations etc);

    b. engages an expert.