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ABI GUARANTEE BONDS AND BUILDING CONTRACTOR INSOLVENCY

- In Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc [2017] EWHC 3286 (TCC) the court considered a claim under an amended ABI Model Form Guarantee Bond.
- As a result of a bespoke clause the Contractor's insolvency was enough to trigger recovery under the Bond, but if a breach of contract was required, the Contractor was in breach of the contract by failing to pay the amount due to the Employer following insolvency.
- The decision is a timely reminder in light of the recent collapse of Carillon that employers should be wary of amending the ABI Model Form Guarantee Bond to deal with insolvency in a way which creates uncertainty and the potential for challenge by the surety.

What is it about?

The Employer entered into an amended construction contract (JCT 2011 standard form) with the Contractor to build a block of student flats in Newcastle Upon Tyne (**Contract**). The Contractor's performance under the Contract was secured by a performance guarantee bond (**Bond**) based on the ABI Model Form of Guarantee Bond. Clause 1 of the Bond was unamended and stated that the Bond could be called in the event that the Contractor breached the Contract and a debt was due. The parties added a bespoke clause that damages payable under the Bond included a debt or other sum payable following insolvency of the Contractor. The court considered these clauses as an intent to mirror the provisions of the Contract.

The Employer terminated the Contract as a result of the Contractor's suspension of and failure to proceed regularly and diligently with the Works after the Contractor ceased work on the development citing financial issues. The Contractor then became insolvent and the Employer paid another contractor to complete the remaining works and sought to recover part of the costs of completion by claiming the maximum amount of the Bond.

The guarantor resisted the payment of the Bond focusing on the bespoke amendments of the parties in relation to the Employer's ability to claim due to the insolvency.

Why does it matter?

The court looked at what was necessary for a successful claim on the Bond and found the surety liable to pay on two bases:

Firstly, reading the two clauses of the Bond together and alongside the Contract the Bond intended to make it clear that it was to protect the Employer from non-payment following insolvency. The insolvency triggered the termination provisions even if it was not a breach and gave rise to a debt in respect of the costs incurred by the Employer which could be claimed under the Bond.

Alternatively, if a breach was required (as argued by the surety) then such a breach existed as a result of the Contractor's failure to pay the debt falling due under the termination provisions. This is in line with the settled position established by the Perar case and is reflected in the Guidance Note to the AB Model Form of Guarantee Bond.

Finally, the court found that the Employer only needed to have completed the ascertainment of the amount due under the Contract to claim against the surety, but that the ascertainment was not conclusive and could be challenged by the surety on the same grounds as were available to the Contractor.

Now what?

This case confirms that a failure to pay a debt due following termination for insolvency gives rise to a breach which creates a liability under the ABI Model Form of Guarantee Bond, but highlights that employers should exercise caution if making amendments referring specifically to insolvency as they may add little and may make the drafting uncertain and prompt a challenge to payment of the bond.

It also makes it clear that a surety can challenge the amount of the debt on the same grounds as the Contractor (although in this case given the margin by which the debt claimed exceeded the maximum amount under the Bond the judge felt that arguments as to quantum may not be of much assistance to the surety).

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