POST-TERMINATION CALLS ON ON-DEMAND SECURITIES: COURT OF APPEAL GUIDANCE

NIDCO v Santander: a recap

As explained in more detail in our earlier Law-Now (click here), NIDCO called on a number of Standby Letters of Credit ("SLCs") after terminating a large FIDIC based contract for the construction of a highway in Trinidad and Tobago. Santander had provided SLCs to serve as retention security in lieu of deductions from interim payments. NIDCO was required to certify to Santander that the amounts demanded were "due and owing" to it by the contractor.

Santander claimed that NIDCO's calls were fraudulent because they were made in respect of termination losses which were not yet "due and owing". Santander also argued that NIDCO had claimed for amounts greater than the cash retention it would have been entitled to retain at the date of termination under the terms of the construction contract.

The Commercial Court disagreed that Santander's arguments provided a basis to doubt the honesty of NIDCO's calls. Santander's case rested on a legal analysis of the underlying contract and NIDCO's belief was not to be treated as a "function of [that] legal analysis". Santander had not shown a triable case that NIDCO did not believe the amounts demanded to be "due and owing".

The Court of Appeal

Santander's appeal against the Commercial Court's decision was heard on an expedited basis and was dismissed last week. In doing so the Court of Appeal directly challenged the legal analysis relied upon by Santander:

- The court disagreed as a matter of law that the requirement for amounts to be "due and owing" did not extend to NIDCO's unliquidated claims for damages arising from termination. The underlying contract incorporated the standard FIDIC clause 4.2(d) which stated that performance securities were required not merely for failures to pay amounts due but also for "circumstances which entitle the Employer to termination ... irrespective of whether notice of termination has been given." This was important background against which the SLCs were to be interpreted and showed that unliquidated claims for damages arising on termination were permissible.

- NIDCO was entitled to call for the full amount of the retention security even though this sum exceeded the amount of the cash retention which would have been held by NIDCO at the date of termination had the retention security not been provided in lieu of a cash retention. The court viewed the provision of a retention security in lieu of cash retention as being "for the benefit of the contractor" and any restriction on the Employer's ability to call on the full amount of the retention security needed to be expressly stated in the SLC.

By Aidan Steensma - CMS Cameron McKenna

"...retention securities given in lieu of cash retentions will allow demands to be made for their full amount..."

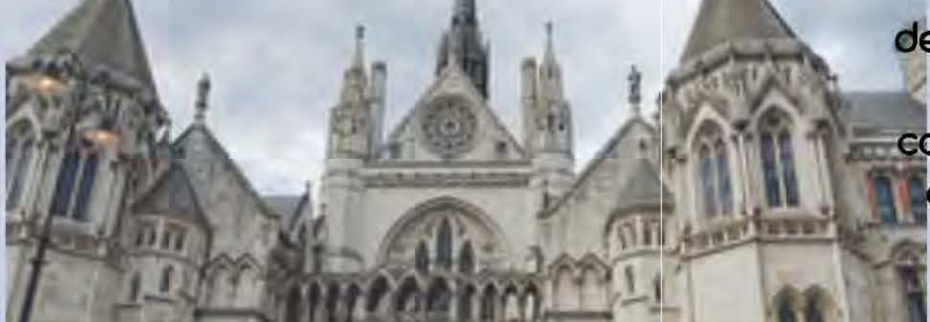
Having found that NIDCO's calls had a valid basis in law, there were no grounds on which it could be suggested that NIDCO's calls were fraudulent.

Conclusion and implications

The Court of Appeal's decision provides additional clarity for Employers considering the termination of a construction contract and the pulling of on-demand securities. Although much will still depend on the circumstances of each case, the standard FIDIC provisions in relation to performance securities will support a broad interpretation of such securities, permitting unliquidated claims for damages arising on termination. The approach taken by the Court of Appeal may also encourage parties in other circumstances to rely to the terms of their construction contract to influence the interpretation of on-demand securities which have been supplied pursuant to its terms.

It appears also that retention securities given in lieu of cash retentions will, in the absence of any contrary wording, allow demands to be made for their full amount regardless of the stage at which a project has reached (provided of course that the Employer has genuine claims which support the making of a demand). Contractor's wishing to limit such securities to a percentage of the amounts certified for payment at any given time should include specific wording to this effect.

References: *National Infrastructure Development Co Ltd. v Banco Santander S.A [2017] EWCA Civ 27*



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