

SHEPHERD HOMES-V-ENCIA REMEDIATION AND GREEN PILING

The Message: It is essential to read and understand the fine print before entering into any contract.

The Case: The High Court has held that a sub-contractor can rely on its standard terms and conditions so as to substantially limit its liability for damages in relation to any defective work for which it is held responsible (Shepherd Homes Limited-v- Encia Remediation Limited and Green Piling Limited (26/1/2007)).

Shepherd Homes employed Encia Remediation to undertake the civil engineering works on their development of 94 homes on a site in Hartlepool. In turn, Encia employed Green Piling as a specialist sub-contractor to undertake the piling works for a total contract price of about £250,000. The works were carried out in 2 separate phases in 2001 and 2002 but, by 2003, houses had already started to show signs of cracking due to settlement.

Shepherd Homes estimate that the settlement problem is so severe that their potential liability is likely to be about £10 million, and possibly more. They commenced proceedings against Encia who then sought an indemnity from Green Piling for any damage caused by failures in the piling design.

However, Green Piling sought to rely on a limitation clause in their standard terms and conditions which provided that their liability for any damage whatsoever would be capped at the contract price. Encia sought to argue that such a limitation had not been agreed and/or was unfair or that Green Piling was prevented from relying upon it because it had represented it had insurance cover up to £1 million.

The Court first held that the contract had incorporated Green Piling's conditions. These had been sent with their offer and, although the limitation clause had not been mentioned at any stage, Encia's Contracts Manager had considered the conditions and had never raised any objection to them or ever sought to impose Encia's conditions.

The Court did not consider there was anything so special or unusual about the cap on liability that Green Piling had to expressly draw Encia's attention to it. Such a limitation clause was fairly standard in the industry and, in any event, Green Piling understood that Encia had given proper consideration to all their terms and had accepted them.

The Court also held that the cap satisfied the test of reasonableness imposed by the Unfair Contracts Act 1977 on any exclusion or limitation clause contained in a party's terms of business. Given that Green Piling was a small company, and Encia was a large one, Encia could not argue that Green Piling had enjoyed a stronger bargaining position at the time of the contract.

Their argument was that Green Piling had expressly represented that it had £1 million worth of insurance cover but the Court held this was not inconsistent with Green Piling capping their liability at a lower figure. The Court also noted that Encia believed it had £5 million insurance cover of its own upon which it could rely, although there was now a separate dispute over whether this was, in fact, the case.

Accordingly, in the event that it is found that there was negligent piling design, Encia will only be able to recover a small fraction of its total liability from Green Piling. The lesson to be learned is to fully consider the contract terms before the contract is made, not afterwards.