fieldfisher

Construction
A year in Review

February 2023

Contents

Introduction

At the end of last year, the UK Government put forward a much welcomed construction playbook to herald in an era of trust, transparency and cohesion. Hard as it may be to accept, against the backdrop of greater productivity in the whole UK economy (and manufacturing productivity in particular) since 1997, construction productivity has fallen by an average of 0.6% each year in that period. For the vibrant, innovative and hardworking industry we know and love, it's hard to recognise (let alone accept) these figures. We all know how much the sector contributes to the UK economy but why is it not always recognised?

Whatever your stance on BREXIT, it is hard not to recognise the impact it has had on productivity and resilience in the UK construction sector. As the nation fights hard to retain its status as being an attractive investment destination, increased barriers to access a well trained workforce, the perception of a high tax environment and political instability have all played their part in the economic anxiety the country experienced last year. The construction industry mirrored the wider UK economy in facing a number of challenges posed by high inflation and the impact of the Ukraine conflict as materials and energy prices continued to rise at (at least recently) unprecedented rates. This brought about severe hardships for many, particularly when coupled with the continued fall-out from the Grenfell tragedy and changes to the Building Safety regime alongside a continued toughening of the UK insurance industry. There were also a number of important decisions from the Courts which, will no doubt impact the industry as we move into 2023 and beyond (a number of which are considered in the pages that follow).

Looking ahead, and as Spring marches toward us, we are experiencing the strange bedfellows of continued uncertainty and increased positivity. Even if inflation does fall as predicted, interest rates are likely to rise further, so it is going to be a hard year with multiple challenges for everyone. This being said, construction prices appear to have peaked and in some cases may even be cooling off. There is still no official call out of the dreaded "R " word and so, perhaps, things are not quite as bad as they may have seemed. As always, construction will be called upon to play its part in the nation's economic recovery. So, what can the UK construction sector do to support the government's ambitious Net Zero targets? Will it grasp the opportunity which the energy transition represents? How is the sector responding to societal demands for more diversity and equality? What contribution will construction make to solving the UK's housing crisis and will the new Building Safety Act mark a Sea Change across the industry, both in attitude and in delivery? These questions, and more, may just be answered in the next 12 months and beyond.

This will be a year about challenge, contribution and opportunities - in equal measure. As always, our team is ready to help our clients face the first, make the second and make the most of the third.

Adjudication Enforcement in 2022 - the curious case of the envelope and other cautionary tales

Enforcement is a streamlined process whereby an Adjudicator's decisions can be converted by the Technology and Construction Court (TCC) into a court judgment against the losing party in the adjudication. That court judgment (a Court Order) can be used to escalate the payment of any sum awarded through other means of physical enforcement (i.e. bailiffs or insolvency proceedings).

The importance of the adjudication regime to the industry is invaluable; as such the Courts have sought to uphold the legitimacy of Adjudicator's decisions by making valid challenges the exception rather than the norm.

For example, in *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778 (TCC) the Court confirmed that an adjudicator's decision must be enforced even if the adjudicator has made an error of procedure, facts, or law evidencing the hard line the TCC has taken.

Although the odds are often stacked against parties challenging an Adjudicator's decision, the Court will be reluctant to enforce in the following circumstances:

1. the adjudicator lacked jurisdiction to determine the dispute;
2. the adjudicator broke the rules of natural justice; and
3. the party receiving the funds is insolvent

2022 saw the Court continue to develop these principles with two notable cases in regard to jurisdiction and insolvency.

Jurisdiction - did you notice the Notice?

In the case of *AM Construction Limited v Darul Amaan Trust* [2022] EWHC 1478 (TCC) there was a dispute over the value of works carried out by way of a true value adjudication. The contract required the service of notices either by hand or by pre-paid post. A process server served the notice (by hand).

AM Construction Limited (AMC) lost an adjudication on the true value of works (i.e. no sums were due to them) and considered that significant sums were due to them by way of a failure of the Darul Amaan Trust to serve the proper contractual notices. They brought proceedings for a declaration that the decision was unenforceable.

AMC claimed that the Notice of Adjudication had not in fact been validly served. They contended that it was not included within the envelope posted through the letterbox by the process server.

Although the Court provided some helpful guidance on the application of *Grove Developments v S&T (U.K) LTD [2018] EWHC 123 (TCC)*, it was primarily concerned with whether the Adjudicator had jurisdiction. A director of AMC claimed that the envelope posted through the door of the registered address did not contain the Notice of Adjudication. The process server provided evidence in Court that it was highly unlikely that when he printed the documents he had failed to print the Notice of Adjudication. The Court noted that there was no evidence that the director of AMC was not being truthful, noting that the process server was "unreliable in certain aspects". Accordingly, the TCC found that the Notice of Adjudication had not in fact been contained within the envelope, thus the Adjudicator lacked jurisdiction to issue the decision.

Insofar as lessons can be learned from the decision in *AM Construction Limited v Darul Amaan Trust*, it cannot be stressed enough how important it is to keep a record of what you have posted, Scanning a compiled version as evidence is also recommended. Although a rare instance in practice, it is incredibly hard to disprove statements of fact in the negative unless tangible contemporaneous records support the positon.

Can a party in a CVA enforce an Adjudicator's Decision?

Since the case of *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited* and specifically the appeal in *Cannon Corporate Ltd v Primus Build Ltd* there was uncertainty regarding whether a company which was subject to a company voluntary arrangement (CVA) could enforce an Adjudicator's decision. Insolvency and adjudication have often clashed. The ethos of pay now and argue later can, in reality, only work if the paying party has a reasonable prospect of getting an overpayment back.

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The Court noted in Cannon that a company in a CVA was distinguished from those in insolvent liquidation. A company in a CVA is not necessarily seeking funds to pay creditors, rather the intent and form of a CVA is often an attempt to "trade its way out of trouble".

FTH Limited v Varis Developments Limited [2022] EWHC 1385 (TCC) further established the distinction drawn by the Court between companies who were in liquidation, and those who were in a CVA.

In *FTH Limited v Varis Developments Limited* FTH were in a CVA. Through a series of adjudications FTH was awarded the sum of circa £757,000. Varis refused to pay, claiming that they had a cross claim of circa £1.7million flowing from a termination. Varis contended that if they were to pay the sum of £757,000 there was a "real risk" that they would not be able to recover the value of their cross claim as a result of the CVA.

Significantly, under the CVA the best-case scenario for creditors showed that only 56p in the pound would be returned. The long-term projections were flawed, assuming 85% recovery for two claims after costs (including Varis' claim) which did not take into account the cross claim from Varis nor the limited prospects of success in regard to the second. Varis argued that the CVA was more akin to liquidation and the Court agreed.

The decision in *FTH Limited v Varis Developments Limited* confirmed the case by case approach that the Court would conduct when considering the effect of a CVA and insolvency more widely.

With the current market uncertainty it is expected that this area will soon be explored further and we have already seen a further example this year in *JA Ball (in administration) Limited v St Phillips Homes (Courthaulds) Limited, where,* whilst strictly obiter, the court held that there was a need to balance the policy of enforcing adjudication awards against the wider insolvency regime. The Court summarised that a company in administration may enforce an adjudication decision only where:

1. no notice of distribution has been given and the adjudication has finally detained issues between the parties; and/or

2. there exist “exceptional circumstances “

What the Building Safety Act 2022 means, so far...

Last June, the Building Safety Act 2022 (the Act), designed to prevent the occurrence of life threatening building defects, came into force. Amongst other measures, it introduced the Building Safety Regulator, a role to be performed by the Health & Safety Executive. The Act also introduced approval gateways at the planning application stage, before building work starts and before occupation, in order to ensure a rigorous approach to the inspection of Building Regulation requirements, and to ensure that building safety is considered at each stage of the design and construction process.

The Act is also designed to cure the long-standing problem of buildings being handed over with safety defects, including dangerous external wall systems, by expanding occupiers' rights. This is illustrated by the extended limitation period for claims pursued under the Defective Premises Act 1972 (**DPA**), which imposes a duty on developers, contractors and professionals to construct dwellings to a habitable standard.

Before this change parties with an interest in dwellings built to a standard falling below that of a habitable standard typically had to bring claims under the DPA within 6 years of completion of the works. This reflected the standard 6 year limitation period for claims in contract (extending to 12 years if the contract is executed as a deed) and tort. Under the DPA claims can now be brought up to 15 years from the completion of works. In addition, the Act also introduced a retrospective limitation period under the DPA for works completed before the Act came into force of 30 years, meaning that dwellings completed from mid 1992 may now be subject to a claim.

The extension of those rights is significant because under the DPA, anybody with an interest in a dwelling can bring a claim. Such claims can be brought against a party including developers, contractors or professionals

What the Building Safety Act 2022 means, so far...

responsible for a failure to carry out work in a workmanlike or professional manner which results in the dwelling being unfit for habitation. Claims can, therefore, be brought by leaseholders and subsequent purchasers even if they have no contract with the original developer or contractor.

With more claims likely to be pursued under the DPA as a result of the extended time period, questions will likely surface about what a 'dwelling' is – for example, can hotels, student accommodation, nursing homes qualify – and what does (and does not) count as being 'fit for habitation'? Principles established in cases considering these issues to date (eg *Rendlesham Estates Plc v Barr* [2014] EWHC 3968 (TCC)) are likely to evolve as more claims are pursued.

Specific to fire safety, the Act seeks to address who should pay for remediating fire safety related defects – both cladding and non-cladding related. Under the Act, leaseholders cannot be asked to pay to remediate defective cladding . This is a criminal offence, according to Michael Gove. Managing Agents will no doubt be concerned about service charge demands issued before the Act came in, because it is unclear if the provisions will apply retrospectively, which we believe is unlikely given the draconian consequences .

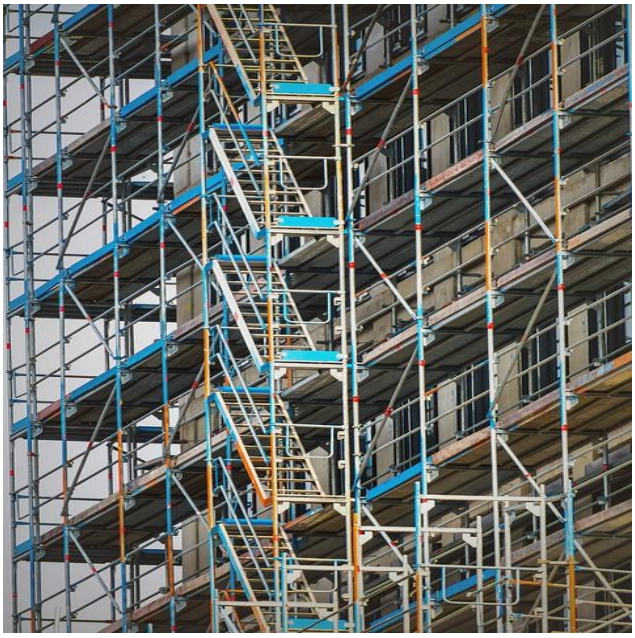
Instead, the Building Owner is expected to pay to remediate defective cladding, with leaseholders applying for funding from the Building Safety Fund (for buildings over 18 metres) and the Building Safety Levy / Medium Rise Scheme, which is currently in consultation and piloted in December 2022 to raise £3 billion (for buildings between 11 and 18 meters).

For non-cladding defects which, according to a guidance note released by the Government covers numerous defects including combustible walkways and balconies, the position is slightly different. The Building Owner should pay for remedial costs if it meets the new 'wealth test' or 'contribution condition'. This is met if the Building Owner and its group companies' total net worth exceeds the number of relevant buildings owned by the Building Owner and its group companies multiplied by £2 million. Where the Building Owner does not meet the wealth test costs can, in theory, be passed down to the leaseholders but are capped at £15k in London and £10k outside of London, and spread over 10 years. To pass down costs, the Building Owner must comply with specific and comprehensive certification requirements. We anticipate that Building Owners' attempts to rely on such certification in order to pass costs to leaseholders are likely to give rise to challenges this year in the First-Tier Tribunal.

The Act also provides for section 38 of the Building Act 1984 to come into force having been on the statute books for almost 40 years. However, to date, the provision has not yet been brought into force.

Under s38 parties will have a statutory right to seek damages to compensate them for damage arising from breaches of duties imposed by Building Regulations. Significantly, the Building Act applies to all buildings so the provision will cover the commercial as well as the residential sectors. Currently parties who suffer damage as a consequence of a breach of the Building Regulations must rely on contractual routes for compensation.

It's worth noting that the impact of the provision may, in practice, be somewhat limited in scope as the key requirement for a claim is damage. Precisely what "damage" means is not at all clear from the provision itself, but it is likely to be restricted to physical damage to persons or property rather than exclusively financial loss. It is unlikely to assist, therefore, where there are breaches of the Building Regulations resulting in defects which have not caused damage. By way of illustration, a lack of adequate provision for disabled persons access may be in breach of the Building Regulations but that of itself would not be sufficient to found a claim under s38. A cause of action would only arise in the event that such failure caused injury to persons or property.



TCC decision concerning cladding defects offers some useful reminders of the law

The proceedings concerned claims brought by an operator of student accommodation, LDC (Portfolio One) Limited (LDC), against a main contractor, George Downing Construction Limited (Downing) as the first defendant, and its specialist cladding subcontractor, European Sheeting Limited (ESL), the second defendant.

Judgment handed down in December 2022 by Ms Buehrlen KC, sitting as a deputy High Court judge. A further judgment was issued by the Technology and Construction Court (TCC) concerning cladding defects.

Background

The project included the external wall construction of three high-rise tower blocks used as university halls of residence.

Following water ingress issues and subsequent investigations by LDC, it was discovered that there were:

1. several defects in the cladding elevations which was allowing water ingress and resulting in deterioration of the structural insulated panels (**SIPs**); and

2. fire barrier and fire stopping issues on all elevations.

The operator (LDC) agreed to drop its claim against the first defendant (Downing) after they reached a settlement which included the payment by Downing to LDC of £17,650,000.00. LDC and Downing then sought to enter judgment against ESL:

1. LDC sought costs of remedial work and loss of income; and

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2. Downing sought an indemnity and/or a contribution by ESL in relation to the settlement, in the sum of £17,650,000.00 and its reasonable costs of defending the claim against LDC. The claim totalled £21,152.198.87.

Buehrlen KC, had several issues to consider.

Aside from the technical issues, there were several which concerned contractual and legal principles. The judge's consideration of the law in respect of these principles is worth summarising as a reminder to parties who regularly enter into construction contracts.

Scope of the specialist sub-contractor's obligations

The scope of ESL obligations under the subcontract had to be considered.

LDC's position was that ESL was obliged to comply with the strict obligation under the main contract that the Works will comply with the Building Regulations.

ESL's position was that it was not obliged to comply with the main contract and that, because the obligation to ensure that that the main contractor, Downing, was not put in breach of the main contract was "*save where the provisions of the subcontract otherwise require*", its obligation under the subcontract to exercise reasonable skill and care superseded any obligation to ensure Downing was not placed in breach. ESL also argued that it was not responsible for the installation of fire barriers and referred to minutes of meeting included in its tender in this regard.

In determining the scope of ESL's obligations, consideration was given to the back-to-back relationship between the main contract and subcontract, and the effect (if any) of the documents included in ESL's tender.

It was decided that the contracts were back-to-back because the commercial intention of the parties was clearly to make the contracts back-to-back. Accordingly, ESL was subject to a strict obligation to comply with the Building Regulations, as provided for in the main contract. In making this decision, Buehrlen KC considered article 1.1 of the subcontract, which stated that ESL was deemed to have notice of the material provisions of the main contract.

It was also held that ESL's obligation to exercise reasonable skill and care did not supersede the obligation to ensure Downing was not in breach of the main contract. In reaching this decision reference was made to the case of *MT Hojgaard AS v E.ON Climate and Renewables UK* [2017] UKSC 59 where Lord Neuberger made the point that, if there are two clauses imposing different standards, the lesser standard must be treated as a minimum requirement.

In respect of ESL's tender documentation, it was decided that the tender was clearly superseded by the subcontract which set out ESL's responsibility for the design and cladding of the rain-screen. The main contract included the relevant paragraphs of the specification and, if that wasn't enough, the specification was included in the subcontract documents.

The minutes of meeting upon which ESL relied were included in the schedule of subcontract documents. The court held that such minutes of meeting which dated back 16 months prior to the subcontract being entered into, should not detract from the detailed requirements of the specification which clearly required the design of the cladding to include the provision of all cavity barriers to meet the requirements of the Building Regulations. The judge also considered emails from ESL which evidenced that ESL understood that cavity barriers were required.

Subcontractors (and contractors) who seek to rely on their tender documentation (even if included in the contract documents) should note the risks of other more recent contract documentation being given more weight.

Remedial scheme

Another issue to be decided by the court was the reasonableness of the remedial scheme carried out by LDC. This issue was determinative of the damages LDC was entitled to recover. A claimant may only recover expenditure that is reasonable. It is important for contractors (and employers) to be aware of these principles when implementing a remedial scheme that they ultimately intend to recover the costs of.

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In determining whether a remedial scheme is reasonable, the court will consider whether, and to what extent, the claimant relied on expert advice in deciding to carry out the remedial works at issue. The judge referred to the case of *Axa Insurance UK Plc v Cunningham Lindsey* [2007] EWHC 3023 (TCC) which summarised the relevant authorities on this topic as follows:

1. advice of an expert that is merely tangential or coincidental to the work (the costs of which are recoverable), the costs of work carried out to that extent upon the expert's advice will generally not be recoverable;

2. there must be some effective causal link between the incurrence of expenditure upon the advice of the expert and the breach of the contract;

3. if two remedial schemes are proposed to rectify a defect which is the result of the defendant's default, and one scheme is put in hand on expert advice, the defendant is liable for the costs of that built scheme, unless it could be said that the expert advice was negligent[1]; and

4. although reliance on an expert will always be a highly significant factor in any assessment of loss and damage, it will not on its own be enough in every case to prove that the claimant has acted reasonably.

It is also accepted that a claimant cannot recover for losses which it has failed to avoid because of its own unreasonable acts or omissions.

A claimant is subject to a duty to mitigate his loss, although the court will not be too critical of his choices if made as a matter of urgency or on incomplete information. This duty was considered in the case of *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC) where HHJ Stephen Davis held that, "*…if a claimant has to make a choice as a matter of urgency or on incomplete information then it is not surprising that the court will not be too critical of a decision to choose Option A which in hindsight turns out to be more expensive than option B. In contract, if the claimant chooses, for his own personal interests, option A rather than option B, knowing that option B was a reasonable alternative, then it is not surprising that the court will only allow him to recover the cost of option B*."

Thus, it is not an answer in itself for a defendant to demonstrate that the defects could have been rectified through an alternative scheme for a lower cost. A defendant must demonstrate that the remedial scheme claimed for was unreasonable.

Finally, in relation to alleged betterment, where works of repair or reinstatement result in the claimant having a better or newer building than it would have had but for the wrong for which damages are claimed, a deduction from the damages awarded will not usually be made for betterment if the claimant has no reasonable choice. This includes betterment resulting from compliance with legislation introduced since the original works were carried out which requires additional or enhanced standards to be met.

Having considered and summarised the position in law, Buehrlen KC turned to the facts.

Temporary remedial works

LDC claimed the cost of temporary remedial works following advice received from Thomason Partnership Limited (TPL). TPL recommended that urgent works be carried out. ESL alleged that LDC failed to mitigate its loss in that there was a delay on the part of LDC in undertaking the remedial works (2012 to 2018) and the nature of the remedial works was unreasonable because they involved the insertion of coach belts into the composite cladding making it impossible for the SIPs to be reused in any subsequent remedial scheme.

It was held that it was evident from the available documentation that LDC did take steps to investigate and address the water ingress and that ESL carried out remedial works at various times and claimed that the issues had been resolved. By late 2016, LDC was not obtaining the level of co-operation required to progress matters and they therefore turned to external consultants. It was accepted that the failure on the part of ESL was a significant cause of the deterioration since they were given ample opportunity to address the issues but failed to do so. There was a period between May 2017 and June 2018 where LDC could have done more to progress but ESL failed to demonstrate that this delay impacted the scope of the required remedial works. It followed that any delay on the part of LDC was not causative of the scope of the required remedial works.

[1] Albeit that to put in issue the reasonableness of a decision based on expert advice does not require the conduct on the part of the expert amounting to professional negligence

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As regards the reasonableness of the remedial scheme, it was decided that no alternative scheme had been proposed by ESL and there was therefore no basis on which to conclude that the scheme was unreasonable. Further, the architectural experts engaged on this issue determined that alternative methods would have been possible but that in view of the urgency (risk of composite panel falling), the temporary works were reasonable.

Permanent remedial works

ESL took issue with LDC's remedial scheme for the permanent works. It averred that the composite cladding was replaced to comply with post-Grenfell enhanced Building Regulations and/or because of damage due to the temporary remedial works rather than because of any defects in the original design or construction. It put LDC to the proof that the substitution of the SIPs with an SFS system was required and/or reasonably necessary and did not constitute betterment. It denied it was reasonably necessary to replace the glazed panel elevations.

Buehrlen KC considered that there was no evidence to support ESL's allegation that the replacement of the composite cladding was unreasonable or not required as a result of the defects in the original design and installation. Neither of the architectural experts criticised LDC for replacing the composite cladding panels. Further, it followed that if the composite cladding had to be replaced by reason of any damage done because of the temporary remedial works then it was reasonable to undertake the replacement as part of the permanent remedial works.

The SIPs could not be replaced like for like because they did not comply with the revised Building Regulations. Any upgrade to comply with revised Building Regulations is not betterment. ESL's expert suggested that the SIPs could have been encapsulated and reinstated. The evidence shows that LDC considered that approach but decided not to adopt it based on its experts' advice. There was nothing to suggest that LDC did not act reasonably in following that advice.

No evidence was presented by ESL to support its case that it was unreasonable for LDC to replace the glazed panel elevations.

ESL's case to the effect that the Permanent Remedial Works were not reasonable was therefore not proved and it was decided that LDC had acted reasonably in implementing the Permanent Remedial Scheme.

Contribution claim

Having agreed to pay LDC £17,650,000.00 in full and final settlement, Downing brought a contribution claim against ESL seeking to pass down the entirety of its liability to LDC.

Downing was entitled to an indemnity from ESL in respect of Downing's liability to LDC arising out of ESL's breaches of the terms of the subcontract and non-observance of the main contract as applied pursuant to the subcontract.

The defects resulted from breaches of the subcontract which, in turn, put Downing in breach of its obligations under the main contract and those same breaches resulted in breaches of the Downing and ESL collateral warranties. Given that a claim for damages by LDC against Downing was based on breaches, on the part of ESL, of the subcontract, it was within the parties' reasonable contemplation and thus it was reasonably foreseeable that Downing might settle a claim brought against it by LDC.

This was also not a case where any issues of apportionment arose as Downing passed on all its design and construction obligations in respect of the cladding under the main contract to ESL under the subcontract.

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As was stated in *Fluor v Shanghai Zhenhua Heavy Industry Co Ltd* [2018] EWHC 1 (TCC), it is settled law that in principle, C can recover from a contract breaker (B) sums that it has paid to A in settlement of a claim made by A against C in respect of loss caused by B's breach of its contract with C, as long as the settlement is objectively reasonable. Therefore the only two issues to consider were whether the settlement sum was reasonable and whether the claim was for the same damage as that for which LDC sued Downing.

It was evident that Downing was right to settle LDC's claim and that it did so for a reasonable amount.

Regarding the amount of the settlement, Buehrlen KC summarised the principles set out in *Siemens Building Technologies FE Limited v Supershield* Ltd [2009] EWHC 927 (TCC) as – the test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlement which reasonable people in the position of the settling party might have made. Such circumstances include the strength of the claim, whether the settlement was the result of legal advice, the uncertainties and expenses of litigation and the benefits of settling a case rather than disputing it. The question of whether a settlement is reasonable is to be assessed at the date of the settlement when necessarily the issues between A and B remain unresolved.

Whilst Downing settled LDC's claim with no admission as to liability, the evidence as to the existence of the alleged defects and breaches relied upon by LDC against ESL was substantially the same evidence as LDC would have relied on at trial. The strength of LDC's position against Downing at the time the settlement was entered into could be seen from Downing's expert evidence.

Given that the quantum experts agreed a value of £16,457,826.00 as being the cost of the remedial works, the settlement sum (which included interest and contribution towards LDC's costs) was clearly reasonable. To that falls to be added the fact that the settlement saved Downing the costs of trial and the possibility that the claim may have increased as a result of further issues.

In addition, as Downing was entitled to a full indemnity from ESL in respect of the settlement sum, they were entitled to recover from ESL their reasonable costs of defending the claim brought against them by LDC. If the settlement sum is reasonable, the damages will be the amount of the settlement and the costs reasonably incurred.

ESL's claim for a contribution and/or indemnity from Downing was struck out.

A warning to employers who fail to re-tender as agreed

In Mallino Developments LTD v Essex Demolition Contractors LTD [2002] EWHC 1418 (TCC) a contractor was entitled to damages relating to loss of profit and overheads, following an employer's failure to honour its contractual obligation to re-tender a section of the works.

Background

On 24 April 2018, Essex Demolition Contractors Ltd (**EDC**) was appointed by Mallino Developments Ltd (**Mallino**) to carry out extension works at Bodmin Jail under an amended JCT Standard Building Contract Without Quantities, 2016 Edition. The works were split into three sections: demolition, excavation and remaining works.

At the same time the parties also entered into a variation agreement, under which Mallino agreed to re-tender section 3 of the works (the remaining works) following which it would either appoint EDC to carry out section 3, appoint a new contractor to carry out section 3 (and novate EDC's existing contract to the new contractor), or terminate EDC's engagement altogether. In the event of termination, Mallino would be required to pay all sums due to EDC to date, including EDC's demobilisation costs (but not any loss of profit or overheads).

Three months later, Mallino engaged a new contractor to carry out section 3, having failed to invite EDC to re-tender and without conducting any competitive tendering process at all.

The parties ended up in dispute and, following two adjudications, in which Mallino denied that it had breached its obligations to EDC to re-tender, the Adjudicator found in EDC's favour and awarded EDC a proportion of its claimed losses.

Mallino failed to pay, EDC commenced proceedings to enforce the adjudicator's decision and Mallino issued proceedings in the TCC challenging enforcement. Mallino did not dispute that it had breached the variation agreement and in so doing denied EDC the right to submit a bid for section 3. Instead, Mallino put forward a 'minimum contractual obligation' argument, stating that as it had alternative ways of performing the variation agreement, it was entitled to opt for the way which was least burdensome to it and the least profitable to EDC.

A warning to employers who fail to re-tender as agreed

Mallino essentially argue that, when assessing the damages due to EDC for the breach, the Court could assume that Mallino would have acted in a manner which was least burdensome to itself. Furthermore, had it re-tendered section 3, it would have been entitled to terminate EDC's engagement without paying to EDC any contribution for loss of profit or overheads; and, even if it had competitively tendered section 3, it would not have selected EDC as the successful bidder, in any event.

Decision

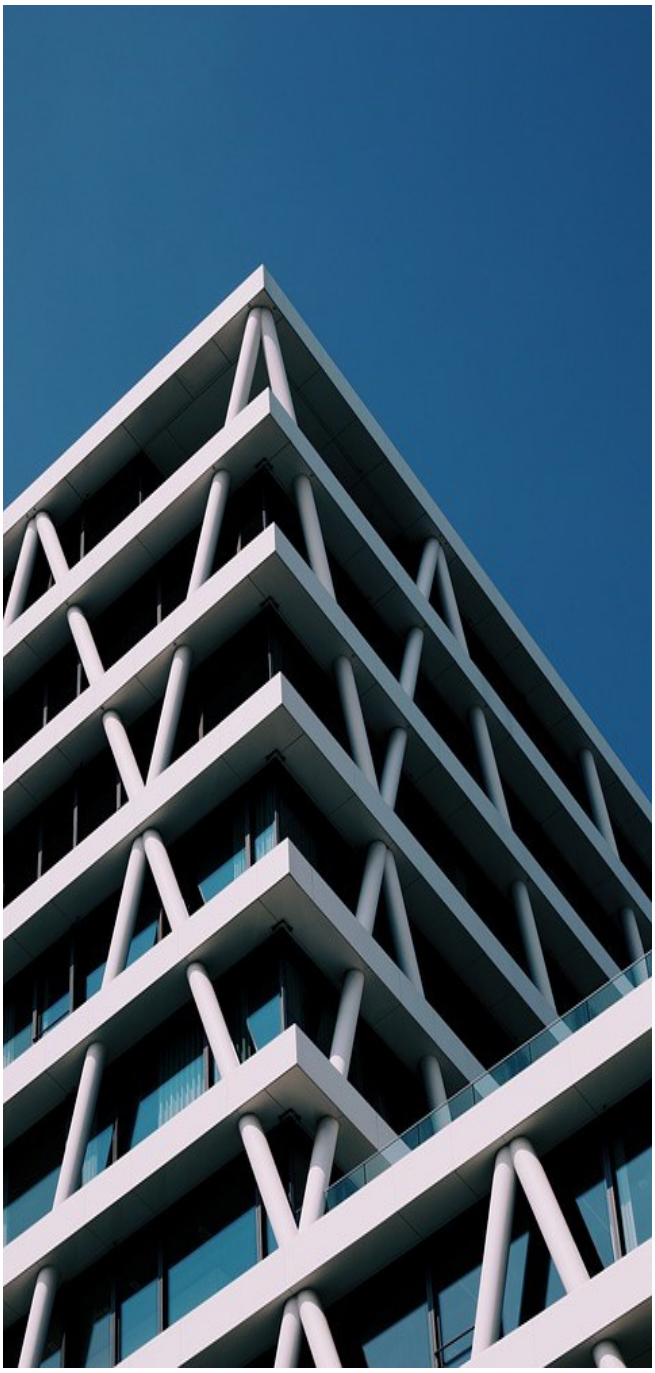
The judge found that the variation agreement imposed a mandatory obligation on Mallino to re-tender section 3 and that EDC was entitled to be invited to tender for those works. Therefore, the minimum contractual obligation principal did not assist Mallino.

On considering whether EDC would have tendered for section 3, the TCC judge held that EDC would not only have submitted a tender but, would have used its original tender for the works, so it's bid would have been considerably cheaper than the price being paid to the third party contractor to whom Mallino awarded the section 3 works in breach if the variation agreement in place with EDC.

Accordingly, there was a real or substantial chance that EDC would have won the competitive tender. Also, as EDC was familiar with the project, because it was already on site, it would have had an advantage over any rival bid. The judge concluded that there was a 66% chance of EDC being awarded the section 3 works and therefore, EDC was entitled to 66% of the damages as assessed, totalling £212,118. The judge added that, for Mallino not to have appointed EDC given EDC's competitive advantage on the project, would have amounted to Mallino 'cutting off its nose to spite its face'.

Commentary

This case illustrates the danger of failing to consider all the risks of departing from a contractual obligation as well as the importance of employers considering carefully their obligations when agreeing to re-tender. In particular, whether their obligation is flexible enough to allow them to choose alternative approaches if required.



Will the courts interfere with the intentions of contracting parties?

In a Judgment handed down by the Technology and Construction Court (TCC) in Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC), the English court has again reiterated its reluctance to interfere with parties' intentions by refusing to hold that provisions in a contract were void for uncertainty.

Background

The Contractor (Buckingham Group Contracting Ltd) '**Buckingham**' was engaged to design and construct the production building at a new plant for the manufacture of corrugated cardboard. The works were significantly delayed and the Employer (Peel L&P Investments and Property Ltd) '**Peel**' sought to deduct liquidated damages, of £1,928,253.77, which were capped at this amount pursuant to a clause 2.29A.1.2 of the contract.

The contract was JCT Design and Build 2016 edition, and was subject to a schedule of amendments. There were also a number of annexes, including a schedule entitled "*Schedule 10 - Liquidated Damages Schedule*".

The contractual provision being relied on by Peel was clause 2.29A.1.2 which was a bespoke clause concerning liquidated damages for a failure to achieve "*Milestone Dates".*

Importantly, Schedule 10 provided that:

"If there is any conflict or inconsistency between the wording of this schedule and clause 2.29 the wording of this schedule shall take precedence."

Buckingham sought declarations that the liquidated damages provisions were void and unenforceable. Buckingham did not argue unenforceability on the basis that the provisions were a penalty (as is more commonly the case) but because the bespoke amendments were so poorly drafted and/or incomplete that they were void for uncertainty and/or unenforceable.

Will the courts interfere with the intentions of contracting parties?

Buckingham's position was based on a number of alleged errors and conflicts, including that:

1. the Completion Date in Schedule 10 conflicted with the date in the contract particulars;
2. Schedule 10 contained two different rates of liquidated damages and was in multiple places referred to as a liquidated damages "proposal";
3. there was a further conflict between the contract sum of £26,164,049.28 stated in the contract particulars and the contract sum analysis in Schedule 10 which was stated to be £25,710,050.28; and
4. that Schedule 10 provided no adequate mechanism regarding partial possession and the impact on liquidated damages.

Decision

None of the arguments advanced by Buckingham succeeded and the provisions were held to be certain and enforceable. The court found a way through the inconsistencies to establish an interpretation which gave clear effect to the parties' intentions.

That said, it was noted that a provision will be void if the court cannot conclude as to what was in the parties' minds or where it is not safe to prefer one meaning above others.

One further point considered in the Judgment was whether the liquidated damages cap of £1,928,253.77 also operated as a general damages cap. The court held that the language was not broad enough to encompass any alternative liability.

This case is another reminder to draft clear liquidated damages provisions to avoid any potential pitfalls or ambiguity.

Collateral warranties: are they a construction contract?

The Supreme Court has granted permission to appeal the decision of the Court of Appeal made in June last year in the case of Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2022] EWCA Civ 823.

The Court of appeal held that a collateral warranty was a "construction contract" under section 104, Part II of the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act") and that, accordingly, there is was a statutory right to adjudication in a dispute between the parties to a collateral warranty.

The appeal of the decision of the Court of Appeal will examine the scope of the Construction Act and, in particular, whether a collateral warranty falls within it – essentially, whether a collateral warranty is a "construction contract" as defined in section 104 of the Construction Act.

Section 104 defines a "construction contract" as an agreement with a person for —

a) the carrying out of construction operations;

b) arranging for the carrying out of construction operations by others, whether under a sub-contract or otherwise; or

c) providing his own labour, or the labour of others, for the carrying out of construction operations.

Section 104 also makes it clear that a "construction contract" includes an agreement to do things such as architecture, design, surveying, providing advice on building, engineering, interior or exterior decoration, and even the laying-out of the landscape, in relation to construction operations. In other words, the definition catches not merely building contracts, but also documents ancillary to building contracts, such as collateral warranties.

Collateral warranties: are they a construction contract?

Background

The contractor (Simply Construct (UK) LLP) was obliged to provide a collateral warranty to a Tenant (Abbey Healthcare (Mill Hill) Limited) under the terms of an amended JCT design and build contract. However, the Contractor so delayed in providing the warranty that it did not in fact do so until approximately 4 years after the works were certified as practically complete.

Defects were discovered some years after practical completion and the Tenant, by then in receipt of the warranty from the contractor, commenced adjudication proceedings under it. In the adjudication, the contractor argued that, as the warranty was not a "construction contract" that there was no statutory right to adjudication of the dispute. However, the adjudicator rejected that argument and awarded the Tenant damages.

When the contractor refused to pay the award the Tenant commenced enforcement proceedings in the Technology and Construction Court (TCC).

The TCC held that the collateral warranty was not a "construction contract" as there were no future works to be carried out at the time it was signed. Furthermore, as the warranty merely warranted the contractor's past performance of works already carried out at the time it was given, it was merely a warranty of a static state of affairs akin to a manufacturer's product warranty. What it was not was an agreement for the future carrying out of, or the ongoing carrying out of, "construction operations" within the meaning of the Construction Act. The TCC judge concluded further that the timing of when that warranty was provided to the Tenant was so critical in this case, that it was the "determinative factor".

The Tenant appealed to the Court of Appeal (CA).

The CA considered three questions:

1. can a collateral warranty ever be a "construction contract" within the meaning of the Construction Act?;
2. if a collateral warranty can be a construction contract, was the warranty to the Tenant of the care home in this case a "construction contract"?; and
3. did the date of execution of the collateral warranty to the Tenant make any difference?

By a majority decision, the CA found for the Tenant. It reversed the decision of the TCC and held that a collateral warranty can, in certain circumstances, be a construction contract.

Decision

The CA's decision can be summarised as follows:

1. the term "construction contract" is capable of including subsidiary agreements, such as collateral warranties as it includes an agreement which "relates to" construction operations (*section 104 (5)*);
2. a construction contract did not have to include detailed payment provisions and a nominal payment provision in a collateral warranty would comply with section 109 of the Construction Act;
3. the TCC judge was wrong to find that the timing of the execution of the Collateral Warranty was the "determinative factor" as the date on which the warranty was executed was "ultimately irrelevant". The reason for this was that the contractor had made “a promise" to the beneficiary not just about the standard of past work, but also about the future carrying out of work under the building contract to the same standard. So, even if given after practical completion of the works (and even if it is given several years after) provided the collateral warranty has future effect - in this case it contained the words "has performed and will continue to perform diligently its obligations under the contract", it will be caught by s.104; and
4. the warranty was not limited to the standard to be achieved or to a past or fixed situation, which differentiated it from a product guarantee.

Commentary

The decision not only confirms a statutory right to adjudication for parties in dispute under a collateral warranty but also makes it clear that, to preserve the right to Adjudication, a warrantor must promise to do something going forwards pertaining to the works. It follows that if the warrantor only warrants a past state of affairs, adjudication will have to be provided for separately. We can only await the Supreme Court’s decision later this year.

Adjudicator’s primary decision unenforceable but the TCC enforces his alternative findings

A contractor (Sudlows), brought a claim in the Technology and Construction Court (TCC) against its employer (Global Switch Estates 1) (Global), to enforce the decision of an adjudicator, Mr Molloy. The Adjudicator’s decision was that Global should pay Sudlows £996,898.24 (plus VAT).

Global brought proceedings against Sudlows seeking:

1. a declaration that Mr Molloy had breached natural justice for taking a too narrow view of his own jurisdiction when he held that he was bound by certain findings made by another adjudicator (Mr Curtis) in a previous adjudication between the parties; and

2. enforcement of Mr Molloy's alternative findings which he said were to apply if he was wrong to hold that he was bound by Mr Curtis' decision. The alternative findings were to the opposite effect in that Sudlows would have to pay Global £209,053.01 (plus VAT).

Background

Sudlows was contracted by Global under an amended JCT Design and Build, 2011 edition, for the design and construction of a new private electricity substation. The works included getting new high-voltage cables from Global's premises to the Site and the creation of ductwork under the access road leading to the Site. When Sudlows started installing the cables, it determined that they were damaged. Global appointed another contractor to provide and pull through replacement cables, however, Sudlows refused to connect and energise the cables. This resulted in a delay to the works.

In January 2021, Sudlows applied for an adjudication to determine whether it was entitled to an extension of time for the period up to 18 January 2021. The adjudicator concluded that Global was responsible for the defective duct network, that Sudlows was correct in refusing to connect and energise the cables, and that Global was liable for any resultant delays to the completion date.

Adjudicator’s primary decision unenforceable but the TCC enforces his alternative findings

In the adjudication Sudlows sought additional extensions of time, relying on the same relevant events under the contract that it had relied on in a previous adjudication before Mr Curtis. Sudlows contended that the natural consequence of Mr Molloy's decision was the grant of a further 133 days, as nothing material had changed after 18 January 2021. Global, on the other hand, argued that it was entitled to challenge this and put further evidence forward in respect of the relevant events relied upon by Sudlows, in order to seek to resist any further extension of time before Mr Molloy.

Mr Molloy concluded that he was bound by the decision of the previous adjudicator, Mr Curtis, because the issue of whether Sudlows was correct to refuse to connect and energise the cables formed part of that earlier dispute.

Mr Molloy also considered Sudlow's claim, in the event that this conclusion was wrong, and provided an alternative decision in respect thereof.

The issues for consideration were:

1. was Mr Molloy bound by the decision of Mr Curtis in that a further extension of time would flow if the Relevant Events continued to apply?; and
2. if Mr Molloy was not bound by Mr Curtis' decision then could Global rely on the detailed alternative findings Mr Molly produced?

The arguments in the TCC

Justice Waksman sitting in the TCC determined that the fact that, in both adjudications, the existence or otherwise of the same relevant events was an issue is insufficient to mean that, in both adjudications, the dispute was the same or substantially so because:

1. they relate to underlying extensions of time for different periods of time;
2. the dispute in relation to the new extension of time sought involved new relevant materials and the event of testing which were not and could not have been part of the dispute leading to the prior adjudication; and
3. the particular issue formed only one part of a much wider dispute between the parties as to the true value of the contract works on the basis that practical completion had now taken place.

Justice Waksman held that Mr Molloy's reasoning was clearly wrong because:

1. the cases make it clear that the jurisdictional question involves an analysis of what both disputes are about and whether they are the same or substantially so. Mr Molloy did not apply that test at all;
2. Mr Molloy failed to give any real weight to the fact that Mr Curtis' decision was in respect of an extension of time for a prior period; and
3. he made no reference to the new material adduced before him and which he considered to be significant. This was more than argument, it was new evidence.

Justice Waksman concluded that there was a breach of natural justice and Mr Molloy's decision cannot be enforced.

The alternative findings

On the question of whether Mr Molloy's alternative findings could be enforced, both parties agreed that Mr Molloy should make alternative findings and argument was covered by the parties in their extensive submissions.

Adjudicator’s primary decision unenforceable but the TCC enforces his alternative findings

Sudlows' argument was that any enforcement of the alternative findings would require the decision to be severed but that was not possible here. Its main argument was that the alternative findings formed no part of the actual decision and were not referred to in the formal part at the end of the decision.

Justice Waksman held that the alternative findings were ones which were just as detailed as the primary findings. Moreover, there was no point in Mr Molloy making them or in the parties agreeing that he should make them if they were not to be regarded as binding if the primary findings fell away.

Sudlows submitted that it had reserved its position on Mr Molloy's jurisdiction. Justice Waksman accepted that in agreeing that Mr Molloy should make alternative findings, Sudlows was not conceding its principle point (which was that he was bound by Mr Curtis' decision) but that does not mean that Sudlows was also contending that, if Mr Molloy was wrong, and in fact he was not bound, he had no jurisdiction to make the alternative findings.

Sudlows also made the point that even if the alternative findings constitute a separate decision, the court should be cautious because it would otherwise be affording that separate decision binding status whereas it was only *obiter*. Justice Waksman held that it did not think that adjudication is or should be analysed in terms of the precedent that it is not ultimately binding. But in any event, because of the way in which the alternative findings were made here, there is no reason for this caution.

The Decision

Justice Waksman concluded that Mr Molloy had jurisdiction to formulate his award on an alternative basis even though it was not referred to in the final decision section. It would be most unfortunate if, having utilised the time spent in adjudication, it was then to be of entirely no use for enforcement purposes.

Shortages: Labour and materials in the Construction Sector

The construction industry has negotiated some complex challenges as it strives to generate a rebound in demand for construction works and services. One of the main obstacles to its recovery is the shortage of labour, and recent studies, such as the Civil Engineering Contractor's Association survey published in Construction News (November 2022), show that up to 75% of construction firms are having trouble hiring workers. The causes of this issue can be linked to a combination of factors, including the impact of both Covid-19 and Brexit on the sector, particularly the implementation by the UK government of stricter rules aimed at restricting the numbers of migrant workers that are eligible to join the UK workforce.

Labour

Perhaps the most notable effect of Brexit on the UK construction sector has been the substantial reduction in the pool of skilled and unskilled labour from the European Economic Area (EEA)available in the UK market. Many workers returned to EU nations after Brexit.

Coupled with that, would-be employers of workers from the EEA, now that Brexit has taken place, must negotiate the so-called 'skilled worker visa route' if they want to offer employment to workers from that region. The 'skilled worker visa route' provides workers, such as builders, glaziers, bricklayers, tilers and plumbers with a route to working in the UK through sponsorship. However, substantially increased fees are now due from would-be employers who want to hire eligible workers from the EEA (it can now cost up to £10,000 to employ a single worker). In addition, the proposed worker must prove that they meet minimum requirements, such as in relation to their qualifications and their language.

The numbers of workers entering the UK construction sector via this route, however, remains insufficient to meaningfully address the sector's demands for labour.

Shortages: Labour and materials in the Construction Sector

Nonetheless, there is optimism that additional measures are being taken such that this labour shortage might be reversed and the gap caused by the exodus of EU construction workers from the UK can be plugged.

A key initiative is to open up access-ways into the sector with the ultimate aim of engaging more young people from the UK into construction. Various schemes have been put in place to try to attract young UK workers. One example, is the provision by the UK government of additional funding to pay for the cost of assessing and training apprentices. Another, is The Department for Business, Energy and Industrial Strategy's funding for 8,900 subsidised or free training courses. These course are specifically in heat pump and energy efficiency installation sectors and the initiative is designed to help equip trainees in order that they can take advantage of the growth and jobs potential created by the push for clean heating and to reduce bills by improving energy efficiency in buildings. £9.2m has been set aside in order implement this particular initiative.

Materials

A volatile product and materials market has compounded labour supply issues, adding yet more cost to projects in 2022. Whilst Brexit and the pandemic introduced importation and availability difficulties in previous years, the war in Ukraine has more recently sent gas and electricity and, therefore, materials, prices rocketing in 2022.

The good news for the sector is perhaps that product and materials availability issues which existed prior to 2022 recovered to pre-pandemic levels at the end of 2022 (although the silicon chip shortage, in particular, remains prevalent). The bad news for the sector, however, is that material prices remained a worry in the same period.

Notwithstanding the difficulties 2022 bestowed on the construction industry on the one hand, on the other, last year unwittingly caused positive change, seemingly driven by contractors' financial/forecasting concerns that:

1. a price increase might adversely affect their margins; and
2. a product/materials delay might sound in damages, each affecting its bottom line.

The pre-contractual phase/process appears to have become more collaborative and risk has been addressed more fervently at the outset of a project. In particular, we have seen:

1. risk provisions (such as 'Relevant Events', 'Relevant Matters', 'Compensation Events' and fluctuation provisions) being more heavily negotiated at the outset;
2. letters of intent (and analogous documents) being adopted more frequently to reduce long product/ material lead in times; and
3. more honest pricing from contractors, who can no longer risk "buying contracts" by under-pricing them, in order to secure work (a practice which, owing to subsequent cost increases, has contributed to construction insolvencies in recent years).

As we head into 2023, we expect to see product/ materials availability continuing to improve and the price of less energy intensive materials (such as timber), continuing to decrease. Energy intensive materials (such as aggregate, bricks, cement, plasterboard and insulation materials) may, however, sustain inflation-busting prices, until the world negates its historic over-reliance on Russian gas, and the cost of living crisis subsides.

ESG and The Chancery Lane Project

The emphasis on climate change and on environmental, societal, and governance (ESG) issues will quite rightly gather pace through 2023. Recent studies indicate that, globally, the built environment generates 30% to 40% of total greenhouse gas emissions and the construction sector uses 32% of the world's natural resources (Chartered Institute of Building (CIOB)). According to the CIOB, approximately half of these emissions is from energy used in buildings and infrastructure that has nothing to do with the building's functional operation.

The Environment Act, which received royal assent in November 2021 and 'The Construction Playbook[1] both recognise the industry's role in achieving the UK's target of net zero greenhouse gas emissions by 2050.

This will impact our clients over the next 10-15 years and, accordingly, we are already seeing steps being taken by the sector to improve air quality, reduce pollution and waste, increase biodiversity and boost resource efficiency.

We anticipate that within construction projects this environmental focus will revolve around future-proofing designs against climate change, appropriate material selection and the use of modern methods of construction that are less carbon-intensive and more environmentally efficient to achieve sustainability.

Various standard form contracts have started introducing clauses to incentivise and demonstrate carbon reduction initiatives on future builds. For instance:

1. the NEC added an optional X29 clause to its NEC4 contract suite which aims to make construction more sustainable through positive and negative incentives;

[1]Government Guidance on sourcing and contracting public works projects and programmes

ESG and The Chancery Lane Project

2. the JCT Design and Build Contract 2016 contains a supplemental provision under which the contractor can suggest 'economically viable amendments' to the works, which 'may result in an improvement in environmental performance', either during the carrying out of the works or the completed project (supplemental provision 8.11); and

3. the FIDIC Yellow, Red and Silver Books all include clauses which oblige the contractor to take steps to protect the environment during the work. For example, by complying with any environmental impact statement and by ensuring that emissions do not exceed those set out in the specification or prescribed by law (clause 4.18).

Funders, employers and suppliers alike are looking at ESG and the environmental impact of projects: entities unable to demonstrate an appropriate and viable ESG strategy may be putting their businesses at risk.

"Change the precedent, change the world!" ('The Chancery Lane Project')

'The Chancery Lane Project' (**TCLP**) is a non-profit collaborative initiative of international legal and industry professionals that is creating new, practical contractual clauses ready to incorporate into precedents and commercial agreement to deliver climate solutions.

As a firm, Fieldfisher has its own ESG targets but we are also acutely aware of our clients' ESG needs. Accordingly, Fieldfisher is a part of TCLP Working Group, which is a collective of dedicated legal professionals who are responsible for upskilling themselves in climate-conscious legal drafting, and implementing TCLP clauses and principles in real-life contracts in a bid to reduce our carbon footprint and that of our clients, and to develop new commercial opportunities in the process.

In light of the increasingly desperate climate crisis, 2022 saw a global uptake of climate contracting as businesses recognise the urgent need to take climate action. TCLP responds to this by providing an independent forum for professionals to discuss and provide climate conscious drafting in line with companies net-zero targets and assist employers seek to become net zero (or more carbon neutral) and contractors/suppliers to become more competitive.

TCLP's clause timeline demonstrates how a selection of its key clauses align with typical contract cycles. The timeline clauses include:

- pre-contract work (business set up, diligence, invitation to tender, pre-contract terms and financing)
- procurement and supply chains- for instance
- performance,
- breach and dispute resolution, and
- termination.

St James's Oncology SPC LTD v (1) Lendlease Construction (Europe) Limited (2) Lendlease Holdings (Europe) Limited

This case, which was heard in Technology and Construction Court (TCC) concerned alleged defects in a hospital which had been designed and constructed under a PFI scheme. The alleged defects related mainly to the fire safety of one of the plant rooms and the electrical systems which served it.

The Parties

The Project Co in the PFI scheme, St James' Oncology SPC LTD ("St James") was appointed by Leeds Teaching Hospital NHS Trust to finance, design and construct the Oncology Centre in Leeds.

ST James appointed the contractor, Lendlease Construction (Europe) Limited ("Lendlease") under a design and build contract to design and build the Oncology Centre, and

Lendlease's parent company, Lendlease Holdings (Europe) Limited, gave a guarantee to St James, in respect of Lendlease's work.

The Dispute

St James claimed that there were numerous, serious, fire safety and electrical engineering defects within Plant Room 2 which meant that a single fire or fault could take out both the primary and secondary power supplies to all medical equipment and facilities in the Oncology Centre. Following an investigation and expert consultation, St James proposed a 2 phase remedial scheme:

1. **Phase 1:** mitigating the fire risk caused by the defects which would include providing a secondary power supply in the event of a fire; and

2. **Phase 2**: implementing a permanent remedial scheme which included a permanent separation of the substation from the remainder of Plant Room 2 as well as fire dampers, a fire extinguisher system and installation of primary and secondary caballing.

St James issued a claim for breach of contract and claimed circa £6m by way of damages.

St James's Oncology SPC LTD v (1) Lendlease Construction (Europe) Limited (2) Lendlease Holdings (Europe) Limited

Lendlease denied liability on the following grounds:

1. The Design of Plant Room 2 was approved by all parties

Lendlease claimed that because the revised fire strategy had been signed off by St James and a statement of compliance had been provided, it cannot be held responsible for the defects (St James deem the fire risk associated with the design acceptable).

The court rejected this argument on the basis that neither of these points show that the fire strategy was justified or was in accordance with the contract. St James was not a fire engineer nor qualified in any way to confirm the adequacy of the design of Plant Room 2. In any event, the evidence suggested that St James was under the impression that the revised fire strategy had already been implemented and was compliant.

2. St James had no intention to actually carry out the remedial works

As St James had only implemented the Phase 1 Works at the time of its claim, Lendlease argued that, because no substantive remedial works had been carried out to date (Plant Room 2 had been operational for circa 14 years by that time) the Oncology Centre could be defective..

In rejecting Leadlease's argument, the Court held that St James was entitled to wait until liability is decided before incurring the cost of the remedial works. However, there must be an intention to actually carry out the remedial Works; and where there is a significant risk to health/life, as is the case with fire safety defects, it may be deemed unreasonable to wait.

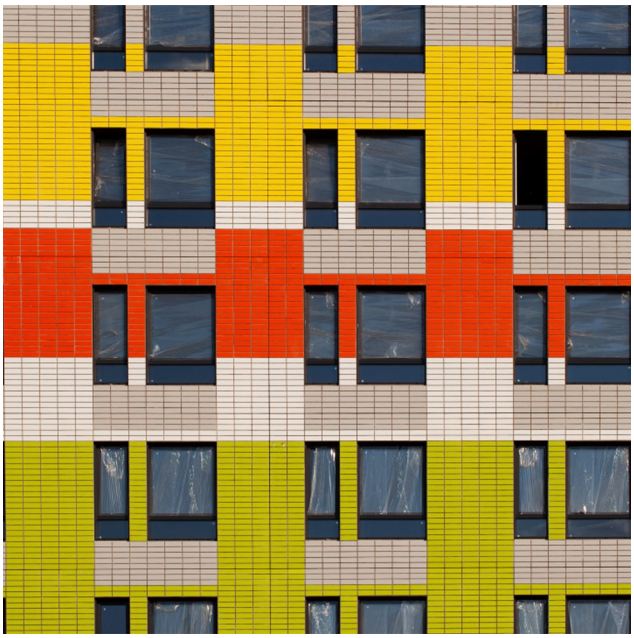
In this case, St James completed the Phase 1 Works but waited until liability was decided before instructing the Phase 2 Works. St James was entitled to take account of the commercial impact of undertaking these works without the knowledge of who is ultimately responsible for the cost.

Interestingly, when considering the timing of the remedial works in the context of damages, the Court confirmed that the measure of damages will be taken at the time they are carried out (or at the time of judgment) not when the breach occurred/was discovered. An example of this is the case of:

Dodd Properties v Canterbury CC [1980] 1 WLR 433; where the claimant waited 8 years before implementing a remedial scheme. In this case the Court confirmed the measure of damages was taken when implemented (i.e. 8 years after the breach).

3. A more limited remedial scheme was appropriate

Lendlease claimed that retrofitting a water mist system would have remedied the defects and was a more appropriate remedial step to take. St James' proposal was therefore unreasonable.



The Court ultimately rejected this argument on the basis that Lendlease provided no credible evidence to support this contention and, based on the evidence, was wholly inadequate. The court confirmed that in determining whether or not a remedial scheme is reasonable (and therefore recoverable) the court will consider whether and to what extent the claimant relied upon expert evidence.

Whilst this approach does not excuse St James (or any other party from its overarching obligation to act reasonably. The court will usually be minded to deem a remedial scheme reasonable if it is supported/provided by an independent expert. In those circumstances, it is for Lendlease (or any other defendant) to prove that remedial scheme is unreasonable, which in this case it did not.

St James's Oncology SPC LTD v (1) Lendlease Construction (Europe) Limited (2) Lendlease Holdings (Europe) Limited

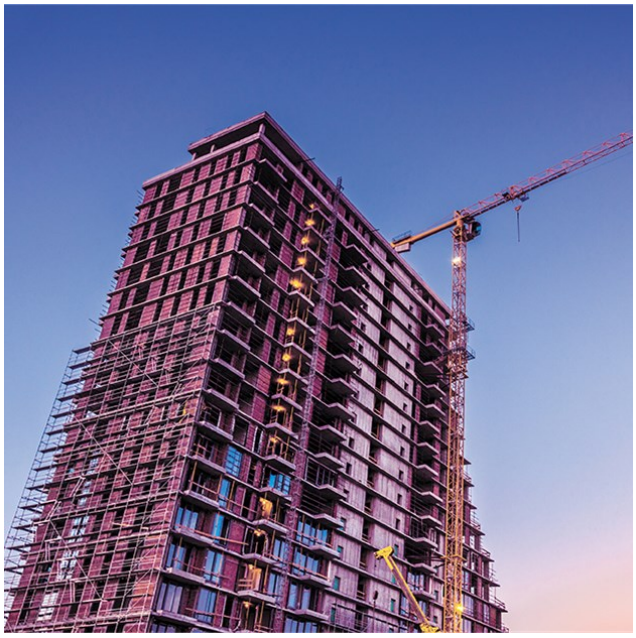
The Court ultimately awarded St James circa £5m in damages.

Comment

The court reinforced the position that the cost of making good defects is the correct measure of damages. Where the works are complete, this is a relatively simply calculation. However, where the Works are ongoing, it can be slightly more complex but broadly equates to the additional cost above what it would have had to pay under the Contract.

In addition, there is no obligation on a claimant to rush to implement remedial works (providing it is not unreasonable to do so). There is often a common misconception that remedial works must be carried out before claiming. Having said this, having completed the works beforehand gives an actual loss as opposed to an anticipated loss which may be easier for a court to justify awarding. Each case turns on its own facts but proper consideration of the defects and any relevant commercial considerations are all relevant factors to consider before commencing works and/or a claim.

Where appropriate, a claimant should seek to rely on expert evidence. This point should not be understated and while this can be a costly exercise, it an essential cost to factor into any litigation.



Key things to look out for in 2023

Changes to standard forms

The NEC has recently published amendments to the NEC4 suite. Our team will be blogging on the changes made in the forthcoming weeks which include the adoption of secondary Option X29 (climate change) for all main contracts together with clarification of the Client's rights to use a Supplier's design, amendments to the adjudication process under Option W2 and amendments intended to provide further flexibility to projects with Early Contractor Involvement (Option X22).

It is also widely anticipated that the JCT will start to publish 2023 Editions of its suite of contracts at some point this year, although the exact timing is uncertain.

Building Safety

Phase two of the public inquiry into the Grenfell tragedy came to a close in November 2022 and we await news on the publication of Sir Martin Moore-Bick's and the inquiry panel's phase two report.

The remaining provisions of the Building Safety Act 2022 are expected to come into force during 2023 including the new gateway regime, the new duty holder obligations and the golden thread of information.

We also expect to see a continuation of so called 'cladding claims' making their way through to judgment including the first decisions seeking building liability orders. It is also worth noting that the Building Safety Act's extended limitation periods included a one year "initial period", which gave parties extra time if they were particularly close to the limitation deadline when the legislation came into force (that period comes to an end on 28 June).

Environment and tackling climate change

The climate change agenda continues to move further up the agenda and we are increasingly seeing drafting in construction contracts aimed at tackling the problem – on the back of the NEC and proposed drafting from the Chancery Lane Project (as discussed in this review), we understand that FIDIC is also looking to introduce drafting to supplement its 2021 Climate Change Charter. It waits to be seen if and how the JCT will embrace the issue.

We also anticipate further legislation in this area including the Carbon Emissions (Buildings) Bill, which, if it becomes law promised to introduce whole-life carbon emissions reporting and a limit on embodied carbon emissions during construction.

The Courts

Work continues to attempt to simplify the Civil Procedure Rules and it may be that we have further updates and developments this year.

We also anticipate a number of key decisions from the TCC and higher courts including the Supreme Court's view on whether a collateral warranty constitutes a construction contract (*Abbey Healthcare v Simply Construct having been granted permission to appeal in December 2022*).

We also anticipate more adjudication and litigation arising from PFI projects, with a number of contracts due to expire and handbacks to be arranged. Over the next decade, it is anticipated that some 200 projects (covering assets valued at over £10bn) will be handed back to the public sector with a number of 'handover inspections' taking place to uncover apparent defects.

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