fieldfisher

Construction
A Year in Review

March 2024

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Introduction

At the beginning of 2023, the outlook for the construction industry was relatively bleak, with uncertainty around the impact of the Building Safety Act, soaring energy and materials costs, rising insurance premiums, the uncertainty of the continuing Ukraine conflict and, the perhaps inevitable, increase in the number of industry insolvencies.

Fast forward twelve months and the Ukraine conflict continues and we now have the added economic and political uncertainty arising from the Israel-Hamas conflict and, closer to home, a general election to "look forward to" at some point this year. The implications of the BSA are now starting to be addressed by the tribunals and courts and we expect to receive the Inquiry's Phase 2 report as Grenfell Tower continues to cast a figurative and literal shadow over the industry.

It is however not all gloom and doom for construction with interest rates stabilising (leading to some hope of a revival in funding appetite), some reports that the widely anticipated recession is over before it had begun and the recent budget underlining the Government's commitment to nuclear energy projects. This follows on the back of other positive developments over the past year or so with an ever increasing focus on the importance of the environment, reduction of carbon and ESG generally as well as a long overdue pledge for Equal Representation in Adjudication Pledge and Women in Adjudication (although a lot still remains to be done).

In this, our review of major developments in the UK construction disputes market over the past 12 months or so, we consider matters such as:

I. important judicial guidance on the BSA including "fair and reasonableness" tests that the courts will grapple with over the coming years;

II. emerging trends in adjudication and clarification around the constraints imposed by a failure to serve valid payment or pay less notices; and

III. clarification around limitation periods under commonly seen construction documents

We hope there is something of interest for all readers in the following pages and, as always, our dedicated team of transactional and contentious experts are on hand should you have any questions or challenges on your own projects.

When is a collateral warranty a construction contract?

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP [2022] EWCA Cid 823

Introduction

In this case the court of appeal was asked to consider whether a collateral warranty is a "construction contract" for the purposes of section 104, Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act"). The decision of the court of appeal was that, in certain circumstances, a collateral warranty can be a construction contract under 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 sub-contract to him or otherwise; [or]

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

Background

The facts of the case are that in 2015, a contractor, Simply Construct, was engaged under a JCT Design and Build contract (2011 form), with bespoke amendments, to carry out the design and construction of a care home ("the building contract"). The building contract required the contractor to carry out the works "*in a proper and workmanlike manner and in compliance with the Contract Documents…*". It contained a number of other obligations as to the quality of the design, materials, goods and workmanship and also obliged the contractor to remedy defective work. In addition, it contained express adjudication provisions.

The employer had the right to novate the building contract to the freeholder, Toppan Holdings Limited ("Toppan") and there were detailed provisions regarding the contractor giving collateral warranties to a Purchaser and Tenant (both terms as defined in the building contract) in the form annexed to the contract.

The warranty provision allowed the Employer by notice to the Contractor, identifying the Purchaser or Tenant and its interest in the works, to require that the contractor (within 14 days from receipt of that notice) to enter into a collateral warranty with a Purchaser or a Tenant. Other references in the building contract

When is a collateral warranty a construction contract?

identified Toppan and Abbey as potential beneficiaries of a collateral warranty from the contractor and in the event, Toppan (as freeholder) received a Purchaser warranty and Abbey, a Tenant warranty.

The completed building was alleged to have fire safety defects and both Toppan and Abbey made claims against the contractor, including for the cost of remedial works. Toppan set out their claim in correspondence in August 2020, and following execution of its warranty from the contractor, Abbey set out its claim in November 2020. Toppan and Abbey served separate notices of adjudication on the contractor in December 2020, when the contractor refused a request that the disputes be dealt with together. The two adjudications, however, ran in parallel.

In the Toppan adjudication, the contractor claimed that the adjudication claim was an ambush and that the dispute was not properly defined. In the Abbey adjudication, the contractor claimed that the contractor collateral warranty under Abbey had brought its claim, was not a "construction contract" within the meaning of the Construction Act and, therefore, the adjudicator had no jurisdiction to hear the matter. In both adjudications, the decision went against the contractor and damages were awarded to Toppan and Abbey. The contractor failed to pay the damages awarded and further proceedings resulted.

The lower court's decision in Abbey

The lower court dismissed Abbey's application for summary judgment when the contractor refused to pay and also reversed the adjudicator's decision, finding that, on the facts, the collateral warranty in this case was not a "construction contract" under the Construction Act. The reason was that it was provided to Abbey not merely after the works under the building contract had reached practical completion, but approximately four years after practical completion. According to the lower court, this timing was critical to it reaching its decision.

That decision would have seemed sound to many, including those familiar with collateral warranties as these are instruments under which warrantors typically warrant works and services (or "construction operations"), not instruments under which contractors, consultants and sub-contractors carry out works or provide services.

Abbey, however, appealed to the court of appeal.

The court of appeal decision in Abbey and its reasoning

In what was undoubtedly a surprising outcome for some, the court of appeal reversed the lower court's decision and found in favour of Abbey when it held that the collateral in this case was indeed a "construction contract".

The court of appeal's decision is important because the Construction Act confers the automatic right to refer disputes under a "construction contract", to adjudication, thus extending the statutory right to adjudicate automatically to disputes under collateral warranties. This is clearly a win for any beneficiary of a collateral warranty as it entitles them to issue an adjudication notice to resolve a dispute with their warrantor; a more accessible, speedy and often considerably more cost-effective method to resolve their claims than litigation in the courts.

The court of appeal set out guidance as the circumstances in which a warranty can be a "construction contract" and, in so doing, it directly addressed the decision of the lower court. The court of appeal decision was essentially that:

a) the lower court decision was wrong when it said that the timing of the execution of the collateral warranty was so critical that it was the determinative factor in whether or not the warranty was a "construction contract"; and

b) the date of the warranty was "ultimately irrelevant" because, the contractor "made a promise" to Abbey – not merely about the standard of past work under the building contract, but also about the standard of future work under the building contract.

The court of appeal held that, on that basis:

a) not all collateral warranties will be a "construction contract" under the Construction Act; and

b) whether a warranty is a "construction contract" or not, depends on the wording of the warranty in question.

The contractor has now appealed to the Supreme Court and that appeal is due to be heard in April of this year.

When is a collateral warranty a construction contract?

What words might a collateral warranty include to preserve the statutory right to adjudication?

The answer seems to be that if the warrantor, e.g. a contractor warrants that they will do something, going forwards, pertaining to works, for example, they warrant that "in the carrying out of the works, they will be carried out using reasonable skill, care and diligence" – that promise is forward facing and, therefore, the collateral warranty is more likely to be a "construction contract", even if it is executed after practical completion of the works, as in this case.

If on the other hand, the contractor merely warrants a past state of affairs, e.g., that the works "have been" (i.e., in the past) carried out using reasonable skill, care and diligence; and they are complete when the warranty is executed, that is not forward facing. Such a warranty is not likely to be a "construction contract".

Comment

We can only wait hear what the Supreme Court decides in this case but, irrespective of what that decision is, parties to a warranty can always provide specifically for adjudication in the terms of their warranty if they wish to do so. They need only include a suitable provision in it before it is signed.

There also remain questions about whether there is any implication for those who obtain Third Party Rights instead of warranties (although the law here appears settled (for now) with the TCC's 2015 decision in *Hurley Palmer Flatt v Barclays*).

Inter-play between smash & grab and true value adjudications: when will an adjudicator lack jurisdiction?

Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023] EWCH 2010 (TCC)

In a judgment handed down by the Technology and Construction Court (TCC) in *Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023] EWCH 2010 (TCC)* the court found that an adjudicator will lack jurisdiction in a true value adjudication which is launched on the back of a paying party failing to satisfy its payment obligations following a smash and grab adjudication.

Background

In this matter, the sub-contractor, Alu-Fix (UK) Limited ("AF"), was employed by Henry Construction Projects Limited ("HCP"), the main contractor, under a JCT standard building sub-contract to develop a boutique hotel in Central London.

Following termination of the sub-contract in November 2022 (over one year after the sub-contract was entered into), AF issued a payment application in the sum of £257,004.50 plus VAT with payment due on 13 December 2022. When HCP missed the payment deadline without providing a reason, AF launched a "smash and grab" adjudication ("SGA").

While the SGA was in progress, HCP commenced a "true value" adjudication ("TVA") against AF on the basis that it issued two valid pay less notices before the payment due date and contended that due to an over-payment, AF was indebted to HCP for approximately £235,000. In response, AF called for the adjudicator of the TVA (Mr. Molloy) to step down, claiming he lacked jurisdiction as HCP had not fulfilled its immediate payment duty. Mr. Molloy declined, citing the ongoing nature of the SGA.

Subsequently, AF succeeded in the SGA and secured an order for HCP to make payment to AF. Mr Molloy stayed the TVA pending such payment and confirmed that we would resign if the payment was not made in accordance with the decision.

Following payment by HCP, the stay was lifted and Mr. Molloy concluded that AF had been overpaid, resulting in a debt to HCP of £191,753.88. AF contested this and did not pay, leading HCP to enforce this ruling.

Decision

In the TCC, HCP argued that a decision in AF's favour would be a huge curtailment on "employers" rights. In addition, HCP argued that there should be no apprehensions of a "Trojan Horse" in this situation, as the payment dictated by the SGA was made within the period mandated by the adjudicator.

AF on the other hand emphasised that the procedure remains expedient regardless of whether it begins before the resolution of an SGA. It reiterated that the policy is unequivocal in mandating the fulfilment of any immediate payment obligations to facilitate cash flow, thereby preventing any potential for subterfuge, akin to a "Trojan Horse" from compromising this principle.

District Judge Baldwin found in AF's favour and held that he saw no basis to conclude anything different than what the adjudicator in the SGA concluded (i.e. the final date for payment was 13 December 2022). As a result of this, the Judge also found that HCP lacked the entitlement to initiate a TVA until it had fulfilled its immediate payment obligations and because HCP did not fulfil such obligation, the adjudicator in the TVA lacked jurisdiction.

In this regard, the Judge relied on a number of cases including that of *S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Cid 2448* which reinforces the principle that a party cannot not commence a TVA until it has discharged its immediate payment obligation.

Commentary

This case highlights the well-known, and well-established principle that parties should only initiate a TVA once they are confident that they have fulfilled their payment obligations. If the party fails to do so they risk ending up with an unenforceable ruling, similar to the predicament faced by HCP. Interestingly, the Judge also concluded that, whilst this matter does not prevent the commencement of a TVA prior to the outcome of an SGA and later relying on the outcome, the result of this case ought to discourage such a course in areas of dubious SGA disputes. On the other hand, it should not dissuade parties who are sufficiently assured that their dispute will lead to a determination that no immediate payment duty was created.

Adjudication: Multiple disputes, or multiple issues?

Surgo Construction Limited v Bellway Homes Limited [2024] EWHC 10 (TCC)

Section 108(1) of the Construction Act 1996 (the "Act") grants a right to refer "a dispute" (not "disputes") to adjudication.

Whilst this initially seems clear, case law has since grappled with what "a dispute" means.

Through various case law, we have come to know that, as per *Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] EWHC 2332 (TCC)*, "[a] *dispute can comprise a single issue or any number of issues within it*".

With that (presumably) in mind, in an adjudication, notified on 28 March 2023 (the "Adjudication"), Roundel Manufacturing Limited ("Roundel") claimed the £152,225.23 (inc. VAT) it had not been paid by Surgo Construction Limited ("Surgo") in respect of its December 2022 payment application (the "Application") in two "alternative" ways.

Firstly, Roundel claimed payment on a "*smash* and grab" ("S&G") basis (Surgo having "*failed to issue a payment notice*" in relation to the Application). Then, "*[f]urther or in the alternative*", Roundel claimed payment of the "*true value*" ("True Value") of the Application.

The adjudicator went on to reject Roundel's S&G claim on the basis that the Application was not a valid application for payment to facilitate a S&G claim under the Act but that the Application was an "interim" application for payment under the contractual "Conditions". Accordingly, he awarded Roundel £148,431.70 on a True Value basis with further interest accruing daily (the "Adjudication Award").

After the Adjudication, Roundel assigned its rights in relation to the Adjudication Award to Bellway Homes Limited ("Bellway") and Bellway, having not been paid the Adjudication Award, sought to enforce it in the TCC (the "Enforcement Proceedings").

Surgo sought to defend the Enforcement Proceedings on the basis of the Adjudicator having either (1) no jurisdiction (to hear two disputes that "*are entire and independent from one another and separate and standalone in analysis, procedure and purpose*" – i.e. the S&G and True Value claims) or, alternatively (2) exceeded his jurisdiction (by deciding that the Application was an invalid application for payment in the S&G claim but valid in the True Value claim).

As to the multiple disputes argument, Bellway, citing Witney and other leading commentary, said that "*only one dispute was referred, namely concerning the sums due on the [Application], which was requested to be determined by one of two routes*" and that "*on rejecting the smash & grab, went on to do exactly what he was requested to do, namely to assess the true value of the [Application]*". Bellway and asked to Court to find that a "*close connection*" exists between the issues "*amounting to one overarching dispute, namely what sums, by either route, are payable as a result of the Application*".

The Court agreed with Bellway in relation to both of Surgo's grounds of defence and awarded it summary judgment for the Adjudication Award sum. In doing so, the Court set out seven reasons, including that "[t]*o characterise these as separate disputes would be to adopt too legalistic an approach*" and that "*there are two routes advanced to the same goal of determining a sum owed*".

As ever, much depends on the wording of the notice of adjudication but this case serves a stark reminder to not too hastily rely on multiple disputes as a ground to resist enforcement. The Courts have made clear that that is a high threshold to meet.

A Lidl more guidance on the Grove Principle

LIDL Great Britain Ltd v Closed Circuit Cooling Ltd t/a 3CL [2023] EWHC 3051 (TCC)

The TCC confirmed the obiter comments in *Rochford Construction Ltd v Kilhan Construction Ltd* (2020) by confirming that a construction contract cannot have a final date for payment which is conditional upon an event or action. This would be non-compliant with the Housing Grants, Construction and Regeneration Act 1996 ("Construction Act").

In this case, the terms of the contract provided that the final date for payment was conditional upon Closed Circuit Cooling ("3CL") submitting a VAT invoice. Lidl argued that the final date for payment had not occurred on the basis that no VAT invoice had been submitted. The TCC disagreed with this argument and found that the Construction Act requires the final date for payment to be a specified number of days from the due date for payment.

Therefore, those drafting and negotiating contracts should ensure that the final date for payment is not conditional upon any event or action. If it is the provision will have no effect and the Scheme for Construction Contracts will apply instead, meaning that the final date for payment will be 17 days from the due date for payment.

For those who do wish to make payment conditional upon the submission of a VAT invoice (or something else), we would suggest making payment (rather than the final date for payment) conditional upon the payee submitting a VAT invoice. If no VAT invoice is submitted, the payer will be able to withhold payment provided that it submits a payment notice and/or pay less notice stating that no amount is due on the basis that the payer has not submitted a VAT invoice.

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL) [2023] EWHC 2243 (TCC)

In this further hearing between the same parties, TCC gave further guidance on the scope of the Grove principle. The Grove principle arising from *Grove Developments Ltd v S&T (UK) Ltd (2018)* provides that a payer who loses a smash and grab adjudication can only commence an adjudication over the true value of those works after paying the "notified sum". If any such adjudication is commenced without payment of the notified sum the adjudicator is likely to lack jurisdiction.

The brief background of the case is that 3CL agreed to carry out design, installation and maintenance works for the supermarket chain, Lidl. 3CL won a smash and grab adjudication over one of their payment applications and subsequently enforced it. In between the adjudicator's award and the enforcement, Lidl launched adjudications of their own, relating to off-setting the cost of defects incurred in remedying the works against sums owed to 3CL ("Adjudication 2") and whether 3CL was entitled to an extension of time ("Adjudication 3").

3CL argued the adjudicators did not have jurisdiction to hear either adjudication 2 or adjudication 3, where Lidl had not yet satisfied their payment obligations under the first smash and grab adjudication. Following Adjudication 2, Lidl sought to enforce that decision therefore the TCC had to address whether the Grove principle was as wide as 3CL contended.

The TCC's judgment further defined the scope of the Grove principle as follows:

a) **The Grove principle does not prevent a payer from issuing any adjudication if it has not paid the notified sum.** Therefore Lidl was not in contravention of the Grove principle simply by virtue of commencing two adjudications before paying the notified sum.

b) **The Grove principle does prevent a payer from issuing any adjudication in respect of matters that could have been the subject of a timely pay less notice or payment notice in respect of the same payment cycle. The date for a pay less notice constitutes a dividing date. If the payer has a claim after that dividing date (meaning that it could not**

A Lidl more guidance on the Grove Principle

have been the subject of a timely pay less notice) the payer may issue a true value adjudication in respect of that claim. Therefore, the court found that the adjudicator in Adjudication 3 did not have any jurisdiction as the matter could have been dealt with in the payment notice – in fact, in its purported payment notice for the relevant payment cycle, Lidl had contended that it was entitled to liquidated damages for late completion. The court also found that, although the claim for remedial costs in Adjudication 2 arose after the dividing date, the adjudicator did not have jurisdiction in relation to parts of Lidl's claim for remedial costs as part of the sums that Lidl was seeking in that adjudication were duplicated with sums that it had sought to withhold under its purported payment notice.

c) **A payer cannot rise any claim arising after the dividing date as a defence to any enforcement of payment of the notified sum.**

d) **The Grove principle can apply to prevent a payer from adjudicating on cross-claims which are not directly related to the value of the works.** This is evident from the fact that the TCC found that Adjudication 3 should not have been commenced even though it had nothing to do with the intrinsic value of the works (unlike a claim for alleged defects). Through Adjudication 3 Lidl was not seeking monetary relief but was instead seeking a declaration that 3CL was not entitled to any extension of time. Nevertheless the TCC held that Adjudication 3 was in substance a claim for liquidated damages because if the adjudicator decided that there was no extension of time then this would inevitably lead to a claim for liquidated damages. The TCC concluded that Adjudication 3 contravened the Grove principle even though that adjudication related to liquidated damages (rather than a matter which related to the "true value" of the works) on the basis that the Construction Act permits parties to withhold amounts for such unrelated matters.

e) **Where the Grove principle applies adjudicators may not lack jurisdiction completely.** The TCC found that the adjudicator in Adjudication 2 only lacked jurisdiction in relation to the duplicated amounts as these were the elements that contravened the Grove principle. It held that the adjudicator's decision in respect of the rest of the amount awarded to Lidl should stand on the basis that Lidl was entitled to commence an adjudication in respect of those issues.

Right to commence adjudication “at any time” cannot be used to circumvent limitation

LJR Interiors Ltd V Cooper Construction Ltd [2023] EWHC 3339 (TCC)

Background

Cooper Construction contracted LJR Interiors to carry out various works at a development, for which LJR quoted £18,675 plus VAT. The works were completed in October 2014, and LJR issued three payment applications.

Eight years later, in July 2022, LJR submitted a fourth payment claim ("Application 4") which included a number of items which had already been claimed for in the third application in 2014. The amount claimed was £3,256.58 excluding VAT. Cooper neither paid nor served a pay less notice in response.

Adjudication

The contract did not contain provisions for reference to adjudication. As such, Part 1 of the Scheme for Construction Contracts ("Scheme") was implied into it by section 108(5) of the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”), and LJR referred the matter to adjudication. Cooper argued that the claim was time barred as it was made outside the limitation period of six years, starting on the date of the third payment application in 2014. LJR argued that the limitation period actually ran from 20 December 2016 when Cooper sent an email to LJR regarding the supposed debt.

The adjudicator rejected Cooper's argument on limitation and believed the breach occurred in August 2022 when Cooper failed to pay or respond to Application 4 by the final date for payment. The contract did not include any provisions for delay in issuing payment applications, and as such the adjudicator applied the provisions of the Scheme and 1996 Act, which also did not include time limits. The adjudicator found that the Application 4 was valid and LJR was entitled to the sum claimed.

Cooper disagreed and did not pay; LJR in turn sought enforcement of the adjudicator's decision.

Enforcement and Part 8 Application

Cooper responded to the enforcement application with a Part 8 application seeking a declaration that the adjudicator's decision was void and unenforceable due to limitation.

Section 5 of the Limitation Act 1980 which sets out its jurisdiction states: "*An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued*." Section 38(1) of the Limitation Act states that "action" includes "*any proceedings in a court of law, including an ecclesiastical court*." Adjudications are not excluded, and the court held that the Limitation Act does therefore apply. The court also confirmed that limitation periods cannot simply be restarted by claiming for sums which had already been claimed on a previous payment application.

As works were completed on 19 October 2014, a claim made over 7 years later was therefore statute barred, and the adjudication decision was unenforceable.

Conclusion

The 1996 Act gives the right to commence an adjudication at any time, however this case confirms that a defence under the Limitation Act 1980 can still be brought. As such, parties bringing late claims are at risk of receiving an unenforceable decision.

The 1996 Act and the Scheme do not include an express time limit for issuing applications for payment – but they do require there to be a subsisting construction contract. It is hard to argue that the contract was still subsisting 8 years after works concluded, although this case did not offer conclusive guidance as to when a contract has ended.

In any event, the lesson for both sides is simple: a great deal of time, effort and uncertainty could have been saved if either party had issued notices in a timely manner. Had LJR issued Application 4 (and proceeded to adjudication, if necessary) in 2014 there would have been no limitation issues to consider. Likewise if Cooper had responded to Application 4 with a pay less notice, valuing the claim at zero with limitation as the reason, they could have avoided the need for a Part 8 application.

Without prejudice communications render Adjudicator's decision unenforceable

AZ v BY [2023] EWHC 2388 (TCC)

A TCC decision that decides that an Adjudicator's decision is unenforceable always sparks our interest, particularly when the reason for such a decision is a breach of natural justice. On this occasion, the TCC decided that an adjudicator had breached the rules of natural justice, by reason of apparent bias, because it had been presented with without prejudice material by one of the parties to the dispute.

We summarise the case below, but the key take-away from this decision is that the adjudicator's decision need not to be based primarily on the without prejudice communications in order for a court to decline to enforce it. The communications need only give rise, objectively, to a legitimate fear of bias.

This decision is notable as it is contrary to how some may interpret the conclusions of Justice Akenhead in the earlier case of *Ellis Building Contractors Limited v Vincent Goldstein* [2011] *EWHC 269 (TCC),* a decision of the TCC which considered the enforceability of a decision of an adjudicator where without prejudice communications were placed before him. In that case, Justice Akenhead referred to an adjudicator deciding a case "primarily" on the wrongly received without prejudice communications as part of the analysis of apparent bias.

One of the claimant's primary arguments in the case at hand was that the adjudicator's decision must be shown to be primarily based on the without prejudice communications, an argument which Justice Constable rejected.

Facts

The parties and the details of the contract they entered into are confidential in this case and thus the pseudonyms AZ (claimant) and BY (defendant) were adopted by the TCC.

As part of its submissions, AZ submitted certain communications which showed that BY had conceded in a meeting that AZ's contractual position was justified (which was contrary to its position in the adjudication). AZ relied on these communications to corroborate its claim that certain obligations lay with BY and that AZ was entitled to additional sums in respect thereof. BY objected to the use of the communications on the basis that they were subject to without prejudice privilege and its response was served under protest.

On 7 June 2023, Mr Derek Pye (the Adjudicator) issued a decision. AZ issued a Part 7 claim in the TCC to enforce the decision of the Adjudicator. BY issued Part 8 proceedings seeking declarations relating to the status of the allegedly without prejudice communications and a declaration that as a result of the inadmissible communications, the decision is unenforceable.

Law

Justice Constable considered the law on without prejudice communications and apparent bias. In particular, he referred to the case of *Ellis Building Contractors Limited v Vincent Goldstein* [2011*] EWHC 269 (TCC)* where Justice Akenhead summarised his conclusions on the subject as follows:

> "*(a) Obviously, such material should not be put before an adjudicator. Lawyers who do so may face professional disciplinary action.*
>
> *(b) Where an adjudicator decides a case primarily upon the basis of wrongly received "without prejudice" material, his/her decision may well not be enforced.*
>
> *(c) The test as to whether there is apparent bias present is whether, on an objective appraisal, the material facts give rise to a legitimate fear that the adjudicator might not have been impartial. The Court on any enforcement proceedings should look at all the facts which may support or undermine a charge of bias, whether such facts were known to the adjudicator or not*."

AZ placed particular emphasis on paragraph (b) above, arguing the need for a determination that the decision must be shown to be based primarily on the without prejudice material in order for a court to decline to enforce it. Justice Constable did not consider that Justice Akenhead had intended to set such a threshold test which must be passed in order for the decision not to be enforced. The apparent bias test looks at the objective perception of the influence the exposure to the material may have had on the mind of the decision-maker. Apparent bias does not depend, however, on actual influence. A court may properly conclude that the

Without prejudice communications render Adjudicator's decision unenforceable

objective observer would consider knowledge of one party's admissions as to the weakness of their case made under the cloak of without prejudice discussions as giving rise to a legitimate fear that an adjudicator took that knowledge into account, possibly even sub-consciously. The communications do not have to be material in the sense that they can be shown to have been the basis of a particular conclusion. They do have to be material in the sense that they give rise, objectively, to a legitimate fear of partiality.

Justice Constable also referred to the reviews expressed in Coulson on Adjudication (4th ed) in which the editor stated:

> "*It is thought that, if the adjudicator was told of the amount of a without prejudice offer, it might be very difficult for him to continue with the adjudication, because there would be an inevitable question mark about whether the result of the adjudication, however inadvertently, was shaped by the amount of the offer*."

In such a case, it would not be possible to demonstrate that the decision was primarily based upon without prejudice material. However, such a situation may nevertheless give rise to apparent bias. It is the existence of the question-mark which is addressed by the objective apparent bias test. Concluding that such a question-mark exists does not depend on establishing that the decision was primarily decided on the basis of the material. It is equally the case that where no such question-mark exists (particularly in circumstances where the decision-maker knows only of the fact of the offers made rather than the amount of any offer) that the decision will be enforced notwithstanding the disclosure of without prejudice material.

Justice Constable concluded that the relevant test is more or less as set out in *Re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700,* where Lord Phillips stated:

> "*The Court must first* ascertain *all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased*."

Analysis

Justice Constable decided that the communications in question submitted to the Adjudicator were subject to without prejudice privilege.

He considered that the question of admissibility of without prejudice material is a question of law and that it is trite that, generally, adjudicator's decisions will be enforced notwithstanding the fact that they contain an error of law. But an error as to the admissibility of without prejudice material is an error of law that could potentially impact the fairness of the decision-making process in accordance with the rules of natural justice. It is similar, in this sense, to an error of law by an adjudicator in assessing the extent of their own jurisdiction. It is an error which can affect the enforceability of the decision. If, therefore, a court concludes (contrary to the determination of the adjudicator) that material was in fact without prejudice and that the test of apparent bias is satisfied, the decision should not be enforced.

Turning to the question of apparent bias, Justice Constable had to consider whether, in all the circumstances, a fair-minded and informed observer would conclude that there was a real possibility that, having seen the without prejudice communications, the Adjudicator was biased.

Both parties made submissions founded on the Adjudicator's decision. The Adjudicator's decision stated that one of the issues he had to decide was the "Privilege Sub-Issue". He concluded that there was no evidence to support the view that the purpose of the meeting was to reach a commercial settlement and that it was more of a technical/commercial meeting to discuss specific issues. However, the Adjudicator then decided that several matters were unequivocally agreed between the parties. The Adjudicator was wrong in this decision, perhaps not having had sight of the full run of without prejudice communications.

Justice Constable decided that the fair-minded and informed observer, considering all of the circumstances of this case, would conclude that there was a real possibility that, having seen the without prejudice material, the Adjudicator was unconsciously biased for the following reasons:

a) The without prejudice communications were placed front and centre within the adjudication by AZ, and

Without prejudice communications render Adjudicator's decision unenforceable

played a significant role in AZ's case. It was put to the Adjudicator that the communications demonstrated that BY were taking a position materially inconsistent to its previously expressed views. The very purpose of without prejudice privilege is to prevent this from happening.

b) The Communications contained implicit admissions by BY that were inconsistent with its opening position and the contractual position it was seeking to establish in the Adjudication.

c) As such, the communications were not just prejudicial and adverse to BY's interests but also related to central issues in dispute. The substance of the communications cannot be likened in any way to an adjudicator knowing of the fact of an offer, or the fact of the existence of negotiations, which as the authorities make clear is something that a decision-maker would readily anticipate. It is much more akin to, and indeed potentially more prejudicial than, an adjudicator knowing the amount of an offer.

d) Regardless of the manner in which the decision was expressed, there is an inevitable question mark about whether the result of the adjudication, however inadvertently or sub-consciously, was shaped by the Adjudicator's knowledge of the admissions in relation to key aspects of the open dispute made by BY in negotiations.

e) The inevitable question mark is even more severe when the Adjudicator had formed the erroneous view that these matters had in fact been agreed (and not just put forward in a commercial offer which might be easier to put out of one's mind).

Conclusion

Justice Constable concluded that this is one of the few cases in which a breach of the rules of natural justice, by reason of apparent bias, dictates that the decision should not be enforced. He therefore dismissed AZ's application for summary judgment and granted BY's request for a declaration that the decision is unenforceable.

The risk of serial adjudications

Sudlows Ltd v Global Switch Estates 1 Limited [2023] EWCA Cid 813

Following a series of adjudications between the parties, the TCC considered whether the adjudicator in Adjudication No.6 had been incorrect in deciding that he was bound by the outcome of a previous adjudication (No.5) in giving judgment in favour of Global Switch Estates 1 Limited ("Global Switch").

In Adjudication No.5, Sudlows Ltd ("Sudlows") sought an extension of time for delays associated with cabling work, with the adjudicator determining that there was an entitlement of 482 days. Following Practical Completion, Sudlows commenced Adjudication No.6 for a further extension of time to Practical Completion and an accompanying loss and expense claim. Sudlows relied on the same Relevant Event and the decision in Adjudication No.5. Whilst Global Switch introduced new evidence in Adjudication No.6, the adjudicator considered himself to be bound by the decision in Adjudication No.5 and therefore awarded Sudlows a further extension of time of 133 days and loss and expense of £996,898.24. In the decision, the adjudicator stated that, in the alternative, had he not bound by the decision in Adjudication No.5, he would have allowed Global Switch's claim for liquidated damages of £209,053.01.

Sudlows commenced a Part 7 claim to enforce the No.6 decision. This was resisted by Global Switch who brought its own Part 8 proceedings seeking (i) a declaration that the adjudicator in No.6 had acted in breach of natural justice by finding he was bound by the findings in Adjudication No.5; and (ii) to enforce the adjudicator's alternative finding that it was entitled to liquidated damages.

Mr Justice Waksman decided in favour of Global Switch; the disputes in Adjudication No.5 and No.6 were not the same or substantially the same. Whilst both adjudications relied on the same Relevant Events, this was plainly insufficient to mean that in both adjudications the dispute was the same or substantially so. Accordingly, the court held that there was a breach of natural justice and the decision in Adjudication No.6 could not be enforced. Instead, Global Switch was entitled to enforcement of the adjudicator's alternative findings regarding liquidated damages on the basis: (i) the alternative findings were as detailed as the primary findings; (ii) there would have been no point in the adjudicator making those findings if they were not to be regarded as binding; and (iii) the parties agreed that he should make those alternative findings.

Sudlows appealed to TCC's decision. Lord Justice Coulson found that the adjudicator had been correct in determining that he was bound by the decision in Adjudication No.5. The core issue in both adjudications was Global Switch's responsibility for the cabling and ductwork issues which was the same in both Adjudication No.5 and No.6. It was of little weight that the two adjudications concerned different time periods. The Court of Appeal noted that whilst the court is not bound by an adjudication ruling, it should be slow to interfere with it, unless it is concluded that it was clearly wrong. Anything less runs the risk of undermining the adjudication process by encouraging repeated challenges to an adjudicator's decision.

Concluding the judgment, Lord Justice Coulson reinforced the principle of "*pay now, argue later*" as a reminder of the principle purpose of construction adjudication to improve cashflow. Global Switch is entitled to argue about their contractual responsibility for the cabling and ductwork issues, but they must do that later, in court or arbitration.

This case serves as a reminder that the policing of this sort of debate is primarily left to adjudicators themselves and the courts will be reluctant to intervene unless something has gone clearly wrong. Parties engaging in serial adjudications inevitably increase the risk of overlap and an adjudicator being bound by a previous decision. Where a dispute has already been determined in adjudication, parties should not seek to re-adjudicate a decided dispute: the appropriate avenue to challenging a decision is in arbitration or litigation.

Mediate or wait?

James Churchill v Merthyr Tydfil County Borough Council (the Council) [2023] EWCA Cid 1416

Last year the Court of Appeal handed down its judgment in *James Churchill v Merthyr Tydfil County Borough Council (the Council)* in which it confirmed that judges have the power, in appropriate circumstances, to order parties to participate in alternative dispute resolution (ADR).

The judgment provided a further boost to ADR as a central and important part of the dispute resolution landscape as it has been for many years in the construction sector in the UK.

Background

Having purchased a house in Merthyr Tydfil, James Churchill noticed Japanese Knotweed growing in his garden. The Council acknowledged that they had previously treated Japanese Knotweed on the neighbouring land they had owned for several years.

Mr Churchill sought compensation from the Council for losses incurred in respect of the encroachment of the Japanese Knotweed onto his land. The Council denied liability but referred Mr Churchill to their internal Corporate Complaints Procedure.

Ignoring the request, Mr Churchill issued proceedings in the County Court and the Council applied for a stay of the proceedings on the basis that the Corporate Complaints Procedure that they had referred him to should be completed first.

The first hearing

While the Judge found that Mr Churchill and his lawyers had acted unreasonably and contrary to the spirit and the letter of the Practice Direction for Pre-Action Conduct (PD) in refusing to use the internal complaints procedure, he nevertheless dismissed the Council's application to stay the proceedings.

The Judge held that he was bound to follow Dyson LJ's statement in *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Cid 576, [2004] 1 WLR 3002 (*Halsey*) to the effect that: "*to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the Court*".

The Council appealed the decision.

Mediate or wait?

The relevant Court rules

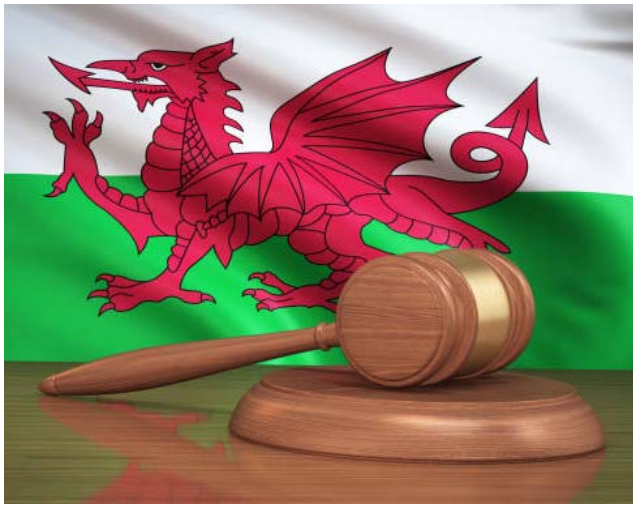
Parties pursuing court proceedings must follow the Civil Procedure Rules (CPR).

The CPR incorporates a number of Protocols for specific types of claims including the Pre-Action Protocol for Construction and Engineering Disputes, which regulates parties' conduct prior to the commencement of proceedings by setting out steps for the parties to follow which are designed to encourage settlement.

Where there is no applicable Protocol, as was the case for Mr Churchill's claim, pre-action conduct is regulated by the PD which requires pre-action behaviour aligned with that required under the Protocols and provides specifically that before commencing proceedings the courts "*expect the parties to have exchanged sufficient information to – … (c) try to settle the issues without proceedings; (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement; … and (f) reduce the costs of resolving the dispute*".

Importantly, the PD notes that *"litigation should be a last resort.…the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings".*

If proceedings are issued, "*the parties may be required to provide evidence that ADR has been considered*", and that a party's refusal to participate in ADR might be considered unreasonable and lead to an order to pay additional costs.



If a party has "*unreasonably refused to use a form of ADR or failed to respond at all to an invitation to do so*" the court may decide that there has been a failure to comply.

In such circumstances, the defaulting party may be subject to sanctions (primarily in respect of costs) or it may be that the "*proceedings are stayed while particular steps are taken to comply"* with the PD.

The issues and decision

The Court of Appeal addressed a series of issues, but the key elements are follows:

a) Can the court lawfully stay proceedings for, or order the parties to engage in a non-court-based dispute resolution process?

The Court of Appeal held that they could lawfully stay proceedings for, or order, the parties to engage in a non -court-based dispute resolution processes provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

b) How should the court decide whether to stay the proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

The Court of Appeal noted that this would need to be considered on a case-by-case basis and was not prepared to impose a fixed set of principles as to what may be relevant.

The judgment does however provide some guidance as to the factors to be considered to establish if a party has unreasonably refused to engage in ADR.

The court will generally weigh the circumstances of the case to the form of ADR proposed to understand the benefit to the parties when considering a stay.

These include matters such as whether parties are represented, the reasonableness and proportionality of the sanction, as well as the costs of ADR, among others.

The Court of Appeal noted that "*other factors too may be relevant depending on all the circumstances. It would be undesirable to provide a checklist or a score sheet for judges to operate.*"

Mediate or wait?

Comment

This decision clearly provides robust judicial support for ADR by establishing that, in principle, the court may stay proceedings should parties fail to meaningfully engage in ADR.

The construction sector has been a significant adopter of ADR in the UK including such processes as mediation, which in our experience has provided an effective alternative to both adjudication and court proceedings in many cases.

While pockets of resistance to ADR remain, this case provides useful support and may be persuasive in changing the view of parties resistant to ADR.

Of course, the effectiveness of ADR corresponds to the commitment of those taking part and there is always a risk of parties participating simply to tick a box. In such cases it can be an expensive waste of time with little hope of any sanction being imposed on the non-committed party. Such behaviour can be challenging, if not impossible, to demonstrate.

It is difficult to see this problem being overcome by anything other than effective advocacy for the process across the construction sector as a worthwhile and effective forum for dispute resolution whether by practitioners, industry leaders, ADR providers (several intervened in the Churchill case), insurers and the courts with the objective of demonstrating the commercial benefits of ADR.

The momentum is certainly with ADR mechanisms transitioning to the forefront of dispute resolution as demonstrated by the 2021 Civil Justice Council report on "Compulsory ADR" which promoted the objective of compulsory ADR.

Supreme Court clarifies rules over expert and factual evidence in civil claims

TUI UK Ltd (Respondent) v Griffiths (Appellant) [2023] UKSC48

On 29th November 2023 the Supreme Court released its decision in the eagerly anticipated case of *TUI UK Ltd (Respondent) v Griffiths (Appellant) [2023] UKSC 48*. After a gastric illness on an all-inclusive holiday in Turkey Mr Griffiths sued TUI, the tour operator, alleging that the illness was attributable to contaminated food and drink consumed at the hotel. Mr Griffiths relied on expert evidence from a microbiologist whose opinion was that the illness was more likely than not caused by contaminated food and/or drink. In this article we examine the decision and consider potential lessons for the approach to expert evidence in adjudication.

The crucial role of expert evidence

Initially, the Judge in the County Court, unpersuaded by the microbiologist's evidence, dismissed Mr Griffith's case but this was subsequently overturned by the High Court. That decision was itself reversed by the Court of Appeal. In June 2023 the Supreme Court unanimously rejected the Court of Appeal's decision.

A key issue concerned the treatment of the expert evidence upon which Mr Griffith's claim relied. The original trial judge accepted TUI's submissions that the microbiologist, Professor Pennington, had given an incomplete explanation for the cause of the illness and had failed to discount other possible causes. TUI's submissions were accepted notwithstanding that it had chosen not to cross-examine Professor Pennington nor provided any contrary expert evidence of its own. The Supreme Court considered this failure as fatal to TUI's defence.

The Supreme Court was concerned with fairness and particularly whether the trial judge was entitled to find that Mr Griffiths had not proven his case on a balance of probabilities when the expert evidence had not been tested by TUI. The Supreme Court considered that the evidence of Professor Pennington was not illogical, incoherent or inconsistent, based on any misunderstanding of the facts, or based on any unrealistic assumptions. Nevertheless, TUI sought to criticise the evidence as incomplete in its explanations and for its failure to expressly discount on the balance of probabilities other possible causes. Importantly, TUI chose to raise such criticisms in the closing stages of the trial when it could have submitted evidence from a microbiologist of its own or at the very least have cross-examined Professor Pennington at a time when at which he could have addressed any such criticism.

The burden of proof, trial requirements, and expert testimony in civil proceedings

The Supreme Court set out a helpful explanation of the law in civil proceedings concerning the burden of proof, the requirements for a fair trial and evidence of fact and expert testimony. The principles are described to have broad application which are flexible depending on the circumstances of the case. The nub of the ruling is that to ensure that fairness prevails "*a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted*". The principle is not so rigid as to require cross examination of an expert whose evidence is manifestly unbelievable e.g., where an expert says the colour red is blue, because in those circumstances cross-examination would make no difference and the absence of cross-examination could not be said to render the trial unfair.

Parties to complex construction disputes are generally aware of the importance of expert evidence which is typically central to the determination of cases whether in TCC litigation, arbitration or adjudication. However, parties are also subject to acute commercial pressures and adjudication, the most common forum for dispute resolution in the sector, is fast paced with limited time and budget for detailed preparation of considered expert evidence. Time pressed adjudicators may see the Supreme Court's decision as a green light to accept uncontested (or lightly contested) expert evidence at face value in a process that is adversarial rather than inquisitorial. Parties to adjudication should therefore take heed to ensure that they take the time available and deploy sufficient resources to address the other party's expert evidence however speculative and flawed such evidence may appear. Ideally such evidence should be contested by an opposing expert or, at the very least, in early submissions which allow the opposing expert an opportunity to respond to the criticism.

Fair and reasonable? A landmark decision on remediation contribution orders under the BSA

Triathlon Homes LLP v-(1) SVDP (2) Get Living plc (3) EVML [2024] UKFTT 26 (PC)

This is the first substantive decision relating to remediation contribution order (RCO) under section 124 of the Building Safety Act 2022 (BSA) and provides a valuable insight on the interpretation of Section 124 of the BSA and how tribunals may approach the "fair and reasonable" tests under the BSA generally.

Background

Triathlon made an application before the First Tier Tribunal ("FTT") relating to the cost of rectifying fire related defects at East Village, the former Athletes Village for the London 2012 Olympic Games (the "Site").

The Site was owned and developed by Stratford Village Development Partnership ("SVDP"), a special purpose vehicle. Following completion of London 2012, SVDP was sold and is now a subsidiary of Get Living plc ("Get Living"). Triathlon is the long leaseholder of all or part of 5 blocks of apartments within the Site (the "Properties"). The Properties were subsequently leased to individuals.

Following the Grenfell Tragedy, East Village Management Limited ("EVML"), the management company of the Site, carried out several inspections. Those inspections identified a number of building safety defects. As a result, a waking watch was implemented while the remedial scheme was designed and carried out.

Triathlon's share of the remedial works and professional fees was estimated at £16 million (the "Remedial Works Cost"). In addition, Triathlon sought reimbursement of expenditure already incurred through service charges paid to EVML in respect of interim fire safety measures and investigative and preparatory works, in the sum of £1.058 million. Triathlon also sought an additional £153,538 in respect of service charges previously demanded by EVML, which Triathlon had not yet paid, and £613,899 in respect of costs and anticipated costs which had not yet been the subject of service charge demands (the "Additional Cost").

Triathlon applied for RCOs against SVDP (in its role as developer) and Get Living plc (in its role as the parent company of SVDP) for both the Remedial Works cost and the Additional Costs.

The Decision

The Court agreed with Triathlon and made five RCOs (one in respect of each of the Blocks affected by the fire safety issues) against SVDP and Get Living, in respect of:

Fair and reasonable? A landmark decision on remediation contribution orders under the BSA

a) £16 million to EVML in respect of the Remedial Works Cost;

b) £767,438 to EVML in respect of the costs of other remedial measures including the future servicing and decommissioning works; and

c) £1 million to Triathlon in respect of the Additional Costs.

We consider a couple of the key points to take away from this case in turn below.

An RCO can be made in relation to costs incurred before the commencement of Section 124 of the BSA (i.e., before 28 June 2022).

SVDP and Get Living argued that Section 124 could not apply to costs incurred before the enactment of the BSA because to do so would give retrospective effect to Section 124.

Triathlon argued that the intention of the BSA (and Section 124) were backward looking and that was reflected in the Parliamentary Explanatory Note which confirmed that the intention was to enable leaseholders to recover sums already paid out before enactment. Triathlon argued that it would be nonsensical to limit the scope of Section 124 by reference to the date the remedial works were done or paid for, rather than applying it generally to the defects which caused the BSA to be enacted. Therefore, it was entitled to recover costs incurred before the enactment of Section 124.

The Court agreed with Triathlon and confirmed that the intention of Section 124 was to apply to all costs incurred and included those cost incurred before 28 June 2022 (the enactment date) and that was evident from the plain express language used in Section 124 and the Parliamentary Explanatory Note. The court also noted that:

"[the BSA] provides for wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholder to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament has decided are necessary and fair"

The meaning of "just and equitable" within Section 124 of the BSA

Given the infancy of the BSA and indeed, Section 124, the test of "just and equitable" had not previously been considered by tribunals. In fact, there is little guidance at all, in the BSA or otherwise beyond stating the power to order an RCO is at the discretion of the tribunal.

In Triathlon, the Court stated that deciding what is just and equitable is to be determined according to the specific facts of each case. In this case, relevant considerations were:

a) The policy of the BSA is that the primary responsibility should fall to the developer and others who have liability to contribute may pass on that cost to the developer (para 265). Therefore, there was a strong argument that it was just and equitable to make an order against SVDP given the fact that it was the developer of each of the Blocks and was ultimately responsible for the presence of the relevant defects. This was in accordance with the hierarchy liability created under the BSA.

b) As Counsel for the Respondents recognised in his submissions; it is not an attractive proposition that the public should pay for the remedial works in circumstances where a "well-*resourced commercial entity*" could be made liable under the BSA (para 270). The fact that funding is or maybe available via the Building Safety Fund is not a "good *reason why SVDP and/or Get Living should not be subject of an RCO*" (para 276). By ordering an RCO against Get Living it would essentially guarantee the funding for necessary remedial works.

c) The BSA permits RCOs against Developers and "*those associated with developers*" and therefore an RCO against Get Living was prudent. It was also supported by the fact that SVDP relied on Get Living entirely for finance and therefore allows an RCO to reach the deepest pockets (para 266).

d) The Court did acknowledge that "*the BSA erodes and elides corporate identity and deprives it of some of its main advantages, but it does so for specific purposes within specific limits*" (para 252). A RCO can, within limited bounds, circumvent the protection a limited company or group structure is intended to be afforded where it is required to ensure leaseholders are properly protected as envisaged by the BSA.

Fair and reasonable? A landmark decision on remediation contribution orders under the BSA

e) The motivations of Triathlon (or any claimant) – argued to be escaping their only obligation to make payment - need not be considered, and the court confirmed that "*we do not need to make any findings about why it seeks these orders. Parliament has made them available, and Triathlon is entitled to take advantage of them*" (para 246). This principle coincides with the effect of paragraph 2 of Schedule 8 of the BSA, i.e. that leaseholders are fully protected against any remedial costs if the responsibility for the defects rests with the landlord or superior landlord.

f) The fact that Triathlon had possible recourse directly against third parties (by virtue of direct agreements, collateral warranties or otherwise) did not need to be considered. Section 124 is a new independent remedy and is not fault based which cannot be contracted out of by the parties. Therefore, any other potential remedies available to Triathlon should not disqualify or delay it from claiming an RCO (Para 261).

g) The intention of Parliament (and therefore the BSA) is that Triathlon should not need to become embroiled in complex, multi-handed, expensive, and lengthy litigation before it can obtain a remedy and undertake the necessary remedial works.

Further Key Points

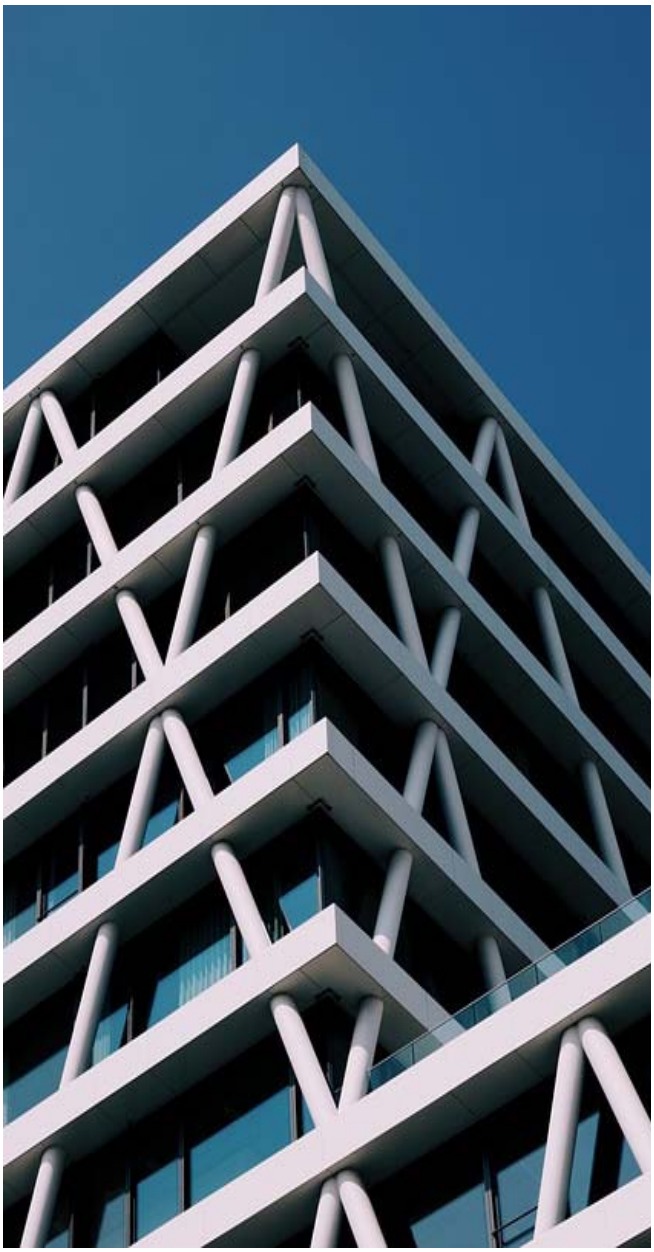
a) The case highlights that despite the complexity and significance of the case, Section 124 of the BSA allows RCOs to be made by the FTT alone and does not need to transfer to the Upper Tribunal.

b) It is noted that any interpretation of the BSA which goes away from the very purpose of the BSA (i.e., to fully protect leaseholders) would create inconsistencies in the operation of the legislation. As such, the courts will seek to give effect to the intention of the BSA.

Conclusion

The Tribunal's discretion to order an RCO is evidently wide reaching and can, in certain instances, sidestep corporate structures to ensure "*those associated with the Developer's*" are held accountable. Equally, an RCO can apply to all costs incurred and includes those costs incurred before 28 June 2022. While confirmed in the above case, neither should come as a surprise given the express wording of Section 124 of the BSA.

As to what is just and equitable, that is to be determined by the specific facts of each case. However, a developer is still considered primarily responsible, and liability is unlikely to be avoided even where the claimant/ leaseholder has alternative claims against third parties, access to the Building Safety Fund or has improper motives.



Developers are owed duties under the Defective Premises Act 1972

URS Corporation Ltd v BDW Trading Ltd (2023) (EWCA CIV 772)

The Court of Appeal decision in *URS Corporation Ltd v BDW Trading Ltd* confirms that developers may be owed duties under S.1.1 of the Defective Premises Act 1972 (DPA) and provides a useful review of the accrual of causes of action in negligence against construction professionals.

Background

The developer, BDW Trading Ltd ("BDW"), appointed URS Corporation Ltd ("URS") to provide structural designs for a residential development that was being developed by BDW (the "Development").

The last phase of the Development achieved practical completion in or around February 2008. All of the individual leasehold units were then sold subject to 200-year leases. BDW retained the freehold until its interest in the head lease was transferred at the end of 2008.

Despite BDW no longer owning a legal interest in the Development, in the wake of the Grenfell Tower disaster in 2017, BDW elected to take steps to ensure the Development was "safe". A number of structural defects were identified which were considered to pose a risk to the residents and, as a result, BDW incurred, or would incur, considerable costs remediating those defects. BDW subsequently sought to recover those costs from URS and issued a claim in negligence in the Technology and Construction Court (the "TCC") in 2019.

As a part of its defence, URS claimed that BDW did not have a proprietary interest in the Development and therefore had suffered no loss. The TCC however rejected this argument and decided that BDW's cause of action accrued no later than the date of practical completion (at the latest February 2008) and the losses were recoverable because BDW did hold a proprietary interest at that point in time.

URS appealed and permission was granted (the "First Appeal").

The Building Safety Act 2022 (the BSA)

Shortly after permission for URS to appeal was granted, the BSA came into force and Section 135 extended the limitation period for claims under the DPA.

BDW made an application to the TCC seeking permission to amend its pleadings to include a claim under section 1.1 of the DPA and a claim under section 1(1) of the Civil Liability (Contribution) Act 1978 ("CLCA"). The Court gave permission to BDW to amend its claim accordingly and URS subsequently appealed (the "Second Appeal").

First Appeal: the Grounds

The basis of URS's appeal was three fold:

a) By the time the defects became known, BDW no longer had any proprietary interest in Development. Therefore, URS maintained that BDW did not suffer any damage (and had in fact opted to incur the cost of remediating the defects) and that the losses were outside the scope of URS's duty of care (which was limited to risk of harm to BDW's proprietary interests which ceased in 2008).

b) The losses claimed by BDW were not recoverable because third party claims were statute barred (which is a position predicated on the cause of action accruing in 2019 and not as per the first instance judge's decision, at PC at the very latest).

c) On the proviso that URS's claim succeeds on the first two grounds, the previous trial judge was wrong to not have struck out the claim for negligence.

Appeal Dismissed

The Court of Appeal dismissed URS's appeal on the following grounds:

a) The risk of harm to BDW (which was the scope of URS's duty) was the risk of economic loss that would be caused by URS's defective design of the Development (i.e. where there are resulting structural deficiencies those deficiencies would need to be remedied). This was considered a standard duty imposed on a design professional, co-existent with that professional's contractual obligations.

   Under a contract, it was well established that a builder despite being under no obligation to do so, might nonetheless successfully claim his costs of going back to carry out repairs. There was no reason

Developers are owed duties under the Defective Premises Act 1972

why the outcome should be any different in a negligence action for economic loss.

b) Where design deficiencies did not cause physical damage, and where such claims were properly to be regarded as claims for economic loss, it was clear that the cause of action in negligence accrued at the latest at practical completion. There was no need for there to be any "*damaging consequences of the defect*". In any event, the Court held that there were damaging consequences of the defect: the development was unsafe.

Second Appeal: the Grounds

The basis of URS's Second Appeal was fivefold:

a) The first appeal judge should have determined the points of law as opposed to deciding that they were arguable.

b) The retrospectivity of S.135 of the BSA could not apply to proceedings ongoing at the point of enactment/coming into force.

c) A developer owed duties under the DPA, it was not itself owed any duty.

d) BDW had suffered no loss under the DPA because it no longer owned the properties when the defects were discovered.

e) No claim could be made under the CLCA because no claim had first been made, or intimated, by the owners of the properties forming part of the Development so that there was no legal right to bring a claim under the CLCA.

Appeal Dismissed

The Court of Appeal dismissed URS's appeal and could find no fault with the judges' approach from the first appeal. On the other grounds:

a) It was clear that the relevant wording of the BSA was intended to have retrospective effect; "*is to be treated as always having been in force*" could not be clearer. There was no carve-out for ongoing proceedings, whereas there were other carve-outs. If that had been intended, other subsections of S.135 BSA would need to be redrafted.

b) It was clear on the plain words of S.1(1)(a) of the DPA that it applied to "*Dwellings provided to the order of*" BDW and so BDW was owed a duty pursuant to S.1(1) of the DPA by URS. The submission that duties were owed only to "lay purchasers", rather than companies or commercial organisations, was unsound and was contrary to the express wording.

c) Damages were indeed recoverable. Recoverability of damages under the DPA is not linked to or limited by property ownership and following the decision in *Bayoumi* BDW was entitled to recover "*such damage as he may prove he suffered by reason of the wording of section 1*".

d) There was nothing in the wording of S.1(1) of the CLCA to suggest that the making or intimation of a claim was a condition precedent to the bringing of a claim in contribution.

Summary

This case focused on the duties owed by professionals but also highlighted the fact that both contractors and sub-contractors also owe a similar duty. Following the adoption of Murphy, developers have typically been unable to claim against sub-contractors. However, and despite being obiter, Coulson LJ suggested that a developer may be a person to whom a duty is owed under S.1(1)(a) of the DPA. The repercussions of this could be significant, and there is a question as to how far this extends – for example, do sub-contractors owe contractors a DPA duty?

This case also confirms that S.6(3) of the DPA may not be excluded and will therefore override any contractual limitation or exclusion provisions. Coulson LJ noted that S.6(3) does not have a draconian effect. If and to the extent Coulson LJ refers to the availability of rights of contribution, this will depend on the solvency of other parties.

Where there is no physical damage, the cause of action in negligence accrues by the date of practical completion and where there is physical damage, it accrues at the date of damage. However, this does not address the question as to what happens where physical damage occurs after practical completion and whether the cause of action accrues at the date of practical completion or when the damage occurs.

With thanks to Trainee Solicitor Caitlin Reed, co-author of this article.

Limitation and more

Lendlease Construction (Europe) Limited v AECOM Limited [2023] EWHC 2620 (TCC)

The TCC judgment in this case, given by Justice Eyre, dealt with a number of key issues which are often seen in construction claims and contracts. We look at some of the issues below.

Background

The dispute related to the Oncology Centre at St James's University Hospital in Leeds which had been delivered under the Government's Private Finance Initiative. Leeds Teaching Hospitals NHS Trust (the "Trust") entered into a project agreement with St James's Oncology SPC Ltd ("Project Co") who in turn entered into a design and build contract with Lendlease Construction (Europe) Limited ("Lendlease"). Lendlease appointed AECOM Limited ("AECOM") to provide mechanical and electrical engineering services.

Defects were discovered and two claims were brought against Lendlease: one by Project Co as employer and one by Engie, who had been engaged by Project Co as estates maintenance contractor. As a result of the claims not only was a settlement agreement entered into under which Lendlease agreed to make payment in respect of various alleged defects, but also a judgment was handed down in *St James's Oncology SPC LTD v Lendlease Construction (Europe) Ltd [2022] [2022] EWHC 2504 (TCC)* which found that various defects were in existence and Lendlease was liable.

The claim and issues

Accordingly, Lendlease issued proceedings against AECOM to pass down liability in respect of matters which it contends were the consequence of AECOM's breaches.

A number of issues were considered with the following being some of those of particular note:

a) **Execution as a deed:** The two signatories who signed the AECOM appointment on behalf of AECOM were not statutory directors. They also signed it in the wrong place (signing in the section where a common seal was envisaged to be affixed). Accordingly, did the appointment still operate as a deed?

b) **12 year contractual limitation period:** Was there wording in the AECOM appointment which

expressly contracted out of the limitation period under the Limitation Act 1980?

c) **Continuing duty to review, advise or warn:** Was AECOM under a continuing duty to review, advise or warn?

d) **Accrual of cause of action:** When does the cause of action for defective design accrue?

e) **Entitlement to recover upstream judgment sum:** If AECOM's breach was proven as being the cause of Lendlease's liability to Project Co, then should the amount awarded in the "upstream" proceedings be taken as the measure of loss? Or, do all elements of the claim, including the amount of loss, need to be proven?

f) **Entitlement to recover settlement sums:** Did Lendlease satisfy the requirements for the sums paid in settlement to be recoverable against AECOM?

g) **Reliance on others:** Is it possible to discharge a duty to exercise reasonable skill and care by relying on the work of a third party specialist?

Decision

Mr Justice Eyre dismissed Lendlease's claim against AECOM. In respect of the issues mentioned above, the following points are of general interest:

a) **Execution as a deed:** Although the two signatories were merely purporting to properly execute the AECOM appointment as a deed with authority, AECOM was estopped from contending that the signatories had no authority to do so. This is because a contract can be executed as a deed even where it is not signed by statutory directors (as here), if the signatories hold themselves out as having authority to sign. In any event, on the facts, AECOM had represented that the signatories had authority to enter into the appointment and Lendlease had relied on this representation.

b) **12 year contractual limitation period:** As decided in other cases, the wording did not oust the limitation period under the Limitation Act 1980. Instead, it was a contractual long-stop date beyond which no further proceedings could be commenced. It was not an extension of the limitation period as specific extension wording is required.

c) **Continuing duty to review, advise or warn:** A continual duty depends on the wording of the contract in question. However, where the contractual obligation is solely that of providing a design, it is unlikely to impose an obligation on the designer to review the design after it has been supplied. In contrast, where there are duties going beyond the provision of a design, there may be an obligation to review the design up to the time it is incorporated into the works. In that event, the duty is to review, only if a *"reasonably competent professional"* would do so.

d) **Accrual of cause of action:** In claims for breach of contract the cause of action runs from the date of the breach. In claims in negligence based on defects in a design of construction works, the cause of action accrues when the negligence first causes damage, which should be the date on which the defective design was incorporated into the relevant building.

e) **Entitlement to recover upstream judgment sum:** If there is a failure to establish liability for all the same defects in both the downstream and upstream disputes, then the upstream judgment cannot be said to be conclusive as to the amount which is payable under the downstream dispute. The burden falls on the claimant to show that a particular amount of the sum awarded by the upstream judgment was caused by the defect(s) for which the defendant is responsible.

f) **Entitlement to recover settlement sums:** The claimant has to show: a breach by the defendant caused loss which was the subject matter of the upstream settlement; that the claimant had acted reasonably in settling the claim; and that the amount paid in settlement was a reasonable sum in respect of the breach in question.

Reliance on others: A duty of reasonable skill and care can be discharged by reliance on others where a third party specialist is engaged. In that event, it is reasonable to not expect to duplicate the work done by that specialist. In other words, construction professionals can discharge their duty to take reasonable skill and care by relying on the advice and/or the design of specialists, provided that such reliance is reasonable; and arguably, a party is entitled to assume that the queries it raises would be properly addressed by that specialist.

Recovery of professional fees and wasted costs

Jenni Glover & Littleton Glover v Fluid Structural Engineers and Technical Designers Ltd [2023] EWHC 3219 (TCC)

In this case the Technology and Construction Court (TCC) was required to consider a professional's scope of duty and the circumstances in which a party may claim repayment of a professional's fees. The TCC refused to strike out a claim against a structural engineer for wasted costs and repayment of fees.

Background

Jenni and Littleton Glover (the "Claimant") appointed Fluid Structural Engineers and Technical Designers Limited (the "Defendant") to provide structural and civil engineering services in respect of the refurbishment of their residential property (the "Property") which included the construction of a new basement, the construction of a loft space at roof level and other significant works (the "Project").

Over the course of the Project, damage and cracking was caused to the Property and adjoining properties on either side of the Property. The cracking led to the works being paused and recommenced on a few occasions and also led to claims being lodged against the Claimant from the neighbouring property owners. The works should have been completed by February 2018 but were only completed on 6 May 2021.

The claim

The Claimant alleged that the Defendant had breached its duty of care to them by failing to make site visits often enough and failing adequately to report on the works. They claimed that, in consequence, they did not have a clear picture of how the works were being performed, which caused them to incur investigation and legal costs instead of simply making an insurance claim.

The Claimant sought recovery under two heads of loss:

a) **Wasted costs —** these are the costs that the Claimant says were only incurred due to inadequate inspections and record keeping. of around £120,000, including solicitors' and experts' fees, the costs of opening-up works, and costs liability resulting from discontinued proceedings, incurred and wasted as a result of the Defendant's breaches.

b) **Repayment of fees —** comprising claims for repayment of parts of the Defendant's fees (totalling around £15,000), relating to its inspection and recording services

The Defendant's application

The Defendant applied for strike-out or summary judgment on the claim arguing that:

a) **Wasted costs —** these fell outside the scope of the Defendant's duty as they related to protecting the Claimant from costs/losses that may be incurred in dealing with litigation, and that nothing in the Defendant's appointment stated that reports and information could be relied upon by the Claimant to address the issues faced.

b) **Repayment of fees —** the Defendant alleged that the claimants' claim could only be made out where the professional's services were not provided at all or were worthless and that the Claimant was unable to establish that on the facts.

The TCC decision

The TCC refused the Defendant's application on the following basis.

a) **Wasted costs:** the TCC rejected the Defendant's submission that a clear line should be drawn between "conventional" types of loss recoverable from structural engineers (i.e. the cost of remedying defective work) and loss comprising legal and disputes-related costs. In the TCC's view, the question of what loss may be recoverable from a structural engineer was "*far more nuanced and fact-sensitive than that*". The court held that it was "*at least arguable that, objectively speaking, Fluid [the Defendant] was or should have been aware that the purposes of its performance of its duties in the construction phase extended to protecting the claimants' interests as a whole in relation to the consequences of the risk of damage to adjoining properties from the works*". Indeed, these duties would have required the Defendant to make site visits not just to monitor the works, but so that claims by the owners of neighbouring properties, or claims by the Claimant against those involved on the project, could be investigated.

b) **Repayment of fees:** In the TCC's view, a difficulty faced by the Claimant was that, on review of the Defendant's appointment agreement and invoices, it was not precisely clear how each part of its fees was broken down. It may, therefore, not be enough for the claimant to show that the discrete items of the Defendant's services, which formed the basis of its claim, were worthless: these might only have been elements within wider parts of the Defendant's services, which were overall substantially performed. However, the TCC concluded that it could not dismiss the repayment claim at this stage. This was because:

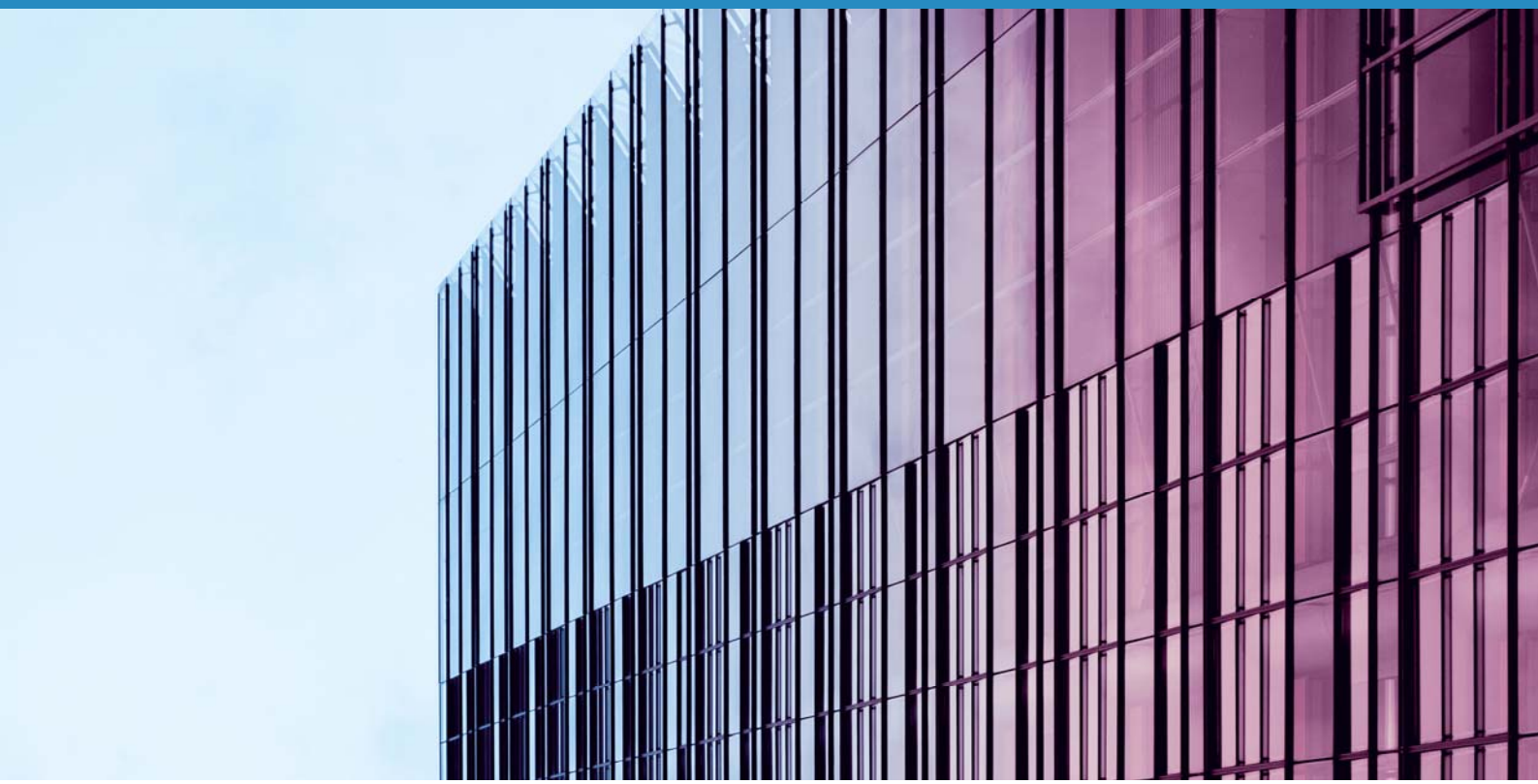
   i) there was no detailed analysis in the authorities as to the legal basis on which a professional's fees might be reclaimed. It therefore remained open to question whether it was an "absolute pre-condition" of such a claim to show failure of the whole or a severable part of the services, or whether it might be enough to show the failure of discrete elements of the services to which a valuation could be attributed at trial; and

   ii) on review of the parties witness evidence and the report of a single joint expert, it was "*at least possible*" that the Claimant would be able to show that the Defendant's inspection and recording services were so deficient that they were worthless.

Comment

The case will now proceed to trial where we await commentary from the TCC on the nature and extent of the losses for which a structural engineer may be liable.

The Sky is the limit – Clarification of scope of CAR cover for third party insureds



Sky UK Limited and Mace Limited v Riverstone Managing Agency Limited and others [2023] EWHC 1207

Background

In *Sky UK Limited and Mace Limited v Riverstone Managing Agency Limited and others* [2023] EWHC 1207 (Comm) the Commercial Court considered the scope of cover available under a construction all risk policy ("the Policy"). Key issues included the period of cover under Policy, the meaning of '*physical damage'*, the number of applicable deductibles and the quantum of sums recoverable under the Policy.

The case concerned the failure of the roof of Sky's global headquarters in West London ("Sky Central") spanning 41,000 square meters and housing up to 4,000 of Sky's employees. The building was constructed by Mace under a JCT Design and Build Contract 2011 ("Construction Contract") and achieved practical completion on 4 April 2016 ("PC"). The roof, covering 16,000 square metres and said to be the largest flat timber roof in Europe, consists of a series of glue laminated timber beans known as Glulams on which 472 cassettes sit forming a secondary roof structure.

Following installation between December 2014 and May 2015, the cassettes were exposed to substantial rainfall prior to the completion of the permanent waterproofing installation. As no temporary weather protection was provided during this period rainwater entered the cassettes. Drying out was attempted between April 2015 and June 2015 and, again, between August 2015 and April 2016. When PC was awarded on 4 April 2016, the issue remained unresolved. Sky and Mace contended that the principle means of the water ingress was attributable to the way the gutters were constructed, with a gap created underneath the underlay without any protection from a temporary roof, described as a "*fundamental flaw*", as well as other means such as the holes in the cassettes.

Sky and Mace sought an indemnity under the Policy for the cost of remediating the roof. In this article we look at the extent to which Mace, as a third party insured, was determined to benefit from the cover under the Policy.

The Sky is the limit – Clarification of scope of CAR cover for third party insureds

The scope of cover under the Policy

Unsurprisingly, following a line of authorities referred to most recently in the decision of Eyre J in *Rugby Football Union v Clark Smith Partnership [2022] EWHC 956 (TCC); [2022] BLR 381* (a decision approved by the Court of Appeal following the conclusion of the Sky trial), the Judge reiterated the established principle that where a principal insured (in this case Sky) concludes an insurance policy with an insurer on behalf of a third party insured (in this case Mace) the extent of the latter's interest in the policy is determined having regard to "*the intention of the parties to be gathered from the terms of the Policy and the terms of any contract between the contractual assured (here Sky) and the relevant third party insured (here Mace) concerning in particular the scope of the cover it had been agreed as between the contractual insured and the third party insured would be provided for the benefit of the third party insured*".

Whilst Sky, as the principal insured, had the benefit of cover for the full period of insurance (the construction period plus a further 12 months maintenance period following PC) the Judge determined in light of the intentions of Sky and Mace as set out in the Construction Contract that Mace's interest ended on PC after which time it was liable to indemnify Sky in respect of any damage to Sky Central to the extent it was attributable to its negligence, breach of statutory duty or omission or default. One consequence of this is that for damage arising due to fault on the part of Mace in the maintenance period, Sky could potentially be indemnified under the Policy but as Mace would not be so entitled the insurers would have rights to bring a subrogated recovery action against Mace for such damage.

Presumably to overcome the principle that the extent of its interest under the Policy should be determined by the intention of the parties as set out in the Construction Contract, Mace sought to argue that as a named insured it should be distinguished from and treated differently from a third party insured that is not named as an insured under a policy but which falls within a defined class of persons insured such as "subcontractors". The Judge rejected that submission as "*unprincipled and unsupported by the authorities*". The Judge referred to the clear comments of Eyre J addressing the issue in the *Rugby Football Union v Clark Smith Partnership* case referred to above.

Accordingly the Judge accepted the insurers submission that, "*a person who is named as an insured but who is not otherwise a party to the insurance contract does not become a party to the contract simply by reason of having been named in it" and therefore "that I should approach an assessment of the scope of cover by reference to the contents of the construction contract*."

A novel argument raised by the insurers based on the terms of the Construction Contract was that Mace was not insured in respect of remedial work carried out after PC even in respect of damage occurring prior to that event. The Judge robustly rejected that submission as being inconsistent with the overall structure of the contractual and insurance arrangements in place being to bar recourse against Mace for damage occurring prior to PC, irrespective of when or whether it is rectified. The Judge stated that, "*In my judgment if the parties had intended Mace to be covered only in respect of remedial work carried out by it prior to Practical Completion, the parties could and would have used clear express words in the construction contract to make that clear*."

This is the latest in a line of recent cases which have reiterated the principle (endorsed by the Court of Appeal in *FM Conway Limited v The Rugby Football Union [2023] EWCA Cid 418*) that the scope of the cover available to third parties who are insured as a consequence of agreement between an insurer and a principal insured is determined by the parties intentions. The starting point for determining such intentions is the contract between the principal insured and the third party rather than the Policy.

Contractors all risks insurance – Application of Deductibles

Sky UK Limited and Mace Limited v Riverstone Managing Agency Limited and others [2023] EWHC 1207

A common battleground in insurance coverage disputes under all risks insurance is the number of applicable deductibles to any claim. In a recent case the Commercial Court has provided guidance as to the courts approach to such issues.

Background

In the preceding article on this case we deal with the Commercial Courts judgment to the extent that it addressed the scope of cover available to a third party insured under a construction all risk policy ("the Policy"). A further key issue addressed by the Judge was the number of deductibles applying to Sky and Mace's claim for an indemnity for the remedial works to the defective roof at Sky Central, and we comment on this below.

The roof, covering 16,000 square metres and said to be the largest flat timber roof in Europe, consists of a series of glue laminated timber beans known as Glulams on which 472 cassettes sit forming a secondary roof structure. The roof was damaged and required replacement due to exposure to substantial rainfall prior to the completion of the permanent waterproofing installation. As no temporary weather protection was provided during this period rainwater entered the cassettes. Sky and Mace contended that the principal means of the water ingress was attributable to the way the gutters were constructed, with a gap created underneath the underlay without any protection from a temporary roof, described as a "*fundamental flaw*", as well as other means such as the holes in the cassettes.

Applicable Deductibles

The insurers argued that a “Retained Liability” under the Policy of £150,000 applied to the replacement of each cassette separately (which for all 472 cassettes would equate to £70.8 million), whereas Sky and Mace argued there was one deductible of £150,000 to be applied to the entire claim for remedial works to the roof as a whole. Sky and Mace succeeded in their argument that only one deductible applies.

As is fairly standard in relation to projects such as Sky Central the Policy incorporated standard form exclusions for damage caused by defects in design, plan, specification, materials or workmanship but which included write backs for differing degrees of cover. In this case, the applicable standard exclusion was Design Exclusion 5 the effect of which the Judge described as follows:

> "*Although the language is convoluted, the effect of the provision is reasonably clear: if any Property Insured is defective in [design plan specification materials or workmanship], the Policy will not respond unless loss or damage to the defective Property Insured is caused by that defect, in which case the Policy will respond but subject to a more limited exclusion from recoverability of the additional cost of and incidental to any improvements to the original design plan specification materials or workmanship of the relevant defective Property Insured*".

The description of the wording as "convoluted" may resonate with practitioners who have had to grapple with such policy wordings! Reflecting the wide nature of the cover under DE5 a special deductible of "*GBP 150,000* ***any one event***" applied. In all other cases a deductible of £10,000 each and every loss applied.

Whilst there was common ground between the parties that the damage to the cassettes had been caused by water ingress, they disputed "*how, why and when the water that caused the damage entered the cassettes*" and the parties technical experts disagreed as to the nature of the defects giving rise to water ingress. However, a key part of Sky and Mace's position was that the water ingress would not have occurred at all had a temporary roof system been in place pending the installation of a permanent waterproof membrane across the affected areas and that this was the "event" giving rise to the damage. The Insurers appeared to dispute this on two bases namely that i) a decision or plan (in this case not to use a temporary roof) could not amount to an "event" and ii) that the nature of the defects giving rise to the water ingress mean that the temporary roof would not have prevented it.

The Judge rejected both points. In terms of the defects giving rise to the ingress the Judge was not persuaded by the Insurers' expert whose opinions were described as "*theoretical possibilities*" by Sky and Mace and

Contractors all risks insurance – Application of Deductibles

"*implausible*" by the Judge. This was in contrast to the approach of Sky and Mace's expert who identified causes supported by "*intrusive investigations*" and testing and the Judge found the explanation given by the expert to be convincing. Furthermore, the water ingress caused by the issues accepted by the Judge would not have occurred had the temporary roof been in place.

Regarding whether the decision not to install a temporary roof (that such a roof was required was not seriously in dispute) could be an event meaning that only one deductible of £150,000 would apply was also determined in Sky and Mace's favour.

The Judge referred to *Axa Reinsurance (UK) Plc v Field [1996] 1 WLR 1026* which defined "event" in an insurance context as meaning something that happens at a particular time, at a particular place and in a particular way. That covered a decision with regard to the use or not of temporary roofing. On the basis that the Judge found that but for the decision not to utilise the temporary roof the damage would not have occurred during the period of insurance he had no difficulty in determining that the decision satisfied the unities of time, place and cause required for an event and that it was the event causing the loss. Therefore, one deductible of £150,0000 applied.

This was clearly a significant decision on the basis that the application of separate deductibles to each cassette would have obliterated the quantum of the claim.

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