Reports from the courts

Our regular round up of court decisions of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who look at a dispute over whether a client had verbally agreed to waive liquidated damages; and a rejection of a claim to strike out an action that confirms the high threshold the courts set for such claims.

Mansion Place Limited v Fox Industrial Services Limited

[2021] EWHC 2972; Eyre J

Mansion Place Limited (MPL), a property developer and special purpose vehicle created for the purpose of refurbishing and extending a student accommodation in Nottingham, engaged Fox Industrial Services Limited (FIS), a contractor, to undertake the works pursuant to an amended JCT Design and Build Contract (2016 edition) dated 19 February 2020 (the Contract).

Clause 2.29 of the Contract provided for the payment or allowance of liquidated damages at the rates set out in the Contract Particulars.

There were delays in the performance of the works. The parties disagreed as to the cause of such delays – FIS considered that the delays were the result of the Covid-19 pandemic and because MPL failed to give timely possession of the site, whereas MPL alleged that the delays were a result of FIS's failure to commit sufficient labour and resources to undertake the works.

On 22 October 2020, FIS served Interim Payment Application 10 in the sum of £367,103.44. On 13 November 2020, MPL served a pay less notice and a number of notices of intention to deduct liquidated damages. FIS disputed MPL's entitlement to make such deductions and referred the dispute to adjudication.

FIS argued that during a telephone conversation between the parties on 14 October 2020, MPL agreed to forego any entitlement to liquidated damages and in return FIS agreed to forego any right to claim payment for loss and expense as a result of the delay in the works. MPL denied the existence of any such agreement. Alternatively, MPL argued that, to the extent that reference was made to it foregoing its right to claim liquidated damages, this was a waiver which it was entitled to and did revoke. On 11 January 2021, the adjudicator decided that the telephone conversation had resulted in a binding agreement whereby MPL abandoned its right to claim or deduct liquidated damages such that the sum of £367,103.44 plus interest was due to FIS.

MPL subsequently commenced proceedings seeking a declaration that no such agreement was made on 14 October 2020.

Decision

Eyre J found that MPL had agreed to forego its entitlement to liquidated damages under the Contract.

Eyre J was able to make a finding as to the context of the conversation on the balance of probabilities. Eyre J noted that there was no need to make a finding as to the actual words used and whether they amounted to an agreement made with the requisite intention. Eyre J was satisfied that both parties wished 'to move forward to a rapid completion of the project' and 'to draw a line under their respective legal claims and to progress the works without regard to those rights'.

Eyre J further noted that MPL did not at the time refute FIS's letter dated 16 November 2020 in which it confirmed its understanding that the parties had reached an agreement on 14 October 2020. Eyre J found the explanation that MPL did not wish to antagonise Fox as 'unpersuasive'.

Eyre J also considered the fact that MPL's internal documents showed that it was worried that FIS would leave the site or deliberately delay the works against the background of the Covid-19 pandemic and the impact on construction work and noted that, in those circumstances, 'the dropping of the liquidated damages claim is not necessarily as surprising an act as it might be in other circumstances and could be seen as

having been regarded by [MPL] as a price worth paying to ensure the project continued to move to completion'.

Comment

This case is a reminder that even informal conversations can be capable of forming binding agreements – but for the oral agreement, MPL would have been entitled to liquidated damages of c.£370,000. Parties should take care to ensure that agreements are not entered into inadvertently and, wherever possible, should confirm their understanding of the outcome of conversations, meetings, etc. in writing as soon as possible. It demonstrates the importance of objecting promptly in circumstances where the other party claims that an agreement has been reached.

Crest Nicholson Operations Ltd and Crest Nicholson (South West) Ltd v Grafik Architects Ltd and NHBC Building Control Services Ltd

[2021] EWHC 2948 (TCC); HHJ Watson

Crest Nicholson Operations Limited and Crest Nicholson (South West) Limited (Crest), the developers of a residential apartment building in Portishead, engaged Grafik Architects Ltd (Grafik) to design the development and NHBC Building Control Services Ltd (the NHBC) to carry out the services of an Approved Inspector.

On 20 May 2021, Crest served Particulars of Claim on Grafik and the NHBC alleging a range of fire safety defects, including the incorporation of combustible phenolic insulation and allegedly non-compliant Parklex cladding, together with the defective design and installation of the cavity and fire barriers. Crest alleged that the NHBC, in their capacity as Approved Inspector, failed to identify defects which were non-compliant with Building Regulations at the time.

In July 2021, the NHBC applied to strike out Crest's claim pursuant to CPR 3.4(2) on the basis that the Particulars of Claim presented no reasonable grounds for bringing the claim and were an abuse of the court's process. The application set out two arguments for strike out: (i) the Particulars of Claim did not sufficiently particularise the alleged breaches of duty to enable the NHBC to understand the case; and (ii) the claim was not supported by expert evidence. The NHBC submitted that, as per ***Pantelli Associates Ltd v Corporate City Developments Ltd [2011] PNLR 198*** (***Pantelli***) (in which Coulson J found that 'generalised and generic allegations' did not meet the standards required under CPR 16.4(1) to form 'a proper pleading of a case of professional negligence'), Crest had failed to set out the factual basis of its claim. In relation to the alleged lack of expert evidence, the NHBC referenced Coulson J's finding in ***Pantelli*** that 'it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise'.

Decision

HHJ Watson dismissed NHBC's application to strike out the claim.

HHJ Watson held that, although the Particulars of Claim would benefit from more detailed particulars on some issues, they clearly disclosed a cause of action and reasonable grounds for bringing the claim. Regarding the lack of expert evidence, HHJ Watson held that the decision in ***Pantelli*** 'does not lay down an immutable rule of practice'. It was found that Crest had the benefit of provisional expert advice and had 'not indicated it does not need expert evidence or that it does not intend to serve it in due course'.

HHJ Watson noted that the NHBC should have instead made a Part 18 request for further information and, in the event that that request was not adequately answered, the NHBC could have made an application for an order that the request be answered.

Comment

This case reaffirms the high threshold for strike out. Importantly, HHJ Watson referenced the fact that similar claims were being made in the wake of the Grenfell Tower disaster – he said that whilst that did not absolve Crest of the need to explain its case, the NHBC's ability to understand the case it has to meet 'has to be viewed in the context of the very high level of awareness in the construction industry' of the issues in question. This means that strike out on the basis of a lack of particulars may be harder to obtain. **CL**