Reports from the courts

Our regular round up of the court decisions of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who look at a dispute between a houseowner and a builder that highlights the importance of parties ensuring strict compliance with the payment and termination provisions in contracts; and another where the decision stands as a reminder of the importance of having a clear contract in writing and for careful and timely invoicing.

The Sky's The Limit Transformations Ltd v Dr Mohamed Mirza

[2022] EWHC 29 (TCC); HHJ Davies

In or around November 2016, Dr Mirza, the defendant houseowner, entered into a fixed-price Federation of Master Builders standard form contract with The Sky's The Limit Transformations Ltd (STLT), a building contractor, to undertake alterations to his residential property in Bolton (the Contract).

Clause 2.1.3 of the Contract stated: 'You must pay us within [ ] days [...] of receiving an interim bill'. Clause 2.1.4 of the Contract provided: 'Within five days of receiving any interim bill [...] you must give us written notice showing how much you plan to pay [...] how you worked out the amount that you are planning to pay'.

On 14 November 2016, STLT sent a payment plan to Dr Mirza which 'provided for a monthly invoice to include for the work done at each milestone'. STLT confirmed that this was agreed on the basis that the monthly invoices would be 'paid prompt'.

On Monday, 27 February 2017, STLT issued an invoice dated Friday, 3 March 2017, in the sum of £64,017.24 (the Invoice), which STLT explained covered work to be completed by the Friday. STLT requested payment 'for Friday or by Monday 6 March (as this is 7 days' notice from today'. On 6 March 2017, Dr Mirza paid some but not all the Invoice and gave an explanation in relation to only some of the sums claimed (the Payment Notice).

STLT threatened to suspend work and subsequently left site on 21 March 2017. STLT's solicitor emailed Dr Mirza that day stating that 'in the absence of a valid 5 day payment notice the full amount was payable but that neither this nor the reduced sum which the claimant had said it would accept had been paid". Dr Mirza did not respond. STLT terminated the Contract on 11 April 2017.

In December 2019, STLT commenced proceedings seeking payment of outstanding invoices and damages for loss of profit on the remaining works. Dr Mirza argued that no sums were due to STLT based on the true entitlement to payment in respect of work done, the cost of completing the works, and the cost of remedying alleged defects.

Decision

HHJ Davies held that the Payment Notice was ineffective as it was two days late. HHJ Davies therefore concluded that 'the defendant has no answer to the termination based on non-payment of interim invoice 4', notwithstanding that the Invoice was overstated:

> The defendant's obligation was to pay what was claimed, since he had failed to give a timely payment or payless notice, and then to address the true position either in subsequent interim valuations or via the final account and, if necessary, by litigation to recover any overpayment.

HHJ Davies calculated that the final account valuation came to £120,411.10. It was common ground that Dr Mirza had paid £144,213.76 pre-termination. HHJ Davies held that no further sums were due to STLT or to Dr Mirza in the absence of a counterclaim.

Comment

This decision is a reminder of the courts' robust approach to the 'pay now, argue later' principle in the *Construction Act 1996*. It also emphasises that parties should ensure strict compliance with their

contracts, particularly payment and termination provisions.

HHJ Davies also lamented the 'time, effort, stress and cost of the whole process' and set out his proposals to deal with low-value residential building disputes. Parties are therefore reminded to look to resolve disputes through alternative dispute resolution before proceeding to court at potentially disproportionate cost.

Hirst & Anor v Dunbar & Ors

[2022] EWHC 41 (TCC); Eyre J

In October 2011, Hirst & Anor (the Claimants) undertook works at a development site in Bradford (the Site). The First Defendant was a director of and shareholder in the Second and Third Defendants who were a vehicle for the purchase and ownership of properties and engaged in the performance of construction work respectively.

On 4 October 2011, the Site was acquired by Anlysse Enterprise Corp (Anlysse) for £1.05m. The Defendants provided £990,000 of the funds used by Anlysse to purchase the Site.

In late-2011, the First Defendant provided the Claimants with a Feasibility Pack to consider whether the works could be performed for less than the amounts stated in the Feasibility Pack.

On 12 April 2012, the Site was transferred from Anlysse to the Second Defendant.

The Works were deemed complete on 4 December 2012.

On 6 March 2014, the Claimants made a demand for payment from the First Defendant 'in the sum of £476,886.29 less monies owed to you' (the Demand). Further correspondence took place between the parties but no payment was forthcoming. On 17 October 2018, the Claimants wrote to the Second Defendant stating that 'we jointly undertook works to [the Site] [...] ultimately we worked for you as a contractor under your instruction'.

On 2 August 2019, the Claimants issued proceedings against the Defendants. The Claimants alleged that the works were performed pursuant to an oral contract, or alternatively a contract arising by conduct, whereby they were engaged by the Defendants to undertake the works on the understanding that the Claimants would be paid a reasonable sum for the value of the Works.

The Defendants' position was that the Claimants performed the works at their own risk to improve the value of the Site and for their own benefit as potential purchaser. The Defendants further argued that the Claimants' claim was statute-barred with the alleged cause of action having accrued at the latest in December 2012.

The Claimants asserted that the Contract was subject to the Scheme for Construction Contracts (the Scheme) such that time did not begin to run until five days after the Demand such that proceedings were issued in time.

Decision

Eyre J dismissed the Claimants' claim. Eyre J held that the alleged contract did not apply to the works and that the claim was statute-barred in any event.

Eyre J found that the Third Defendant undertook the groundworks at the Claimants' direction – the Claimants were not therefore engaged by the Defendants to perform the Works but did so because the Claimants believed that they would be able to purchase the Site and so would benefit from the performance of the works. The Claimants were ultimately unable to raise the funds to purchase the Site and so lost the benefit of the works as a consequence of the risk in undertaking them before acquiring the Site.

Whilst academic, insofar as limitation was concerned, Eyre J found that the Scheme did apply, although that would not have assisted the Claimants. Eyre J explained that the cause of action is the right to payment of a reasonable sum for the Works – the only element which is needed for that cause of action is the completion of works. Eyre J emphasised that '[t]here is a difference between a provision which gives rise to an entitlement or right to payment and one which identifies when payment is due'.

Comment

The decision is a reminder of the importance of having a clear contract in writing and for careful and timely invoicing. It also confirms that, whilst the Scheme provides a mechanism for identifying when payment is due, it does not determine the accrual of a cause of action. Parties are advised to adopt a cautious approach to limitation and to keep contemporaneous and accurate records. **CL**