

Reports from the courts

Our latest round up of the court decisions of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who examine a case that reinforces the courts' robust approach to adjudication enforcement, and highlights the importance of compliance with the immediate payment obligation where the requisite notices have not been served; and a fire safety related case where the decision contrasts with a recent claimant-friendly decision.

BexHeat Limited v Essex Services Group Limited [2022] EWHC 936 (TCC); O'Farrell J

On 8 October 2019, Essex Services Group Limited (ESG) engaged BexHeat Limited (BHL) as sub-sub-contractor to undertake plumbing works for the construction of a residential/extra care facility (the Contract). ESG was engaged as sub-contractor for the MEP works.

Clause 30 of the Contract provided:

30.2 The Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator's award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor [...].

30.3 If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another.

On 19 July 2021, BHL submitted Interim Application 22 (IA 22) in the gross sum of £1,832,071.87 for the valuation period to 31 July 2021 and sought a net payment of £678,885.78. On 13 August 2021, ESG issued a Pay Less Notice with its valuation of £1,170,729.19 such that a net sum of £4,808.44 was due to BHL.

On 18 August 2021, BHL commenced the First Adjudication, seeking a declaration that the true value of IA 22 was £2,010,121.83 such that a net payment of £797,423.01 was due to BHL. ESG argued that the true value of IA 22 was £8,740.53 such that no further payment was due under IA 22. The adjudicator decided that the true value of IA 22 was £1,319,830.61 such that BHL was entitled to payment of £141,646.35 (the First Award).

On 17 August 2021, one day before commence-

ment of the First Adjudication, BHL issued Interim Application 23 (IA 23) in the gross sum of £2,010,121.74 for the valuation period to 31 August 2021 and sought a net payment of £847,675.97. ESG failed to issue its purported Pay Less Notice in time such that it was invalid. ESG failed to make payment in respect of IA 23.

On 18 October 2021, BHL commenced the Second Adjudication, seeking £706,029.70 as the notified sum under IA 23 taking into account ESG's payment under IA 22. The adjudicator decided that BHL was entitled to payment of £706,029.62 (the Second Award).

ESG made payment in respect of the First Award but not the Second Award.

On 23 November 2021, BHL commenced proceedings claiming £706,029.62 plus interest, statutory compensation, and adjudication fees. The issues were inter alia:

- (i) whether the 'true value' of IA 23 was determined in the First Adjudication such that the second adjudicator had no jurisdiction to determine the payment due under IA 23 in the Second Award;
- (ii) whether ESG was entitled under clause 30.2 of the Contract to set off against the Second Award in respect of amounts due from BHL to ESG; and
- (iii) whether ESG was entitled under clause 30.3 of the Contract to have the 'true value' dispute determined at the same time by the same adjudicator as the 'notified sum' dispute.

Decision

O'Farrell J held that the Second Award was valid and enforceable such that BHL was entitled to summary judgment of £724,827.88 plus interest and costs.

O'Farrell J concluded that the dispute in the First Adjudication was not the same or substantially the same as the dispute in the Second Adjudication.

Despite the overlap between IA 22 and IA 23, the First Adjudication determined the true value of IA 22 and not IA 23. The Second Adjudication “decided that BHL was entitled to payment in full by reason of ESG’s failure to serve a valid Pay Less Notice”.

O’Farrell J held that clause 30.2 of the Contract was contrary to section 108 of the *Construction Act 1996* (the Act) and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme) which provide that an adjudicator’s decision is binding and require immediate compliance by the parties. O’Farrell J dismissed ESG’s attempt to set off unrelated contra charges as “an unqualified contractual right to set-off [which] offends against the statutory requirement for immediate enforcement of an adjudicator’s decision”.

Finally, O’Farrell J found that ESG’s exercise of any contractual right under clause 30.3 of the Contract to require the adjudicator to determine the ‘true value’ dispute and the ‘notified sum’ dispute in the same adjudication must be subject to compliance with its immediate payment obligation of the ‘notified sum’ in accordance with section 111 of the Act. Given ESG’s non-compliance, it was not entitled to adjudicate on the ‘true value’ dispute.

Comment

This case is a reminder of the courts’ robust approach to adjudication enforcement “regardless of errors of procedure, fact or law, unless the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice”. It also highlights the importance of compliance with the immediate payment obligation where the requisite notices have not been served. Finally, it reinforces that, save in exceptional circumstances, set off against adjudicators’ awards will be unenforceable.

Evolve Housing + Support v Bouygues (U.K.) Limited and Others

[2022] EWHC 906 (TCC); Ter Haar QC

On 28 February 2011, Evolve Housing + Support (Evolve), a social housing provider, engaged Bouygues (U.K.) Limited (BYUK) to design and build a YMCA hostel in Croydon (the Property) (the Contract). BYUK engaged Stride Treglown Limited (STL), a firm of architects, to provide design and inspection services.

On 27 June 2012, STL executed a warranty in favour of Evolve.

Evolve’s case was that intrusive inspections revealed widespread dangerous fire safety defects to the external walls which required replacement and that the Defendants all failed in their contractual and tortious duties as their work fell below the standard reasonably to be expected.

On 28 April 2021, STL served several Requests for Further Information on Evolve. Evolve responded to those Requests on 26 May 2021. STL applied to the court seeking an order requiring Evolve to provide properly particularised responses to STL’s Requests. STL contended that Evolve had failed to particularise its case of causation and breach such that STL was unable properly to plead until it had been provided with disclosure of the designs for and inspection records of the Property. Evolve objected to providing the outstanding Further Information as it did not have full information as to STL’s design and inspection role.

Decision

Ter Haar QC granted STL’s application.

Ter Haar QC noted that “there has already been enough disclosed to enable Evolve to serve Further Information as requested even if it has to be supplemented in due course”. Ter Haar QC acknowledged that it was open to Evolve to reserve its position if further relevant information became available but that “STL is entitled to know how Evolve puts its case on the basis of what has already been disclosed”.

Ter Haar QC considered *Pantelli Associates Ltd v Corporate City Developments No2 Ltd [2010] EWHC 3189 (TCC)* which confirmed that pleadings must “set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated”.

Comment

This case contrasts with the court’s recent claimant-friendly decision in *Crest Nicholson Operations Ltd v Grafik Architects Ltd [2021] EWHC 2948 (TCC)* which appeared to lower the threshold of particularisation “in the context of the very high level of awareness in the construction industry” of fire safety issues. It also reinforces the standard to be applied to claims against professionals – where a defendant is unable to properly plead its defence, it should consider whether to request further information from the claimant. **CL**