Reports from the courts

Our regular round up of court decisions of most interest to construction from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** includes a rare example of NHBC's arrangements with its approved contractors being tested in the courts; another case stands as a reminder to ensure that contracts are clear and unambiguous, especially when the works are divided into phases or sections, and when agreeing to design life obligations.

National House Building Council v Vascroft Contractors Limited

[2022] EWHC 1881 (TCC); O'Farrell J

In 2007, Vascroft Contractors Limited (Vascroft), a contractor registered with National House Building Council (NHBC), was engaged by Saterix Trading Incorporated (Saterix) in respect of works at a property in London (the Property). NHBC, Vascroft, and Saterix were parties to a 10-year tripartite Buildmark Cover agreement effective from 12 June 2014, which required Vascroft to design and build the Property in accordance with the NHBC 'Requirements'.

In or around July 2011, a dispute arose, following which Vascroft's appointment was terminated and Vascroft left site. In 2013-2014, Saterix notified Vascroft in writing of alleged defects in the works.

On 26 March 2014, Saterix sold the Property to Ethiel Assets Limited (Ethiel).

On 15 March 2017, following investigations into the alleged defects, NHBC produced a 'Resolution Report' which identified remedial works to be undertaken by Vascroft pursuant to the 'Rules' under the Buildmark Cover scheme. Vascroft did not undertake the remedial works and on 30 August 2018, NHBC notified Vascroft that NHBC would do so and seek reimbursement from Vascroft for the same. On 27 March 2019, NHBC settled with Ethiel, pursuant to which £1,003,343.03 was paid in respect of the defects.

On 2 March 2021, NHBC commenced proceedings against Vascroft alleging breach of the NHBC 'Requirements' which caused 'Damage' within the meaning of the Buildmark Cover. NHBC sought to recover £1,003,343.03 by way of indemnity under the terms of the Buildmark Cover scheme.

Vascroft argued, inter alia, that: (i) NHBC was estopped from denying that the designs submitted to it for appraisal and approval satisfied the 'Requirements' and that it relied on NHBC's design approvals and undertook the works in accordance with the same; and (ii) the sale of the property by Saterix to Ethiel was a sham sale, affecting the validity of the Buildmark Cover.

NHBC sought to strike out various elements of Vascroft's defence.

Decision

O'Farrell J struck out limited parts of Vascroft's defence but held that Vascroft was allowed to plead its case on estoppel and elements of Vascroft's defence had a real prospect of success and should be determined at trial – it was not possible "to determine the strengths or weakness of those arguments in a vacuum".

O'Farrell J noted it was arguable that NHBC had represented to Vascroft that, as a pre-condition to the grant of Buildmark Cover, NHBC's engineering department would undertake an appraisal and approval of Vascroft's design against the 'Requirements'. O'Farrell held it was necessary to consider the full factual matrix and for the same to be tested under cross-examination in order to assess whether Vascroft placed reliance on the approvals process and whether it was reasonable to do so.

O'Farrell J also held that "valid registration of ownership is not a necessary precondition to the Buildmark Cover start date" but that it might be relevant to arguments as to the reasonableness of the settlement by the NHBC. O'Farrell concluded that the court was not in a position to determine the strengths or weaknesses of the parties' respective arguments.

Comment

This case is a rare example of NHBC's arrangements with its approved contractors being tested in the

courts. The NHBC's limited success in striking out parts of Vascroft's defence may result in NHBC and other warranty providers becoming reluctant to compensate homeowners in circumstances where recovery from contractors is not as straightforward as previously thought.

Solutions 4 North Tyneside Limited v Galliford Try Building 2014 Limited

[2022] EWHC; Eyre J

Solutions 4 North Tyneside Limited (S4NT), a special purpose vehicle, and North Tyneside Borough Council entered into a Project Agreement on 26 March 2014 (the Project Agreement) in respect of a PFI project to provide sheltered housing for elderly residents (the Project). S4NT in turn appointed Galliford Try Building 2014 Ltd (Galliford Try) pursuant to a Construction Sub-Contract (the Sub-Contract).

The Project was to run from March 2014 to March 2042. The first phase involved the demolition and replacement of ten buildings (the New Build Dwellings) and the refurbishment of the other sixteen buildings (the Refurbishment Dwellings).

Sections 2.9 and 2.10 of Part A of the Output Specification at Schedule 1 to the Project Agreement concerned the minimum design lives to be achieved. Section 2.9 provided that "Good Industry Practice for a design life at the point of issue of a Certificate of Availability for the elements of new build is listed in Table 1 below". Section 2.10 required structural elements to have a minimum residual life expectancy of 30 years at the Expiry Date i.e. March 2042. The Sub-Contract was back-to-back with the Project Agreement.

A dispute arose in relation to alleged defects in the roofs of the Refurbishment Dwellings, in respect of which the final Certificate of Availability was issued on 6 April 2017. S4NT alleged that the defects emerged in mid-2018 and that Galliford Try was liable for rectification of the same.

Despite various matters having been referred to adjudication, S4NT issued proceedings "to have the proper construction of the material terms of the [Sub-Contract] finally determined by the court in order to resolve the dispute". S4NT sought various declarations, including that Galliford Try's obligation was to return the Refurbishment Dwellings at the time of the relevant Certificate of Availability with a design life of 60 years in relation to the timber roof structure and such that it would have a residual life expectancy of 30 years in 2042. Galliford Try accepted that it had obligations under section 2.9 and section 2.10 in respect of the New Build Dwellings but not in respect of the Refurbishment Dwellings – the obligation in relation to those works was to put the Refurbishment Dwellings into a condition such that at the date of each Certificate of Availability they met the Availability Certification Requirements.

Decision

Insofar as the above issue was concerned, Eyre J agreed with Galliford Try's interpretation.

Eyre J explained that the court's task in relation to questions of contractual interpretation was to seek to ascertain the intention of the parties by reference to the language used when seen in context such that a degree of caution was required.

Eyre J noted that section 2.9 made reference to "design life" and stated that "Good Industry Practice for a design life […] for the elements of new build is listed in Table 1 below". Whilst Eyre J noted that the subsequent paragraph did not expressly limit that obligation to new build, he noted that "the two passages are to be read together with the second most naturally being seen as requiring a demonstration that the obligation set out in the first has been satisfied rather than imposing an obligation to ensure that all elements of all the Dwellings whether new build or refurbishment achieve the design life set out in the table".

Eyre J observed that S4NT's interpretation of the Sub-Contract would require Galliford Try to perform refurbishment works which were not otherwise necessary during the limited period of the Sub-Contract so as to ensure that the Refurbishment Dwellings would be capable of having the residual life expectancy. Eyre J stated that "that would be an unusual arrangement (not to say a wasteful one) and if such were the parties' intention one would have expected it to be set out in clear terms".

Comment

This case is a reminder that the courts will proceed with caution in relation to questions of contractual interpretation. Parties are reminded to take care to ensure that their contracts are clear and unambiguous, especially in circumstances where the works are divided into phases or sections, and when agreeing to design life obligations. **CL**