Reports from the courts

Our round up of court decisions and rulings from Andrew Croft and Will Buckby of Beale and Company focuses on one that confirms set-off cannot be laid against sums awarded to be paid by an adjudicator, and one which sheds light on whether collateral warranties are contracts for the purpose of adjudication.

Thameside Construction Co Ltd v Stevens
[2013] EHWC 2071 (TCC); TCC; Akenhead J

In July 2010 Mr and Mrs Stevens (the employers) entered into a contract with Thameside Construction Company Ltd (Thameside) to carry out extension, construction and conversion works to their home in Buckinghamshire. The contract incorporated the JCT Intermediate Form of Building Contract with Contractor’s Design (Revision 2 2009) (the contract).

There were a number of variations to the contract and the completion date was extended from the initial date of 14 March 2011 to 8 August 2011. The works were not completed by 8 August 2011 and a dispute arose as to when practical completion took place.

On 21 June 2012 Thameside submitted an interim application for just over £1.3 million. The parties treated this as the final account. The employers disputed Thameside’s application and assessed the value of the works as being just under £1.2 million, from which a contra charge of £58,000 was to be deducted. The employers ultimately paid circa £1.1 million to Thameside.

In March 2013 Thameside served a notice of adjudication on the employers in respect of the sums outstanding in its final account application, which amounted to £190,102.89. Thameside asked the adjudicator to decide the amount due to Thameside and requested payment of any such sum without set off. The employers counterclaimed for liquidated damages and defective works.

The adjudicator made his decision on the basis that the adjudication was ‘the equivalent of an interim certificate’, in that any issues as to when practical completion occurred, extensions of time and liquidated damages would be dealt with at a later date, as he had not been asked to consider these issues. After deducting sums for defective works, he held that Thameside was due £88,000, which should be paid within 14 days. The employers withheld payment of £40,000 from the award to set off their liquidated damages claim on the grounds that they were contractually entitled to do so, as the adjudicator was treating his decision as if it was an interim certificate.

On 10 June 2013 Thameside issued proceedings for the outstanding £40,000, arguing that the employers were not entitled to set-off against the adjudicator’s award. The employers argued that because the contract entitled them to set-off against an interim certificate they were entitled to set-off against the adjudicator’s award.

Decision

The employers were ordered to pay Thameside the £40,000 plus VAT and interest. Akenhead J considered a number of cases regarding whether a losing party in an adjudication can set-off against sums awarded and held that the general position was that an adjudicator’s decision to pay a sum of money is ‘to be honoured’ unless the case falls within certain limited exceptions. Those exceptions include ‘an allowable contractual set-off which does not offend against statutory requirements or a declaratory type of decision’ or where an adjudicator is simply declaring that an overall amount is due, rather than directing that a balance should be paid, or otherwise permits further set-off to be made.

Akenhead J held that it was clear from the adjudicator’s decision that he directed the employers to pay Thameside the specified amount as he ‘actually directs that payment of the sum is made’ and the decision did not provide for any set-off. The adjudicator referred to his decision as being equivalent to an interim certificate to justify ordering immediate payment and therefore the employers could not rely on this to set-off against the sums awarded.
Significance
This case confirms that the general position is that one cannot set-off against sums awarded to be paid by an adjudicator. There are only limited exceptions to this, for example where there is a specific contractual right to do so, where the adjudicator simply declares that an amount is due or where the decision expressly permits further set-off. A party is unlikely to be able to rely upon one part of an adjudicator’s reasoning to argue that such a right can be exercised: the decision must be considered as a whole.

Parkwood Leisure Ltd v Laing O’Rourke Wales and West Ltd
[2013] EWHC 2665 (TCC); TCC; Akenhead J

On 7 April 2006 Orion Land and Leisure (Cardiff) Ltd (Orion) entered into a contract with Laing O’Rourke Wales and West Ltd (LOR) to design and construct a swimming facility in Cardiff (the contract). Orion, acting as leaseholders of the swimming facility, sublet the swimming facility to Parkwood Leisure Ltd (Parkwood) in 2008.

On 6 December 2007, pursuant to art 10 of the contract and before the design and construction of the swimming facility was complete, LOR entered into a collateral warranty with Parkwood whereby LOR gave certain warranties, acknowledgements and undertakings to Parkwood (the collateral warranty).

Clause 1 of the collateral warranty provided that LOR ‘warrants, acknowledges and undertakes’ that it has ‘carried out and shall carry out and complete the Works in accordance with the Contract’. Similarly, LOR warranted that in the design of works it would exercise and continue to exercise ‘all reasonable skill and care’.

Following practical completion in 2008, Parkwood occupied the swimming facility. A number of defects arose over the following 30 months including defective air handling units and motors.

On 29 July 2013 Parkwood issued CPR Pt 8 proceedings against LOR asking the judge to consider whether the collateral warranty was a construction contract for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996) and therefore whether Parkwood was entitled to commence adjudication proceedings.

Parkwood argued that the collateral warranty was a construction contract as it contained LOR’s express agreement to carry out and design the works and therefore constituted a contract for the carrying out of construction operations under s 104(1)(a) of the HGCRA 1996.

Held
The court held that the collateral warranty was a construction contract.

In reaching this conclusion Akenhead J considered the wording used in the collateral warranty and held that by cl 1 LOR undertook that it would carry out and complete the works in accordance with the contract. On the basis that an undertaking involves an obligation to do something in the future, Akenhead J considered that the collateral warranty was clearly a contract for ‘carrying out construction operations’ under s 104(1)(a) of the HGCRA 1996 and therefore was a construction contract.

However, Akenhead J made clear that it does not follow from the above that all collateral warranties will be construction contracts. If the warranty is provided after the works (or services) have been completed and is simply warrantying a past state of affairs this will suggest that the collateral warranty is not a construction contract.

Significance
The case is of interest because previously there was no direct authority on whether contracts such as collateral warranties are in fact construction contracts as defined under the HGCRA 1996 and therefore subject to the right to adjudicate. As a result, this has been an area of uncertainty up to this point.

Following this judgment it appears that the extent to which the HGCRA 1996 applies will depend largely upon whether or not the warranty contains an obligation to carry out works or services in the future. Accordingly, a warranty which is provided after the completion of a project is less likely to be a construction contract.

As a result of this judgment, those entering into collateral warranties should consider the wording of the warranty carefully: if it does more than simply warrant a past state of affairs, it appears that the right to adjudicate under the HGCRA 1996 will apply. In particular, if the warranty is provided before completion of the project, the parties should consider whether to include express adjudication provisions. CL