Our latest round up of the court cases of most interest to construction comes from Will Buckby and Andrew Croft of Beale and Company who focus on an appeal court ruling that confirms the dangers of agreeing an absolute obligation to complete a project by a specific date; and a case that underlines uncertainties that may arise under NEC3.

**John Grimes Partnership Ltd v Gubbins**

[2013] EWCA Civ 37; CA; Sir David Keene, Tomlinson, and Laws LLJ

Mr Gubbins engaged John Grimes Partnership Ltd (Grimes) in September 2006 to design a road and to obtain approval from Cornwall County Council (CCC) in connection with a housing development. It was orally agreed that the services would be completed by March 2007 and that Grimes would be paid £15,000.

The approval from CCC had still not been obtained in February 2008 and in April 2008 Mr Gubbins engaged another engineer, who eventually obtained approval in June 2008. Having been paid £20,000 in connection with its services, Grimes submitted a further invoice for approximately £3,000. Mr Gubbins refused to pay this invoice and Grimes commenced proceedings. Mr Gubbins counterclaimed for amounts paid and damages as a result of a reduction in the market value of the residential units and an increase in building costs.

At first instance it was held that it was a term of the contract that the services would be completed by March 2007. As a result of Grimes’ breach, completion of the development was delayed by 15 months, during which the gross sales value of the development fell by £398,000. The judge concluded that these losses were not too remote and fell within the **Hadley v Baxendale** test (see **Hadley v Baxendale** (1854) 9 Exch 341). Grimes had actual knowledge when entering into the contract that delay might cause Mr Gubbins losses connected with any decline in the property market and such losses were therefore within its contemplation. Only if, on consideration of the commercial background, the **Hadley v Baxendale** approach did not reflect the parties’ reasonable expectations would reasonably foreseeable losses not be recoverable.

Grimes appealed, alleging that losses flowing from a decline of the housing market, over which it had no control, were too remote, relying upon **The Achilleas** (see Transfield Shipping Inc of Panama v Mercator Shipping Inc, The Achilleas [2008] UKHL 48) in which the court found the defendant had not accepted responsibility for a type of loss, even though it was reasonably foreseeable. Grimes also emphasised the difference between the original fee and the potential scale of the losses. Mr Gubbins contended that the correct approach was that taken in **Hadley v Baxendale** and that **The Achilleas** exception did not apply, because the circumstances indicated that Grimes had assumed responsibility for the relevant type of loss.

**Held**

The leading judgment of Sir David Keane rejected the appeal. The starting point in assessing remoteness is to apply the **Hadley v Baxendale** test as expressed in **The Heron II** (see Koufos v C Czarnikow Ltd, The Heron II [1967] 3 All ER 686). A type or kind of loss will not be too remote if it was, at the time of the contract, reasonably foreseeable as ‘not unlikely to result from his breach’. **The Achilleas** is an exception to this rule and will only apply if there are circumstances demonstrating that the parties ‘could not have contracted on the basis that the defendant was to bear the liability of a particular kind of loss’.

The fact that the scale of a loss may be disproportionate to the fee was merely ‘a pointer’ that a contracting party did not undertake a reasonably foreseeable liability.

**Significance**

This confirms the risks of agreeing to an absolute obligation to complete by a particular date. It may also encourage clients to pursue consultants and contractors who have failed to comply with any such obligation for
losses arising from the recent fall in the market because, unless the circumstances demonstrate that the parties did not contract on the basis that the defendant would be liable for such losses, they will not be too remote.

Finally, this judgment emphasises to construction professionals the importance of clearly setting out any exclusions or limitations of liability in their appointment: it is not uncommon for liability for losses of the kind claimed in this case to be expressly excluded and (subject to the ‘reasonableness test’) this approach may have protected Grimes.

Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi) [2013] EWHC 87 (TCC); TCC; Akenhead J

In March 2011 May and Baker Ltd, trading as Sanofi-Aventis (Sanofi), engaged Arcadis UK Limited (Arcadis) to carry out remediation works. The contract incorporated the NEC3 Engineering and Construction Contract.

Two compensation events arose after additional work was required beyond the northern and southern boundaries of the site, which were confirmed by the project manager. After the project manager purported to withdraw his confirmations a dispute arose regarding Arcadis’ entitlement in relation to the northern and southern boundary works.

Arcadis commenced an adjudication in relation to the northern boundary works. Dr Derek Ross was appointed to decide whether the project manager could reverse his decision; whether a compensation event had arisen; and what the effect of any compensation event was. Dr Ross concluded that: the project manager could not reverse his decision after the compensation event had been implemented; a compensation event had arisen; and Arcadis was entitled to £412,060.78 (ie an additional £98,111.54). Sanofi paid the additional sum to Arcadis. In October 2012 Arcadis commenced a second adjudication regarding the southern boundary works, seeking £541,898.10. Arcadis invited the ICE to appoint Dr Ross, but Sanofi objected and the ICE appointed Mr Rogers as adjudicator.

In his decision Mr Rogers stated that he might be bound by Dr Ross’ decision in certain circumstances and that he had a duty to consider whether he was so bound. He ultimately concluded that he was not bound by Dr Ross’ decision and decided the issues on their merits. Mr Rogers decided that the project manager could not reverse his decision and that a compensation event had arisen which resulted in a change to the prices of £480,231.44. In reaching this figure he ‘split the difference’ between the project manager’s forecast and the amount claimed by Arcadis.

Sanofi did not comply with Mr Rogers’ decision and Arcadis commenced enforcement proceedings. Sanofi alleged that Mr Rogers had breached the rules of natural justice by taking a ‘restrictive view of his jurisdiction’, by having regard to Dr Ross’ decision and because he ‘went off on a frolic of his own’ by ‘splitting the difference’. Sanofi also alleged that Mr Rogers failed to consider Sanofi’s defence on delay.

Held

Akenhead J enforced Mr Rogers’ decision. A previous adjudicator’s findings on the same contract will be either binding or persuasive and adjudicators should be able to consider whether any such findings are relevant. In fact, it was clear that Mr Rogers did not consider himself to be bound by Dr Ross’ decision; by agreeing with it in some respects he did not restrict his jurisdiction.

In ‘splitting the difference’, Mr Rogers was not ‘going off on a frolic of his own’ but was resolving the difficulty of the fact that there were two figures which he considered to have evidential basis.

Mr Rogers had not ‘failed to consider’ Sanofi’s defence: the decision made clear that he had considered it. The fact that it did not address it in detail was not a breach of natural justice.

Significance

This emphasises that simply ‘cherry picking’ items from an adjudicator’s decision in an attempt to resist enforcement is unlikely to be a successful approach. The court will always bear in mind the limited time available to an adjudicator and will enforce a decision unless there are clear grounds not to do so. It also suggests that any previous decision regarding the contract should be persuasive to a subsequent adjudicator.

This case is also interesting as it is one of few to refer to the NEC3. Although Akenhead J did not comment on the adjudicators’ interpretations of the Engineering and Construction Contract, his judgment underlines some of the uncertainties that may arise under it, particularly regarding the ability of a project manager to reverse an earlier decision. CL