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** looks at a case showing why Parties should take care when seeking to place reliance on previous adjudication decisions; and another judgment which should be taken as a reminder to parties to take care when entering into 'back-to-back' contracts , as these will likely impose higher standards of care.

Sudlows Ltd v Global Switch Estates 1 Ltd

[2022] EWHC 3319 (TCC); HHJ Waksman

Global Switch Estates 1 Ltd (Global) appointed Sudlows Ltd (Sudlows) to fit out a data hall at Global's premises in London pursuant to an amended JCT Design and Build 2011 form of contract dated 22 December 2017 (the Contract). The Contract Sum was £14,829,738.

Clause 2.26 defined a "Relevant Event" as "Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change" or "any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons".

The ductwork was constructed by or at the instruction of Global. When Sudlows pulled the heavy cables through the ductwork on 21 June 2019, one of the cables was damaged. Sudlows said this was due to the defective ductwork. Global took the new cable out of Sudlows' scope of work, which resulted in Sudlows refusing to terminate, connect, and energise those cables, causing delay in the completion of the cabling work (the Relevant Events).

On 18 January 2021, Sudlows commenced the fifth adjudication between the parties seeking an EOT for the relevant section of the works that ran from 29 May 2020 to 18 January 2021 on the basis of the Relevant Events. The adjudicator determined that Sudlows was entitled to an EOT of 482 days, thereby amending the Completion Date to 8 December 2020, and that Global were not entitled to withhold payment or deduct LADs (the Previous Decision).

Following the Previous Decision, Global omitted the energisation works from Sudlows' scope of work and certified practical completion as being achieved on 7 June 2021. Thereafter, Sudlows sought a further and final EOT and related costs from 19 January 2021 to 7 June 2021, which Global refused.

Sudlows commenced the sixth adjudication between the parties seeking a decision that it was entitled to an additional EOT and that Global were not permitted to continue to deduct LADs from the requested sums. Sudlows argued that the adjudicator was bound by the Previous Decision and should grant the final EOT. The adjudicator agreed and granted the EOT (the Primary Decision) but provided an alternative position that, in the event that his conclusion regarding jurisdiction and the Primary Decision were incorrect, Sudlows' further EOT should be refused (the Alternative Findings).

Sudlows sought enforcement of the Primary Decision. Global sought: (i) a declaration that the adjudicator acted in breach of natural justice "because he wrongly took too narrow a view of his own jurisdiction by holding that he was bound by certain findings […] made by a different adjudicator"; and (ii) enforcement of the Alternative Findings.

Decision

HHJ Waksman held that the Primary Decision was not enforceable and instead enforced the Alternative Findings. Global was therefore entitled to £209,053.01 plus VAT, interest, and fees.

With reference to ***Quietfield Ltd v Vascroft Construction Ltd [2006] EWCA Civ 1737***, HHJ Waksman concluded that the existence of the Relevant Events was "plainly insufficient to mean that in both adjudications, the dispute was the same or substantially so". The Relevant Events concerned EOTs for different periods of times and the dispute in relation to the new EOT involved new relevant evidence which did not form part of the Previous Decision such that the adjudicator was not bound by the Previous Decision. HHJ Waksman held that the Previous Decision had been considered in a vacuum – the jurisdictional question required consideration of what both disputes related to and whether they were substantially the same, which the adjudicator did not consider.

Comment

This judgment serves as a reminder of the courts' approach to the question of whether causes of action arise out the same or substantially the same facts and whether the finding of one adjudicator would bind subsequent adjudicators. Parties should take care when seeking to place reliance on previous adjudication decisions, particularly if they relate to different facts, and should remain live to the introduction of new issues/evidence and present their claims/defences accordingly.

LDC (Portfolio One) Limited v (1) George Downing Construction Limited (2) European Sheeting Limited (In Liquidation)

[2022] EWHC 3356 (TCC); Ms Buehrlen KC

LDC (Portfolio One) Limited (LDC) is the owner of three high-rise tower blocks in Manchester used as student accommodation which were constructed in 2007-2008 (the Towers). George Downing Construction Limited (Downing) was the main contractor for the Towers. Downing appointed European Sheeting Limited (ESL) as the specialist subcontractor in relation to the external wall construction, including the rainscreen and cladding works (the Sub-Contract). Downing and ESL issued collateral Deeds of Warranty dated 17 October 2008 in favour of the then Employer, which were subsequently assigned to LDC (the Warranties).

Clause 2.5.1.8 of the Main Contract contained a strict obligation to ensure compliance with "all Statutory Requirements", including Building Regulations. Article 1.5 of the Sub-Contract required ESL not to put Downing in breach of its obligations under the Main Contract: "no act or omission or default of the Sub-contractor in relation to the Sub-contract Works shall constitute cause or contribute to any breach by the Contractor of any of his obligations under the Main Contract". Clause 5.3.1 of the Sub-Contract imposed on ESL an obligation to exercise reasonable care.

LDC sued Downing and ESL pursuant to the Warranties in relation to re-cladding and associated remedial works to address fire safety and water ingress issues concerning the external wall construction of the Towers (the Defects).

On 17 October 2022, LDC settled its claims against Downing for £17,650,000. However, ESL was in Creditor's Voluntary Liquidation and had not played a part in the proceedings since May 2022. LDC sought judgment against ESL for £21,152,198.87 based on the cost of remedial works and loss of income. Downing also sought judgment in respect of its claim for an indemnity and/or contribution against ESL for £17,650,000 (the Settlement Sum)

ESL did not consent to judgment being entered against it such that the TCC heard the claim.

Decision

The TCC held that ESL was liable in respect of the Defects. LDC's total loss recoverable against ESL was therefore £21,152,198.87. ESL was likewise required to indemnify Downing in respect of the Settlement Sum.

Notwithstanding ESL's absence at trial, the TCC confirmed that "it remains necessary for a claimant to prove its case and for the Court to address the defendant's case in so far as it purports to give rise to a defence" (***Stewart Milne Group Ltd v Protex Corp Ltd [2008] EWHC 3171 (TCC)***).

With reference to ***MT Hojgaard AS v E.ON Climate and Renewables UK [2017] UKSC 59***, the TCC held that the terms of the Sub-Contract meant that ESL could not place reliance on the obligation to exercise reasonable skill and care contained in the Sub-Contract. In circumstances where the Sub-Contract contained conflicting standards, ESL should have considered the strict obligation as a minimum requirement: "Clause 5.3.1 of the Sub-contract Conditions […] cannot […] be relied upon to somehow supersede the obligation to ensure that Downing is not placed in breach of its obligations vis a vis LDC under the Main Contract".

ESL was therefore found to be in breach of its obligations under the Sub-Contract for failure to ensure compliance with Building Regulations and failure to exercise reasonable skill and care in respect of both the fire safety defects and the water ingress issue.

Comment

This judgment is a reminder that parties should take care when entering into 'back-to-back' contracts – these will likely impose higher standards of care. Where contracts contain conflicting obligations/standards, parties should consider the strict/more onerous obligation as a minimum requirement. Alternatively, parties should consider making it expressly clear that their obligations are limited to exercising reasonable skill and care. **CL**