Reports from the courts

Our regular round up of the court cases of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who examine the decision in an appeal that emphasises the need for parties to either raise issues in respect of the validity of payment applications/payment notices or to reserve their positions without delay; and another that shows the current judicial uncertainty regarding the extended limitation periods under the *Building Safety Act 2022*

A&V Building Solutions Limited v J&B Hopkins Limited

[2023] EWCA Civ 54; Coulson LJ

J&B Hopkins Limited (JBH), the M&E contractor on the Moulsecoomb University Project in Sussex, engaged A&V Building Solutions Limited (AVB) to undertake certain M&E works pursuant to a sub-contract dated 18 December 2019 (the Sub-Contract).

Clause 23.1 stated: 'No waiver by [JBH] of any breach of the Sub-Contract by [AVB] shall be a waiver of any subsequent breach of the same or of any other provision of the Sub-Contract'.

Appendix 6 provided that AVB was to issue its Interim Application 14 (IA14) on 21 March 2021.

On 22 March 2022, AVB issued IA14, seeking a net amount of £211,773.60. On 1 April 2021, JBH indicated that no further sums were due to AVB, who had in fact been overpaid. On 16 April 2021, JBH issued a Payment Notice reiterating that AVB had been overpaid by £68,946.25 (the Payment Notice).

On 12 October 2021, AVB wrote to JBH threatening to commence adjudication proceedings if payment was not forthcoming. In response, JBH asserted for the first time that IA14 was not served in accordance with the Sub-Contract, albeit JBH did not elaborate further.

On 17 November 2021, AVB commenced adjudication proceedings, seeking £211,773.60 plus VAT, interest, and fees. JBH submitted for the first time that IA14 was issued one day late. On 19 January 2022, the adjudicator issued his decision, identifying a net sum due to AVB of £138,010.86 (the Decision). JBH failed to make payment to AVB.

On 2 December 2021, i.e. whilst the adjudication proceedings were ongoing, JBH issued Part 8 proceedings against AVB seeking, inter alia, declarations as to the invalidity of IA14/the validity of the Payment Notice. The TCC held that IA14 was one day late and thus invalid. The TCC rejected AVB's submission that there had been a variation/waiver/estoppel of the date of 21 March 2021, by reference either to a similar event in 2020 when JBH had made an interim payment in respect of an application notice due on a Sunday but sent on the following Monday or to the parties' contemporaneous treatment of IA14.

AVB appealed on various grounds, including whether the TCC's dismissal of AVB's arguments as to variation/waiver/estoppel as unarguable was correct.

Decision

Whilst the appeal was allowed on other grounds, Coulson LJ held that the TCC was wrong not to find that JBH had unequivocally represented that IA14 was valid.

Coulson LJ referenced ***Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWC 168 (TCC)*** in which it was deemed trite law that the making of a payment in respect of a prior application is normally equivocal conduct that does not establish common understanding sufficient to found a variation/waiver/estoppel. With reference to clause 23.1, "one instance of paying a late payment application is not generally sufficient to amount to a waiver".

Nevertheless, Coulson LJ noted that JBH issued the Payment Notice – JBH did not suggest IA14 was invalid or seek to reserve its position in respect of its validity. JBH "unequivocally affirmed the validity of [IA14]". Coulson LJ noted, "[i]f at any time, JBH had indicated that they considered [IA14] to have been served one day late, then AVB could have taken the necessary steps to resolve that debate, by repeating the claim for the next monthly cycle in April" or indeed any month prior to the commencement of the adjudication proceedings.

Comment

Coulson LJ noted "these sorts of arguments regularly arise in adjudication enforcement, particularly arising out of 'smash and grab' adjudications". This judgment provides some helpful guidance. In particular, it emphasises the need for parties to either raise issues in respect of the validity of payment applications/payment notices or to reserve their positions without delay. There is otherwise a risk that the right to raise such issues at a later date could be waived.

URS Corporation Ltd v BDW Trading Ltd

[2023] EWCA Civ 189; Coulson LJ

Between 2005 and 2012, BDW Trading Ltd (BDW), a developer, engaged URS Corporation Ltd (URS), a firm of structural engineers, to undertake structural design work in respect of various blocks of flats.

Following the fire at Grenfell Tower in 2017, BDW undertook investigations into the safety of its building stock. In late-2019, BDW noticed structural defects on a particular block, which led to a wholesale review of the structural condition of a number of other blocks in which URS were involved (the Buildings).

In 2019, BDW commenced proceedings against URS in respect of its alleged negligent structural design of the Buildings. BDW argued that it remained subject to liability by the occupiers of the Developments pursuant to the contractual agreements for the sale of individual flats and under the *Defective Premises Act 1972* (the *DPA 1972*).

URS argued that, because at the time the cause of action in tort accrued in 2019, BDW no longer had a proprietary interest in the building, had no obligation to rectify the defects, and had no liability to third parties because of limitation, no loss had been or could have been suffered by BDW.

A preliminary issues hearing was held in October 2021, at which the TCC held that, with some exceptions, the scope of BDW's duty of care extended to the alleged losses and that those losses were recoverable. The TCC found that BDW's cause of action accrued no later than the date of practical completion for each of the Buildings.

URS appealed on various grounds, including that the TCC should have concluded that the cause of action did not accrue at practical completion but much later in 2019 when the defects were discovered such that BDW had not suffered the loss required to complete a cause of action in negligence. On 20 January 2022, permission to appeal was granted. The appeal is due to be heard in April 2023.

On 28 June 2022, the *Building Safety Act 2022* (the *BSA 2022*) came into force. BDW sought to pursue a new claim against URS under the *DPA 1972* in accordance with the extended limitation periods in s135 *BSA 2022*, which retrospectively extends the relevant limitation period to 30 years. BDW was granted permission to amend its pleadings accordingly.

Two disputes arose between the parties, namely: (i) whether, as a result of the *BSA 2022*, the appeal had been rendered academic; and (ii) whether URS should be given permission to appeal the decision which allowed BDW's amendments to its pleadings.

Decision

Coulson LJ: (i) held that the *BSA 2022* did not render the appeal academic; and (ii) granted URS permission to appeal the decisions allowing BDW's amendments to its pleadings.

When addressing the possible redundancy of the appeal, Coulson LJ considered "whether or not they are ultimately found to be so will depend on the detailed arguments advanced at the hearing in April". Coulson LJ observed that there was in any event "a major and freestanding dispute" in respect of the scope and application of s135 *BSA 2022* such that it could not be concluded that the appeal was academic.

Coulson LJ adopted a similarly cautious approach in respect of the second dispute to avoid constraining the parties' arguments for the substantive appeal hearing. Coulson LJ found that, pursuant to CPR 52.6(1)(b), there was a compelling reason for the appeal to be heard, including that "both appeals concern potential issues that arise out of [s135 *BSA 2022*]". As the relevant section was novel, and the issues to which it gives rise have not previously been considered, Coulson LJ concluded "some appellate guidance may be helpful".

Comment

Whilst this judgment itself does not establish any new legal principles, it is of interest as it demonstrates the current judicial uncertainty regarding the extended limitation periods under the *BSA 2022*, particularly in respect of claims where limitation is in issue. **CL**