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 look at a judgment providing clarification on the use of Part 8 proceedings to resist adjudication enforcement; and another judgment that shows the courts will look to the factual matrix when determining the existence of a common law duty of care.

Sleaford Building Services Limited v Isoplus Piping Systems Limited

[2023] EWHC 969 (TCC); Nissen KC

Sleaford Building Services Ltd (Sleaford), which specialises in MEP works, was engaged by Amey Defence Services Ltd, the main contractor, in relation to maintenance and construction works for the Ministry of Defence at Wattisham Airfield, Ipswich (the Site). On 16 February 2021, Sleaford engaged Isoplus Piping Systems Ltd (Isoplus), a specialist pipework contractor, under an amended NEC3 Engineering and Construction Short Subcontract (the Sub-Contract).

Clause 21.4 of the Sub-Contract provided that, if Isoplus wished to sub-subcontract its works, the subcontractor "procures that the terms of each sub-contract are compatible with the terms of this subcontract" and that as a pre-condition to the sub-subcontractor's payment, the subcontractor must provide the contractor with a certified and compatible copy of the sub-subcontract with evidence of professional indemnity insurance held by the sub-subcontractor to ensure compliance with the terms of the Sub-Contract.

On 11 November 2022, Sleaford issued a notice of adjudication alleging that Isoplus had installed incorrect fittings causing a catastrophic failure, which resulted in non-completion that caused loss and expense to be incurred and loss of opportunity to negotiate a second phase of work at the Site. Alternatively, Sleaford argued that Isoplus had failed to comply with clause 21.4 on the basis that "the sub-subcontracts provided on 4 October 2022 were not compatible with the subcontract" and the pre-conditions under clause 21.4 had not been satisfied such that no sum was payable to Isoplus. Isoplus contended that it was owed the sum of £505,741.16 and that Sleaford had provided insufficient particulars in respect of Isoplus' alleged breach of clause 21.4. The adjudicator found that Isoplus' installation was compliant with the Sub-Contract and awarded the sum of £323,502.32 to Isoplus (the Decision).

In February 2023, Sleaford resisted a demand for payment issued by Isoplus and, in anticipation of inevitable proceedings, issued Part 8 proceedings seeking a declaration that clause 21.4 had been breached on the basis that Isoplus "has not complied with the pre-requisites". In response, Isoplus issued a Part 7 claim for enforcement of the Decision.

Decision

Nissen KC found in favour of Isoplus, dismissing Sleaford's Part 8 claim.

With reference to ***A&V Building Solutions Ltd v J&B Hopkins Ltd [2023] EWCA Civ 54***, Nissen KC noted that where two sets of proceedings have been commenced, "the correct approach is to consider whether there is any defence to the Part 7 claim […] and, then, to go on and sort out the Part 8 claim". In circumstances where Sleaford accepted that the Decision was enforceable, there should be judgment in favour of Isoplus "unless the effect of any substantive declaration made concurrently in the Part 8 proceedings impacts upon its efficacy by reasons of any final determination therein made".

Insofar as Sleaford's claim was concerned, Nissen KC concluded that these proceedings were not suitable for determination under Part 8 in circumstances as Isoplus had an arguable case to resist Sleaford's arguments (that Sleaford's payments to Isoplus in respect of various milestone achievements amounted to a waiver of such preconditions). In addition, further evidence was required to determine the matter, including valuation evidence to assess the value of work in a given milestone attributable to work done by a sub-sub-contractor.

Nissen KC also referenced Coulson LJ's comments in ***A&V Building Solutions Ltd v J&B Hopkins Ltd*** that "[w]arnings have continued to be given as to

the over-liberal and inappropriate use of Part 8 in adjudication cases".

Comment

Whilst the position remains that adjudication decisions will likely be enforced, this judgment provides further clarification on the use of Part 8 proceedings to resist adjudication enforcement. Parties are reminded to ensure that their Part 8 claims are "short and self-contained" and adequately particularised in both the adjudication proceedings and subsequent court proceedings to ensure that the issues can be identified/determined by the courts.

Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnership Ltd and others

[2023] EWHC 644 (TCC); O'Farrell J

On 20 December 2004, Sheffield Teaching Hospital Foundation Trust (the Trust) engaged Hadfield Healthcare Partnership Ltd (Hadfield) to design, build, commission, and operate a new ward block at the Northern General Hospital (the Wing). Hadfield in turn appointed Kajima Construction Europe (UK) Limited (Kajima) to design, construct, and commission the Wing (the Construction Contract) and Veolia Energy & Utility Services UK Plc (Veolia) to provide facilities management services.

On 26 March 2007, practical completion was certified as achieved. In 2017-2018, the Trust identified fire compartmentation/fire protection defects in the Wing. On 30 January 2018, the Trust, Hadfield, Kajima, and Veolia entered into a Standstill Agreement.

On 9 December 2020, the Trust commenced proceedings against Hadfield seeking damages of c.£13m. On 16 August 2021, Hadfield commenced Part 20 proceedings against Kajima for its "failure to design and/or construct […] in compliance with the Construction Contract", alleging that Kajima owed "a duty of care at common law to take reasonable care in the performance of its obligations under the Construction Contract".

Kajima denied liability and on 13 January 2023 applied for summary judgment/to strike out of parts of Hadfield's Part 20 claim against Kajima, asserting, inter alia, that a contract for construction works does not amount to an assumption of responsibility so as to give rise to a common law duty of care in respect of workmanship and materials per ***Robinson v PE Jones (Contractors) Ltd [2012] QB 44 (CA)*** (the Application).

Hadfield submitted that the issue whether a concurrent common law duty of care not to cause pure economic loss by virtue of defective workmanship/the use of defective materials can arise in circumstances such as the Construction Contract is unsettled and controversial, such that its claim had a real prospect of success. Hadfield sought to distinguish ***Robinson v Jones*** on the basis that the Construction Contract did not include a sole remedy clause and did not exclude Kajima's liability in tort to Hadfield.

Decision

O'Farrell J dismissed the Application, finding that Hadfield's claim had a real prospect of success.

O'Farrell J emphasised the significance of the factual matrix to determine whether a common law duty of care arises. O'Farrell J thought it arguable that ***Robinson v Jones*** could be distinguished on the basis that the Construction Contract contained both design and workmanship obligations, did not contain any exclusion of Kajima's liability in tort to Hadfield, and must be construed in the context of complex PFI contractual arrangements. Moreover, O'Farrell J highlighted that ***Robinson v Jones*** did not preclude the existence of a concurrent duty of care in tort where the factual circumstances give rise to an assumption of responsibility.

O'Farrell J further noted that Hadfield was "right to question, as a matter of law, whether there is any basis on which building contractors should be distinguished from other professionals when ascertaining whether there has been any […] assumption of responsibility".

Comment

This judgment demonstrates that the courts will look to the factual matrix when determining the existence of a common law duty of care, particularly in the construction industry given the often-complex factual arrangements. Contractors seeking to avoid such a duty of care arising should request that the construction contract excludes liability in tort and state that the contractor's sole liability will be under the construction contract. It also provides further guidance on what matters are suitable for determination on a summary basis – broadly speaking, where factual and expert opinion evidence is required, which is often the case where complex PFI projects are concerned, a full trial is likely to be consider more appropriate. **CL**