

# Reports from the courts

Our regular round up of the court decisions of most interest to construction comes from **Andrew Croft**, **Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who report on a case that warns parties to avoid linking final dates for payment to the submission of invoices/notices; and one that cautions parties about commencing a 'true value' adjudication until outstanding payment obligations have been complied with.

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### **Lidl Great Britain Limited v Close Circuit Cooling Limited t/a 3CL** [2023] EWHC 2243 (TCC); HHJ Davies

Lidl Great Britain Limited (Lidl) entered into a framework agreement with Close Circuit Cooling Limited t/a 3CL (3CL), an industrial refrigeration and air-conditioning contractor, which enabled the parties to enter into individual works orders, each of which was to constitute a separate contract incorporating both the terms of the framework agreement and the individual order (the Contract).

The Contract entitled 3CL to make interim payment applications following the achievement of defined milestones. The Contract provided that the final date for payment was either 21 days following the due date or receipt of 3CL's compliant VAT invoice, whichever was the later.

A dispute arose in relation to the first order, including in respect of the nineteenth interim payment application (AFP19), in which 3CL sought payment of £781,986.22. Lidl withheld payment on the basis that the Contract made the final date for payment conditional upon 3CL delivering a compliant VAT invoice, which Lidl alleged that 3CL failed to do.

On 26 April 2023, 3CL referred the dispute over its entitlement to payment under AFP19 to adjudication, contending that the terms of the Contract as regards the final date for payment were non-compliant with s110(1)(b) of the *Construction Act 1996* (the Act) (which requires every construction contract to "provide for a final date for payment in relation to any sum which becomes due"). The adjudicator rejected Lidl's defence that no sum was payable because the final date for payment had not arrived and/or because no sum was payable pursuant to a valid payment notice and ordered Lidl to pay the sum

applied for in AFP19 together with interest (the Decision).

Lidl did not pay the sum ordered and instead issued its Part 8 claim against 3CL seeking various declarations in relation to the Decision/the proper interpretation of the Contract. In response, 3CL issued its Part 7 claim and a summary judgment application for enforcement of the Decision.

#### **Decision**

HHJ Davies dismissed Lidl's claim and enforced the Decision.

HHJ Davies held that the final date for payment of an application could not be dependent on the submission of a VAT invoice as such a provision did not comply with s110(1)(b) of the Act. HHJ Davies followed the decision in *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 941 (TCC) in which Cockerill J found that, "while a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism".

HHJ Davies noted:

"...there is a very obvious and compelling difference between the wording used and the plain intent of s.110(1)(b) when compared with that of s.110(1)(a) and [...] on a proper analysis, that is because the only discretion intended to be and actually given in the former case is for the parties to agree the length of the time period between the due date for payment and the final date for payment."

#### **Comment**

Whilst previous cases had upheld final date for payment provisions based on the submission of invoices, this judgment reconciles the position regarding obiter comments made in *Rochford Construction Ltd v Kilhan Construction Ltd*. Parties are therefore advised to avoid linking

final dates for payment to the submission of invoices/notices; otherwise, there is a risk that the statutory time period in the Scheme will apply.

### Henry Construction Projects Limited v Alu-Fix (UK) Limited

[2023] EWHC 2010 (TCC); Baldwin J

On 14 June 2021, Henry Construction Projects Limited (Henry Construction) appointed Alu-Fix (UK) Limited (Alu-Fix) in relation to the development of a boutique hotel in Central London pursuant to a JCT Standard Building Sub-Contract (the Subcontract).

On 11 November 2022, Alu-Fix terminated the Subcontract pursuant to clause 7.12 of the Subcontract in relation to termination at will, which triggered the payment mechanism at clause 7.11 of the Subcontract. Alu-Fix was therefore required to submit a payment application, whereupon Henry Construction would pay the sum properly due within 28 days of the payment application.

On 15 November 2022, Alu-Fix submitted a payment application in the sum of £257,004.50 plus VAT. The Subcontract required payment by 13 December 2022. However, Henry Construction failed to pay the sum by the final date without justification for the non-payment. Accordingly, Alu-Fix referred the matter to a ‘smash and grab’ adjudication (the SGA) on 15 December 2022. Henry Construction contended that it submitted two potentially valid pay less notices on 25 November 2022 and 12 December 2022 respectively.

On 18 January 2023, whilst the submissions stage of the SGA was ongoing, Henry Construction commenced a ‘true value’ adjudication (the TVA), contending that Alu-Fix was, as a result of over-payment, indebted to Henry Construction in the sum of £235,302.73 plus VAT.

The decision in the SGA, which awarded the sum claimed to Alu-Fix to be paid by 3 February 2023, was issued on 27 January 2023 (the SGA Decision). The TVA was stayed pending payment. On 2 February 2023, Henry Construction made payment and the stay was lifted, culminating in the decision that Alu-Fix was indebted to Henry Construction in the sum of £191,753.88 plus interest (the TVA Decision).

On 14 March 2023, Henry Construction applied to enforce the Decision.

Alu-Fix’s contended that Henry Construction’s commencement of the TVA prior to payment by Henry Construction of a notified sum pursuant to s111 of the *Construction Act* (the Act) resulted in the second adjudicator having no jurisdiction to reach the TVA Decision. Henry Construction argued that it should be allowed to rely on the TVA Decision in circumstances where it had paid the immediate payment obligation consequent upon the decision in the SGA. Henry Construction’s position was that, prior to the decision that ‘there was no valid PLN, no “immediate payment obligation” arose or subsisted’ such that “the embargo upon launching a TVA prior to the payment of any immediate payment obligation is not engaged and no question of jurisdiction can or should arise”.

#### Decision

The TCC found in Alu-Fix’s favour.

The TCC found that, in circumstances where Henry Construction had not served valid pay less notices, the final date for payment was 13 December 2022 such that Henry Construction was not entitled to commence the TVA. The TCC noted that “the authorities are clear that [Henry Construction] [...] was prohibited from embarking upon / not entitled to commence the TVA [...] without first having discharged its immediate payment obligation” such that, in circumstances where the TVA had been prematurely commenced, the second adjudicator did not have jurisdiction.

#### Comment

The TCC did not wish to close the door on commencing a ‘true value’ adjudication prior to the outcome of a ‘smash and grab’ adjudication. However, this decision is intended to discourage such a course in areas of “spurious” dispute as to the ‘smash and grab’ adjudication. This judgment therefore emphasises the importance of parties having a “sufficient level of confidence” that the ‘smash and grab’ dispute raised should result in a finding of no immediate payment obligation having been established before commencing a ‘true value’ adjudication. Parties should therefore be cautious about commencing a ‘true value’ adjudication until outstanding payment obligations have been complied with. **CL**