Reports from the courts

Our regular analysis of 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 reminds parties to comply with contractual notification requirements/payment obligations to avoid prejudicing their right to adjudicate; and a First Tier Tribunal decision that underlines that it has discretion under s124 of the *Building Safety Act* to determine whether a Remediation Contribution Order would be just and equitable.

Lidl Great Britain Limited v Closed Circuit Cooling Limited t/a 3CL

[2023] EWHC 3051 (TCC); HHJ Stephen Davies

Lidl Great Britain Limited (Lidl) and Closed Circuit Cooling Ltd (3CL), an industrial refrigeration contractor, entered into a framework agreement which enabled the parties to enter individual works orders.

The first order for refrigeration works at Lidl's Belvedere 2 Regional Distribution Centre contained provisions entitling 3CL to make applications for interim payment following the achievement of defined milestones.

On 29 September 2022, 3CL issued Application for Payment 19 for £781,986.22 (AFP19). This became a notified sum on 12 October 2022, with the final date for payment being 2 November 2022. On 6 October 2022, Lidl served a payment notice (PAY-7) stating that nothing was payable as 3CL's work was incomplete and/or defective. PAY-7 also sought a deduction of £765,000 for LADs for 18 June 2022 - 29 September 2022.

On 26 April 2023, 3CL referred the dispute regarding AFP19 to adjudication (Adjudication 1). The adjudicator rejected Lidl's submissions as to the invalidity of AFP19 and the validity of PAY-7, ordering Lidl to pay the sum sought in AFP19 with interest by 8 June 2023 (Decision 1). Instead of effecting payment, Lidl issued a Part 8 claim challenging Decision 1 on various grounds. In response, 3CL issued a Part 7 claim and summary judgment application. 3CL's Part 7 claim and summary judgment application succeeded, and Lidl paid the sum ordered in Decision 1 on 18 September 2023.

Meanwhile, on 28 July 2023, Lidl referred to adjudication its entitlement to recover costs and losses incurred in appointing a third party to rectify defects in 3CL's work (Adjudication 2). On 25 September 2023, the adjudicator decided that Lidl could deduct the sum of £757,845.63 from any monies due or which may become due to 3CL (Decision 2). At the time of referral, Lidl had not paid the sum due under Decision 1, although it had done so before Decision 2.

3CL did not pay the sum due under Decision 2. On 6 October 2023, Lidl issued a Part 7 claim seeking enforcement of Decision 2.

On 19 October 2023, 3CL issued a Part 8 claim seeking a declaration that Decision 2 was unenforceable alleging that Lidl had not complied with its immediate payment obligations under s111 of the *Construction Act 1996* (the Act) regarding AFP19 before commencing Adjudication 2.

3CL relied on the Court of Appeal's judgment in ***S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448*** that a party is prevented from commencing any adjudication until it has complied with its obligations under s111 of the Act, because it would be fatal to the adjudication system – and, by extension, the prompt payment regime. Lidl argued that the ***S&T v Grove*** prohibition was limited to a 'true value' adjudication concerning the same payment cycle as the notified sum adjudication, i.e. the re-valuation of work for which payment has become due on a previous payment application, and that Adjudication 2 was not a 'true value' adjudication. 3CL further argued that there was nothing in ***S&T v Grove*** which expressly limited the principle to the same payment cycle.

Decision

HHJ Davies held that the adjudicator had jurisdiction in Adjudication 2 and enforced part of Decision 2.

Having considered various authorities, none of which were conclusive on the point to be determined, HHJ Davies found that "there is no possible basis in principle or in case-law for the wide no adjudication

prohibition contended for by" 3CL. The Court found that the ***S&T v Grove*** prohibition covered matters which could have been the subject of a pay less notice in respect of the notified sum in question such that matters concerning valuation could not be the subject of a 'true value' adjudication without prior payment of the amount awarded. However, where issues do not exist at the date when a pay less notice is due, e.g. defects/delay occurring after the pay less notice date in respect of the notified sum, "there can be no principled reason for prohibiting the payer from commencing an adjudication in respect of such matters".

Comment

This decision outlines the scope of the prohibition in ***S&T v Grove*** regarding the immediate payment obligation under s111 of the Act. The fact that there is no restriction on commencing adjudications in respect of defects arising after the relevant pay less notice deadline will provide some comfort to employers. This decision is another reminder to parties to comply with contractual notification requirements/payment obligations to avoid prejudicing their right to adjudicate.

Triathlon Homes LLP v (1) Stratford Village Development Partnership (2) Get Living PLC (3) East Village Management Limited

[2024] UKFTT 26 (PC); Johnson J

Stratford Village Development Partnership (SVDP) developed five residential buildings at Stratford, London, to provide athlete accommodation during the London Olympics 2012. This has become a large permanent residential estate comprising 66 blocks, now known as East Village (the Development).

The proceedings concerned five buildings (the Blocks), which formed part of Plot N26. Triathlon Homes LLP (Triathlon) owns the social affordable housing in the Blocks. Get Living PLC (Get Living) is a property company that owns all the private rented housing at the Development, which is not leased to Triathlon. East Village Management Ltd (EVML) is responsible for the repair and maintenance of the structure and common parts of the Development.

In November 2020, serious fire safety defects of various non-ACM cladding systems adopted for the external façades were discovered in the Blocks, including combustible insulation and inadequate firestopping. A waking watch was implemented in all Blocks which remained until additional alarm and heat detection systems were installed in the flats as temporary measures.

On 20 April 2023, remediation works commenced on the Blocks, which are due to complete by August 2025. The total cost of the remediation works exceeds £24.5m and is being funded by grants from the Building Safety Fund.

On 19 December 2022, Triathlon made five applications to the First-Tier Tribunal, Property Chamber (FTT), i.e. one for each of the Blocks, for a remediation contribution order (RCO) under s124 of the *Building Safety Act 2022* (the Act). Each RCO sought reimbursement from SVDP and Get Living (the Respondents) for various expenditure, including £16.03m to be incurred by EVML in remedying the defects.

The Respondents contended that it would not be just and equitable to make an RCO as the remedial works had commenced with funding secured and instead Triathlon should defer to its contractual and common law remedies with liability being apportioned by the Court "on normal principles".

Decision

The FTT determined that it was "just and equitable" to make a RCO for payment of c.£18m.

The FTT found that costs incurred before the commencement of the Act on 28 June 2022 could form part of an RCO. Further, the FTT found that any measure that is implemented for the purpose of rectifying a relevant defect, or which forms part of a larger programme of remedial measures, e.g., waking watches, can be the subject of an RCO.

The FTT stressed that an RCO is an independent non-fault-based remedy, such that the availability of contractual and common law remedies had no bearing on Triathlon's application, and that (emphasis added): "[t]he remedy has been created by Parliament as an alternative to other fault-based claims which a party may be entitled to make in relation to relevant defects".

Comment

This decision clarifies the applicability of s124 of the Act which will be useful guidance for parties with upcoming applications. Whilst each application will be determined based on its specific facts, the decision underlines that the FTT has discretion under s124 of the Act to determine whether an RCO would be just and equitable. **CL**