

Reports from the courts

Our latest Reports from the Courts on the cases of most interest to construction comes from **Andrew Croft, Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who find in one an important reminder to parties settling litigation by way of Tomlin orders to ensure that the provisions are carefully drafted to prevent future claims arising in connection with the same contract or the dispute; and another that is the first decision to consider a Remediation Order (RO) application where a Grant Funding Agreement and contract for remediation works exists.

Dawnvale Café Components Limited v Hylgar Properties Limited

[2024] EWHC 1199 (TCC); Neil Moody KC

In February 2020, property developer Hylgar Properties Limited (Hylgar) entered a contract with Dawnvale Cafe Components Ltd (Dawnvale), a kitchen and bar fit-out company for the design, supply and installation of the mechanical works at The Beacon, Wirral. The contract price was £631,435 plus VAT.

The contract was terminated in November 2020 following which Dawnvale and Hylgar alleged that the other party had repudiated the contract.

On 8 June 2021, Hylgar referred the dispute to adjudication at which time Hylgar had paid Dawnvale £452,251.08. Hylgar sought a true value adjudication of the works and repayment of £180,322.92 plus VAT and interest. Dawnvale denied that any amount was due to Hylgar and advanced a counterclaim of £147,289.25.

The adjudicator found that Dawnvale had repudiated the contract and that the true value of the works at termination was £272,251.08 plus VAT. Therefore, Hylgar was owed £180,322.92 plus VAT following its overpayment to Dawnvale. Dawnvale failed to pay the outstanding sum.

On 9 August 2021, Hylgar issued enforcement proceedings in the TCC to recover the adjudicator's award. By a Tomlin order dated 24 August 2021 (the Order) the claim was settled.

The Order provided:

BY CONSENT IT IS ORDERED THAT:

(2) All further proceedings in this action be stayed upon the terms set out in the Schedule hereto expect for the purpose of enforcing those terms.

IT IS AGREED AS FOLLOWS

4. This Settlement Agreement shall immediately be fully and effectively binding on the parties. The payment of the Settlement Sum is in full and final

settlement of any and all claims the Claimant may have against the Defendant arising from or in connection with these proceedings.

By a letter of claim dated 31 August 2023, Hylgar claimed further losses arising from the same repudiatory breach and stated an intention to refer a claim for these losses to adjudication (the New Claim). Dawnvale rejected the New Claim arguing that the Order had resolved “any and all claims arising from the dispute between the parties.”

Dawnvale issued Part 8 proceedings seeking to prevent Hylgar from referring the new claim to adjudication, submitting that the New Claim was caught by the Order and could not be referred to adjudication, as it had already been determined by the first adjudication. Hylgar argued that it sought to determine its entitlement to additional heads of loss instead of re-determining whether Dawnvale had repudiated the contract.

Decision

Neil Moody KC dismissed Dawnvale's Part 8 proceedings.

It was held that the Order did not prevent Hylgar from referring the further heads of loss to adjudication. Neil Moody KC considered that it had not been the parties' intention to settle all potentially related future claims, as paragraph 4 would have referenced all claims arising from or in connection with “the contract”, “the works” or “the dispute(s)”.

Further, Neil Moody KC determined that if the claims were advanced to adjudication, the adjudicator would not be deciding the same of substantially the same dispute. The Court referenced Coulson LJ's analysis in *Sudlows Limited v Global Switch Estates 1 Limited [2023] EWCA Civ 813* that “what matters for the purpose of s.108... is what it was, in reality, that the adjudicator decided. It is that which cannot be re-adjudicated.” It was Neil Moody

KC's view that there was no overlap between the adjudications.

Comment

This is an important reminder to parties settling litigation by way of Tomlin orders to ensure that the provisions are carefully drafted to prevent future claims arising in connection with the same contract or the dispute.

Moreover, a settlement agreement may not prevent a second adjudication if the dispute is not the same or substantially the same as the first adjudication.

Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership

First-tier Tribunal Property Chamber (Residential Property) 2024 WL 02275316; Judge David Wyatt

In 2015, Vista Tower in Stevenage was converted from office to residential use by the then freeholder, Edgewater (Stevenage) Limited (Edgewater), which granted leases of each flat for 250-year terms. In July 2018, Grey GR Limited Partnership (the Respondent) purchased the freehold from Edgewater for £587,650.

Fire safety investigations identified that the UPVC curtain glazing system incorporated materials that were not of limited combustibility.

In June 2020, the Respondent applied to the Building Safety Fund (BSF) for funding for works based on the Consolidated Advice Note (CAN) which required the removal of all combustible material. The BSF agreed pre-tender support of £327,195 in December 2020, at which time a waking watch was implemented.

In October 2022, the Respondent withdrew its BSF application based on the CAN and re-submitted it by reference to the PAS9980 safety standard (PAS) at the request of the BSF. Consequently, the remedial works were delayed until funding was obtained for the PAS-based application.

On 2 November 2022, the Secretary of State for Levelling Up, Housing and Communities (the Applicant) applied to the First-tier Tribunal (the FTT) for a Remediation Order (RO) under section 123 of the *Building Safety Act 2022* (the *BSA*) which requires those with repairing obligations to remedy defects caught by the *BSA* within a specified time. The Applicant sought a RO requiring the Respondent to complete the remedial works by 9 September 2025.

On 15 December 2023, the Respondent entered a JCT Works Contract with Lancer Scott Construction West Limited for the remedial works (the Works Contract). On 17 January 2024, the Applicant entered into a Grant Funding Agreement (GFA) with the Applicant's Department and Homes England.

The remedial works commenced in January 2024 and initial funding of £3,733,069.78 was released by the BSF on 15 February 2024.

The Applicant pursued its application arguing that the need for a RO remained irrespective of the remedial works commencing and submitted that a RO would provide oversight in relation to the works which would be a comfort to the leaseholders.

The Respondent noted that it had the GFA and Works Contract in place and requested that the FTT exercised its discretion under the *BSA*. Accordingly, the Respondent sought that the FTT dismissed the application to guarantee timely remedial works.

Decision

The FTT granted a RO requiring completion of the remedial works by 9 September 2025.

The FTT stated that the "deliberately broad" drafting of the *BSA* enables the tribunal to exercise its discretion and respond appropriately to the wide-ranging circumstances that are presented in RO applications.

Further, the FTT noted that if the pre-qualification criteria under section 123 of the *BSA* applies and there are relevant defects present, then "it is likely that the tribunal will make an order".

In reaching its decision, the FTT acknowledged the limited impact a RO would have on the remedial works given the existing GFA and Works Contract. However, as the leaseholders were neither party to the GFA nor the Contract, and as the RO mechanism exists for leaseholder protection, the tribunal considered it appropriate to grant a RO for the benefit of the leaseholders "as a backstop to give reassurance".

The FTT stressed that the RO should not interfere with the existing contractual arrangements and granted the RO "subject to the Works Contract and GFA" and "any extensions of time agreed via those contracts".

Comment

The FTT's decision indicates that the discretion afforded by the *BSA* will continue to be exercised in favour of leaseholders to ensure they benefit from the mechanisms afforded by the recent legislation. **CL**