Reports from the courts

Our regular round up of the judgments of most interest to construction comes from **Andrew Croft**, **Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who look at an appeal ruling emphasising that the Building Safety Fund's objective is ensuring that remediation works are completed 'as quickly as possible', irrespective of recoveries from third parties; and a judgment reaffirming the courts' reluctance to exercise powers under s44(3) of the *Arbitration Act 1996* and to interfere with arbitral proceedings.

(1) Redrow PLC (2) Redrow Homes Limited (3) HB (WM) Limited v The Secretary of State for Levelling Up, Housing and Communities

[2024] EWCA Civ 651; Coulson LJ

Redrow PLC, Redrow Homes Limited and HB (WM) Limited (collectively the Appellants) were developers of two high-rise buildings in Birmingham, known as Hemisphere and Jupiter 2 (the Properties). Upon purchase, leaseholders in both buildings acquired an insurance policy from East West Insurance Co Limited (the Insurer) known as the Zurich 10 Year Home Warranty Policy (the Policy). The Insurer went into administration in 2020.

After the discovery of cladding defects on the Properties, leaseholders claimed under the Policy. In 2022, the Insurer accepted liability in respect of the cladding defects at the Properties. In the meantime, management companies for the Properties (the Applicants) applied for the remedial works to be funded via the Building Safety Fund (the BSF). Subsequently, the Appellants signed the Developer Remediation Contractor which committed them to undertake or fund "works to address life-critical fire-safety issues on all our buildings of 11 metres and above in England that we have developed or refurbished".

The BSF guidance outlines the following requirements:

- the historical life safety risk associated with cladding on high-rise residential buildings is addressed quickly and proportionately so that residents in those homes are safe. […]
- to demonstrate that you have taken all reasonable steps to recover the costs […] from those responsible through insurance claims, warranties, legal action etc.'

On 25 May 2022, the Appellants wrote to the Secretary of State for Levelling Up, Housing and Communities (the Respondent) identifying the Properties as buildings that were subject of applications to the BSF and informed the Respondent that the Insurer "has accepted the claim in respect of […] Hemisphere and we expect will come to the same conclusion at Jupiter 2" such that the Appellants would not reimburse the BSF in respect of the remedial works. The Appellants did not suggest undertaking the remedial works themselves.

On 8 June 2022, the Respondent replied to the Appellants acknowledging the ongoing insurance claims and confirmed that, given "the Department's objective remains that works continue at pace and without disruption", the remedial works for the Properties would run through the BSF with the expectation that the Appellants would reimburse the BSF costs with insurance proceeds to be netted off from the reimbursement once such proceeds were made available.

The Appellants did not accept the Respondent's proposal as they understood that the BSF placed an obligation on the applicant to exhaust all other avenues of funding prior to procuring the necessary remedial works via the BSF.

On 26 August 2022, the Respondent sent the Appellants the decision letter stating that it was expected that the Appellants would complete the remedial works and reimburse the Respondent "for all funds paid out under the terms of the [Grant Funding Agreement]" (the Decision).

On 22 November 2022, the Appellants issued a claim form seeking judicial review to quash the Decision on the ground that: (i) the Respondent acted unlawfully in making the Decision; (ii) the Respondent failed properly to identify the reasons for the Decision; and (iii) the Decision was irrational, albeit this ground was later abandoned. The application was refused on the papers by Eyre J on

the basis that there was no merit in the application as the Appellants misunderstood the nature and effect of the BSF guidance.

The Appellants appealed Eyre J's decision on two grounds: (i) the unlawfulness of the decision; and (ii) the unfairness of the procedure.

Decision

Coulson LJ dismissed the appeal, finding that the Decision was lawful and accorded with the BSF guidance.

Coulson LJ noted that "an unqualified promise to reimburse, much less actual hard cash, had not been made" and that whilst the Applicants had taken all reasonable steps to recover sums from the Insurer, in circumstances where the Insurer was in administration, there was no reason to believe that funds would be made available imminently. Coulson LJ highlighted that the BSF guidance "expressly anticipates" insurance claims may remain ongoing at the time of the application but that "the urgency of the remedial works was such that a funding decision was required". Coulson LJ further noted that the BSF's objective 'is to resolve the problems "quickly", so that residents were and felt safe "now"', which takes priority over the potential availability of funding through insurance recoveries.

Comment

This judgment will provide clarity to parties engaged with the BSF, particularly the steps that must be taken to recover sums from others before seeking funding. It emphasises that the BSF's objective is ensuring that remediation works are completed "as quickly as possible", irrespective of recoveries from third parties.

Environment Agency v High Speed Two (HS2) Limited

[2024] EWHC 1560 (TCC); J Smith

High Speed Two (HS2) Limited (HS2) proposed to undertake works in connection with Phase One of the HS2 rail network (Phase One), authorisation for which flows directly from the *High Speed Rail (London - West Midlands) Act 2017* (the *HS2 Act*).

The *HS2 Act* creates its own regime of "Protective Provisions" whose purpose is to protect "the interests of certain persons who may be affected by other provisions of this Act", which includes the Environment Agency (the EA). Prior to undertaking certain works which are likely to "affect the flow, purity or quality of water in any main river or other surface waters or ground water" or "affect the conservation, distribution or use of water resources", pursuant to schedule 33, paragraph 51 of the *HS2 Act*, HS2 must, at least 14 days prior to commencing such works, seek approval from the EA, such approval not to be unreasonably withheld.

The *HS2 Act* provides that disputes between HS2 and the EA are to be determined by arbitration.

The EA applied for an interim injunction pursuant to s44(3) of the *Arbitration Act 1996* to prohibit HS2 from undertaking earthworks at Glasshouse Wood Cutting, Kenilworth, Warwickshire and at Stonehouse Cutting, Warwickshire (collectively the Cuttings) until the earlier of the grant of consent by the EA under the *HS2 Act* or the date of determination of arbitral proceedings commenced by the EA on 6 June 2024. The EA's position was that the Cuttings are located within water bodies with a "poor" status classification, which means that "a number of surface watercourses that require groundwater are failing and that the amount of groundwater abstraction exceeds available groundwater resource" such that it is at risk of deterioration and serious damage.

HS2 argued that the earthworks would not impact groundwater on the basis that the dry digs were to be conducted above the water table such that it did not amount to "category 1 specified work".

Decision

Smith J dismissed the EA's application on the basis that it did not surmount the jurisdictional hurdle of s44(3) of the *Arbitration Act 1996*. Whilst Smith J considered that the EA's case was "one of urgency", the EA had not demonstrated that an injunction would preserve any assets. HS2's control measures, which included monitoring of groundwater levels and excavating trial pits, were considered adequate for the prevention and mitigation of potential risks.

Smith J therefore did not consider the arguments arising in relation to the grant of injunctive relief as these were for the arbitrator to address. Smith J was "mindful of the need to avoid usurping or interfering in the arbitral process more than is required in order to determine this application".

Comment

This judgment reaffirms the courts' reluctance to exercise powers under s44(3) of the *Arbitration Act 1996* and to interfere with arbitral proceedings. It is also a useful reminder of the threshold that applicants must reach to persuade the courts to grant injunctive relief. **CL**