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 examine a judgment supporting the Scottish law position that an adjudicator's decision as to liability for their fees cannot be challenged, even if the adjudicator's decision is later reversed; and another that serves as a reminder that parties are under a duty to mitigate their losses, so only reasonable costs should be incurred owing to another party's alleged breach, and parties must be able to evidence that such costs have been reasonably incurred.

A & V Building Solution Limited v J & B Hopkins Limited

[2024] EWHC 2295 (TCC); Mr Ter Haar KC

In September 2019, J & B Hopkins Limited (J&BH) were engaged by Bouygues UK Ltd as Main Contractor for the new student accommodation development for the University of Brighton, known as Moulsecoomb Campus (the Project). J&BH engaged A & V Building Solution Limited (A&V) to undertake plumbing works for the Project (the Sub-Contract Works). A&V left the Project in March 2021 when the Sub-Contract Works were incomplete.

In June 2022, A&V commenced a true value adjudication of the sub-contract works. On 6 July 2022, the Adjudicator ordered A&V to pay a net sum of £82,956.88 to J&BH, as well as the Adjudicator's fees in the sum of £13,962, as the Adjudicator had found in most major respects in favour of J&BH (the Decision).

On 18 June 2024, Mr Ter Haar KC found that J&BH in fact owed A&V the sum of £101,543.17, thereby reversing the Decision in A&V's favour, albeit Mr Ter Haar KC did not rule on the Adjudicator's fees.

A&V submitted that J&BH should bear the costs of the Adjudicator's fees on the basis that the Decision had been overturned such that A&V were in fact the successful party.

J&BH argued that "the position is that the adjudicators' decisions as to liability to pay their fees is final and are not subject to final determination or reversal by the Court". J&BH relied on the decision in ***Castle Inns (Stirling) Ltd v Clark Contracts Ltd [2005] Scot CS CSOH 178***, in which the Outer House of the Court of Session established that an adjudicator's decision as to liability to pay fees is final and is not subject to challenge in subsequent proceedings.

Decision

Mr Ter Haar KC made no order in respect of the Adjudicator's fees. A&V therefore remained liable for the Adjudicator's fees pursuant to the Decision.

Citing ***Castle Inns***, Mr Ter Haar KC concluded that the English law position supported the position established by the Court of Session, namely that an adjudicator's decision as to liability for their fees was final. Mr Ter Haar KC noted however that "[i]t seemed to me […] that there may be arguments to suggest that Castle Inns should be reconsidered. However, upon reflection, I have decided that this is not the case to do so". Mr Ter Haar KC also noted that "there was and is no pleaded case in respect of Mr Smith's fees".

Further, Mr Ter Haar KC found that A&V were entitled to statutory interest pursuant to the *Late Payments of Commercial Debts (Interest) Act 1998* (the 'Act') on the basis that the Sub-Contract did not provide a substantial remedy for late payment such that the application of the Act was ousted.

Comment

This judgment supports the Scottish law position that an adjudicator's decision as to liability for their fees cannot be challenged, even if the adjudicator's decision is later reversed. Nevertheless, given Mr Ter Haar KC's comments above, it is worth noting that there may be scope to challenge the established position in Caste Inns in future provided that the challenging party properly pleads its case.

Magnetic Shields Limited v Vacuum and Atmosphere Services Limited

[2024] EWHC 2260 (TCC); Mr Coppel KC

Magnetic Shields Limited (MSL) owns and operates several vacuum furnaces across multiple manufacturing sites. In June 2017, MSL acquired two used vacuum furnaces, one of which was an Abar HR50 furnace (the Abar), originally built in the 1980s and designed to operate at pressures up to a positive pressure of 5 bar absolute. In November 2017, MSL engaged Vacuum and Atmosphere Services Limited (VAS) to refurbish the Abar to an 'as new' standard specification.

In October 2019 refurbishment of the Abar was completed to the apparent satisfaction of both parties and the Abar entered into service for MSL. VAS provided a two-year warranty as part of the refurbishment (the Warranty).

On 15 June 2021, a serious overpressure incident occurred during the operation of the Abar following which MSL commissioned Vacuum Furnace Solutions (VFS) to assess the safety of the Abar. VFS identified necessary remedial works to the Abar, which it costed at £12,850.

MSL did not commission VFS or VAS to undertake the remedial works, even despite VAS's two-year warranty. Instead, MSL purchased a new furnace, and the Abar remained out of service.

On 14 March 2022, MSL issued proceedings against VAS claiming damages for breach of contract because of a failure to perform the contracted works with reasonable skill and care or in a workmanlike manner.

MSL's claim was for the cost of essential repairs at £12,850, the cost of replacing the Abar's Programmable Logic Controller (the PLC) at £74,000, albeit "without any explanation of why this was necessary", or alternatively, the full cost charged by VAS for refurbishing the Abar, including supply of a new PLC, at £199,015, albeit again "without explanation of why it would be necessary to start the refurbishment from the beginning", as well as additional costs, characterised as staff overtime costs for running other furnaces to perform the work which the Abar had been intended to do, and new parts, refurbishment of parts, and repainting which MSL did not plead as defective or not in accordance with the contract as supplied by VAS. Further, MSL did not obtain a quotation from a contractor to support the proposition that a 'full' refurbishment was necessary. Further, MSL alleged that these costs were incurred "to avoid defaulting on pre-existing contracts".

VAS argued that MSL had failed to disclose sufficient evidence to demonstrate that MSL had pre-existing contracts to meet, as well as a dissatisfactory explanation for staff overtime costs and other items. VAS issued two counterclaims in respect of two outstanding invoices in the net sum of £2,582.65, which included an invoice which MSL refused to pay on the basis that it concerned work completed in March 2021, which MSL alleged should have been performed by VAS without charge under the Warranty.

Decision

Mr Coppel KC awarded damages of £16,600 in MSL's favour for breach of contract, which he then reduced by £2,582.65 in respect of VAS's counterclaims to £14,017.35.

Mr Coppel KC rejected that MSL suffered losses in the full amount pleaded nor did he consider that MSL proved its alleged losses in mitigation to the requisite standard. In his judgment, Mr Coppel KC found that MSL had failed to demonstrate that its approach was "a necessary or reasonable one", which justified "the conclusion either that MSL has not proved that the claimed losses in mitigation were reasonably incurred and so were caused by VAS's breach of contract, or that MSL has failed to mitigate its losses".

In respect of the alternative claim pleaded, Mr Coppel KC criticised for not obtaining any quotations from a contractor to support the proposition that a full refurbishment was necessary and noted that, whilst other problems may arise, "MSL cannot base its case on causation of loss on the fear that something much worse may turn up".

Insofar as VAS's counterclaims were concerned, Mr Coppel KC found that MSL had not supplied evidence or more detailed argument to support the position that the works performed by VAS in March 2021 should have been performed under the Warranty.

Comment

This judgment is a reminder that parties are under a duty to mitigate their losses, which means that: (i) only reasonable costs should be incurred owing to another party's alleged breach; and (ii) parties must be able to evidence that such costs have been reasonably incurred. **CL**