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Dispatch

Building Safety Act

Triathlon Homes LLP v Stratford Village Development Partnership & Others

[2024] UKFTT 26 (PC)

The decision of the First-Tier Tribunal is the first to consider a contested remediation contribution order ("RCO") under section 124 of the Building Safety Act 2022 ("BSA").

Section 124 allows for the making of RCOs, by which developers, landlords and their associates may be required to contribute towards the costs of remedying, what are termed, relevant defects. Section 120 of the BSA defines relevant defects as being: "*a defect as regards the building that— (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and (b) causes a building safety risk*".

Triathlon brought the proceedings in respect of five residential blocks at the former athletes' village for the London 2012 Olympics at Stratford, now known as East Village. Starting in 2017, work was carried out to identify the materials used in the construction of the East Village and to determine what risks they might present. In November 2020, serious fire safety defects were discovered, relating both to the design and the construction of the various cladding systems adopted for the external facades. In response to these discoveries, a waking watch was implemented in all blocks in November 2020 which remained in place until additional alarm and heat detection systems were installed in flats as temporary measures. A programme of work to remedy the defects at East Village permanently by the removal and replacement of the exterior cladding was implemented which is planned to see the remediation of the blocks by August 2025. The total cost of the work was said to exceed £24.5 million.

Triathlon sought a contribution of some £18 million towards the remediation costs from SVDP the developer and its parent company (the "Respondents"). These costs represented Triathlon's share of the total and included historic costs that had been paid.

In relation to the historic costs, the Respondents argued that a remediation contribution order could not be made in respect of costs incurred before the commencement of the BSA on 28 June 2022. This would reduce the sum claimed by some £1.1 million. The Respondents further argued that the fact costs were incurred before the date of commencement of the BSA was either a sufficient reason, or a contributory reason, as to why it would not be just and equitable for a remediation contribution order to be made against them in relation to those costs.

The Tribunal was in "*no doubt*" that section 124 "*allows remediation contribution orders to be made in respect of costs incurred before 28 June 2022*". The language was clear and there was no temporal limitation or transitional provision. Further, paragraph 1012 of the Explanatory Notes comments that one of the circumstances in which it is said leaseholders might wish to seek a remediation contribution order against a developer is where they have already contributed towards the costs of remediation works before the coming into force of the leaseholder protections. The Tribunal noted that this was:

> "*consistent with the purpose and structure of Part 5 that the radical protection it extends to leaseholders should not be restricted by precise distinctions of time … Parliament has decided that, irrespective of fault, it is fair for those with the broadest shoulders to bear unprecedented financial burdens*".

The BSA provided for the wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholders to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament had decided was necessary and fair.

Triathlon accepted that jurisdiction under section 124 was limited to the costs of remedying relevant defects but argued that all of the costs in issue in these applications were costs of remedying relevant defects, including the costs of the waking watch, fire detection equipment and other precautionary measures. The Tribunal agreed. Section 124 focused "*on the practical outcome of the things which have been done, or are to be done, rather than any interpretation which tends to narrow the scope of the remediation provisions*". A remediation contribution order could be made in respect of costs incurred in preventing risks from materialising or in reducing the severity of building safety incidents.

The Tribunal could only make an RCO if it considered it "*just and equitable*" to do so. This was a discretion for the Tribunal. On the facts here, relevant issues included:

- Interested persons, such as Triathlon, were entitled under the BSA to seek an RCO. Their motivation was, therefore, not relevant.
- The ability to make a claim for a remediation contribution order under section 124 was a new and independent remedy, which was essentially non-fault based. It had 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.
- It was relevant that SVDP was the developer. The policy of the 2022 Act was that primary responsibility for the cost of remediation should fall on the original developer, and that others who have a liability to contribute may pass on the costs they incur to the developer.
- SVDP was financially dependent on the second defendant, its parent company. It seemed to the Tribunal that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constituted precisely the sort of circumstances at which the association provisions of the BSA were.

- The fact that the works were to be fully funded under the BSA was not relevant. Public funding was "*a matter of last resort, and should not be seen as a primary source of funding where other parties, within the scope of section 124, are available as sources of funding*".

Triathlon was entitled to the RCOs it had sought.

Adjudication: failure to provide reasons

UK Grid Solutions Ltd & Anr v Scottish Hydro Electric Transmission plc

[2024] ScotCS CSOH_5

The pursuers, a joint venture, entered into a contract with Scottish Hydro, the defender, in respect of works to be carried out at an existing electricity substation on the outskirts of Fort Augustus. The contract was based on NEC3 Option A.

The delivery and installation of the two transformers was delayed, which gave rise to a compensation event ("CE"). The project manager made an assessment that the CE had no effect upon the defined cost, completion or meeting a key date, and the JV gave notice of adjudication, seeking an order for payment of the sum due in respect of the alleged increased defined cost. The JV asked that the adjudicator provide reasons for their decision.

The adjudicator's decision included:

> "*12.13. I declare that the Contractor is entitled to an increase in the Defined Costs (including Fee) in the sum of £1,834,573.43.*
>
> *12.14. I order for payment of £1,834,573.43, or such other sum as the Adjudicator may decide, within 7 days of the Adjudicator's.*
>
> *12.15. I declare that the Contractor is entitled to interest on the sum noted at paragraph 12.14 ...*
>
> *12.16. I order for payment of the interest noted in paragraph 12.15 above, within 7 days of the Adjudicator's decision*".

The defender refused to comply with the decision saying that:

1. The adjudicator had failed to exhaust their jurisdiction by failing to address certain relevant and material defences advanced by the defender relating to delay damages and deductions or set-off.
2. Contrary to that, if the adjudicator did, in fact, address and reject the defender's argument, they gave no reasons for doing so.
3. The adjudicator's purported financial award was meaningless and unenforceable.

The defender said that, where required to give reasons, an adjudicator was obliged to make clear that they had decided all essential issues properly put forward by the parties. The parties should be able to understand from the adjudicator's reasons: "*in the context of the adjudication procedure, what it was that the adjudicator had decided and why*".

In the adjudication, the defender denied that the JV were entitled to any extension of time. The JV was in critical and culpable delay caused by the pursuers' lack of progress, poor coordination, and defects in their works. Accordingly, the defender was entitled to recover liquidated damages which they were entitled to deduct/set off against any sums otherwise due to the JV.

The adjudicator had not "*referred to, let alone determined*" these arguments. As such, the adjudicator had failed to address a material line of defence advanced by the defender. Although the adjudicator, in their decision, noted that they agreed with the contractor saying that if the compensation event had been assessed in accordance with the contract, payments would have been made accordingly, this did not address the defender's arguments in respect of liquidated damages and set-off.

Further, paragraph 12.14 of the decision was "*meaningless and thus unenforceable*". This paragraph did not order the defender to make payment of a specified sum. Nor did it specify the time period within which any such payment was to be made. The NEC3 contractual conditions contain a mechanism whereby the adjudicator could correct clerical errors within 14 days of the decision. No correction had been made. It was not for the court to try to correct the adjudicator's error at this stage. To act in this way would usurp the role of the adjudicator.

Lord Richardson repeated the well-known approach of the courts to summary enforcement. The court will only interfere in the plainest of cases, it is "chary" (i.e., cautiously reluctant) of technical defences, and if the adjudicator has answered the right questions, the decision will be binding even if it is wrong in fact or law.

There was no dispute between the parties that where an adjudicator has failed to address and determine a material line of defence, this will result in unfairness and a breach of natural justice which will mean that the court will not enforce the adjudicator's decision. Lord Richardson was satisfied that the defence of set-off had been put before the adjudicator. It was also a material line of defence that could not be ignored by the adjudicator.

However, the judge was satisfied that the adjudicator did address and determine this line of defence. The adjudicator referred to the arguments advanced by the defender in the Rejoinder submission in respect of the redress by the pursuers. It was "*reasonably clear*" that the adjudicator had concluded, in agreement with the JV's arguments, that they ought to have been paid by the defender following the assessment of the compensation events in accordance with the parties' contract. Had this been done, the payment by the defenders would have pre-dated the defender's claims for liquidated damages. On this basis, had the contract been complied with, the defender's arguments, including set-off, based on its entitlements for liquidated damages could not have been advanced at the time payment ought to have been made by the defender.

Lord Richardson said that it was clear it was not necessary for an adjudicator to deal in their decision expressly with every argument made to them. That is, provided that the adjudicator deals with the arguments which are necessary and sufficient to establish the route by which they reached their decision. Here, it was: "*possible to discern from the adjudicator's decision, reasonably construed against the background of the submissions made ... both what [the adjudicator] decided and the reasons for that decision*".

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