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1. Editorial: Stuart Ross, Director, Arup

Welcome to the second edition of Construction Law Quarterly for 2024. In this comprehensive edition, we present a rich array of papers that delve into both current issues and the wider complexities encountered in the field of construction law.

Our first paper is from Simon Taylor who covers the issue of competition law relative to public procurement. This follows the paper by Sean Wilken KC in our final CLQ of 2023. The paper focuses on the interplay between competition law and public procurement and concludes that this remains unsettled. Existing definitions under the Competition Act 1998 (CA 98) and the Procurement Bill coexist uneasily, potentially necessitating resolution through litigation. Consequently, public bodies and utilities should exercise caution by scrutinizing tender documents and contractual terms for compliance with competition law before releasing them to tenderers.

Our second paper is from Sarah Dyer et al covering the first substantive decision by the First Tier Tribunal (FTT) on Remediation Contribution Orders, a new remedy under the Building Safety Act 2022 (BSA). The FTT, in its decision, sheds light on key statutory definitions, particularly the meaning of 'just and equitable.' The FTT's stance supports the policy and intent of the BSA, emphasizing that the Act aims to protect leaseholders to the fullest extent possible. Consequently, the FTT ordered the developer and its well-capitalized parent to bear responsibility, signaling a commitment to equitable application of the BSA.

Our third paper from Karen Gough discusses the findings of a recent case involving set-off. In its concluding remarks, the court emphasised that parties should not exploit arguments related to set-off and withholding to undermine legitimate enforcement proceedings, except in specific exceptional circumstances. Overall, it appears that the applications for set-off in such cases were strategically aimed at achieving precisely that outcome.

The fourth and final paper from Jon Miller covers the topic of Applications for Payment and why they have to be correct and follow the contract provisions. The case reviewed underscores the importance of applications for payment adhering to all terms of the subcontract. In this instance, late submission, incorrect valuation dates, and dispatching the application to the wrong email address rendered it invalid.

As we head into the spring/summer in the northern hemisphere, the CLQ team hope that these papers and case briefings provide an interesting read on your summer holiday travels but also one that helps keep you all up to date on the latest construction law issues.

As ever, should you have a short article or legal update that you would be interested in submitting for inclusion in a future issue please contact the journal editor at journals@icepublishing.com.

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2. When is public procurement subject to competition law? : Simon Taylor

The recent article authored by Sean Wilken KC (see CLQ 2023 Issue 4), *Government by Contract*, raises the interesting issue of whether contractual schemes such as the Self Remediation Terms imposed on developers by the Department for Levelling Up, Housing and Communities are subject to competition law scrutiny under the Competition Act 1998 (CA 98)[1].

This article relates to an area of Government contracting which already attracts a considerable degree of scrutiny in the courts - public procurement. Contracting authorities and utilities subject to the Public Contracts Regulations 2015 (PCR 2015) and the Utilities Contracts Regulations 2016 (UCR 2016)[2] are regularly sued for a failure to follow rules designed to ensure that procurement procedures comply with the principles of transparency, equal treatment and proportionality. Typically, these cases are challenges brought by unsuccessful tenderers to the manner in which the procurement process was conducted. But occasionally, they also relate to the design of the tender rules and that may include often non-negotiable contractual terms.

For example, in *Abbvie Ltd* v *The NHS Commissioning Board*[3] a challenge was brought both to the award criteria and to a contractual mechanism by which a fixed fee would be payable to successful tenderers even though they may have to supply surplus treatments. The jurisdictional argument that the fixed fee was contractual and therefore not subject to the PCR 2015 was rejected at [151] on the basis that the relevant provisions in regulation 18 (the equal treatment principle) apply to the design of the procurement – of which the proposed conditions of contract are plainly a part.[4]

Given that terms are imposed on tenderers and Government/utilities often have a very high share of the buying market for the goods or services being procured, the question arises whether and to what extent competition law constrains or should constrain those contractual terms. Terms could include liquidated damages clauses, long term exclusivity and market sharing arrangements – all of which are potentially caught by competition law prohibitions.

This article considers briefly; first, the outline differences between the competition and procurement regimes, second, how far the definition of an 'undertaking' means that competition law does not apply to bodies conducting public procurement and third, whether that is changing or could change in the post Brexit environment.

2.1 Differences between procurement and competition law

These regimes tackle different problems. Procurement law is a means of addressing the risk of corruption by public officials, the tendency of public bodies to prefer local or national suppliers and agreements reached in international treaties to secure reciprocal access for suppliers to public markets. The rules were based on the Treaty on the Functioning of the European Union (TFEU). Now, post Brexit, the UK is bound in its own right to the WTO General Procurement Agreement (GPA), has procurement commitments to the EU via the EU-UK Trade and Cooperation Agreement (TCA) and is also in the process of adopting new procurement legislation.

By contrast, competition law, though also mirrored in EU law and subject to ongoing international commitments under the TCA and WTO rules, is a means of ensuring that markets operate efficiently, fairly and for the benefit of consumers.

The scope for challenging contractual terms under competition law is broader than under procurement law and the remedies are more extensive.

Possible bases for challenging conditions of contract under the current procurement rules include the equal treatment principle and the regulation 18 requirement that the design of the procurement shall not be made with the intention of artificially narrowing competition. Technical specifications may also be challenged if imposed without allowing tenderers to use equivalent standards.[5] In general, the requirement for an advertised tender should ensure that there is some competition for the market, even if the contractual terms are dictated by the public buyer.

Competition law goes further as it prohibits (with certain exemptions and safe harbours) agreements which have the object or effect of preventing, restricting or distorting competition[6] (e.g. by fixing prices in or sharing markets) and conduct by a dominant undertaking which amounts to an abuse of dominance[7] (e.g. by imposing unfair prices or otherwise limiting production, markets or technical development to the prejudice of consumers without objective justification). Competition law applies to buyer as well as supplier markets and joint purchasing may cause competition concerns through 'oligopsony power' (i.e. where the buyers jointly make up a significant share of demand).

Remedies in procurement cases can extend to setting aside decisions or ordering the authority to amend a document (before the contract is entered into), damages and a declaration of contractual (prospective) ineffectiveness in narrow circumstances (such as an unlawful direct award without publicity).

But competition law remedies are more coercive with the prospect of a contract being declared null and void, damages and even a fine of up to 10% of turnover in serious cases. The limitation period for procurement challenges is also shorter (30 days) than for competition cases (6 years).

A hybrid area is subsidy control, formerly known as state aid. Under EU law, this was a means of ensuring that member states did not distort competition by unfairly subsidising national providers, though there were myriad exceptions which allowed for a controlled industrial policy and aid to underdeveloped regions. Post Brexit, there continue to be reciprocal requirements under the TCA[8] and the Subsidy Control Act 2022[9] has been adopted in the UK giving the right to challenge non-compliant public subsidies to the Competition Appeal Tribunal (CAT).

EU state aid law has been invoked as a further weapon in procurement challenges on the basis that the failure to conduct a transparent and fair procurement procedure can amount to the grant of unlawful state aid.[10] There may continue to be a role under the Subsidy Control Act 2022 in considering the competition implications of public procurement.

These regulatory tools are not necessarily mutually exclusive. Challenges to public procurements or procured contractual terms based on the CA 98 have been few and far between in the UK.[11] However, this may change as further explored below.

There is a policy question as to whether a clearer and more extensive application of competition law principles to public procurement and Government contracting would be beneficial from an economic, political and social perspective in the UK. This article does not attempt to tackle that policy issue[12] but takes stock as to where the law now stands and how it could evolve.

2.2 Undertakings in cobmpetition law

The competition law prohibitions in section 2 and 18 of the CA 98 apply only to 'undertakings'.

Neither the EU Treaties nor the CA 98 define an undertaking. The definition has evolved through rulings of the Court of Justice of the EU. The Competition and Markets Authority (CMA) and UK courts have been required by section 60 of the CA 98 to ensure so far as possible that questions arising under the competition prohibitions in the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law.

An undertaking has been defined in the case-law as any natural person engaged in economic activity, regardless of its legal form or the way in which it is financed.[13] For public bodies, the '*basic test is whether the entity in question is engaged in an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private operator in order to make profit.*'[14] They are not undertakings when they perform essential functions of the state, such as social or regulatory functions.

The concept of an undertaking is functional so a public body could be acting as an undertaking for some activities but not others and such activities could include procurement. In *FENIN*[15], which concerned the purchase of goods and services by the body which ran the Spanish health service (a free service), it was held that the nature of the purchasing activity (i.e. whether it was economic) must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. In that case, the subsequent use was not economic and the authority did not therefore act as an undertaking in its procurement activity.

Applying these EU tests, procurement by utilities (caught by the UCR 2016) may well be caught by the CA 98. In *Achilles Information ltd* v *Network Rail Infrastructure Ltd*[16], the CAT and Court of Appeal applied *FENIN* in finding that Network Rail's rules requiring suppliers accessing the network infrastructure to use a certain provider of assurance services were subject to the CA 98 on the basis that they were an essential part of and dissociable from its operation of the rail infrastructure. It appears to have been accepted that Network Rail's monopoly over the rail infrastructure was an economic activity and the argument that the assurance activity was of a regulatory nature was rejected.

The procurement activity of certain entities currently caught by the definition of 'public bodies' under PCR 2015 could also be subject to the CA 98 on the basis of *FENIN*. This might include universities, housing associations, NHS Foundation Trusts and Government arms' length bodies which engage in market-based activities.

Furthermore, post Brexit, the UK courts now have greater freedom to move away from the EU case-law constraints and expand the list of public bodies subject to competition law. In particular, section 60A of the CA 98 now provides that the CMA or courts (or other persons applying the CA 98) are not required to ensure consistency with EU law if the person:

> '*thinks that it is appropriate to act otherwise in the light of one or more of the following —*
> *(a) differences between the provisions of this Part under consideration and the corresponding provisions of EU law as those provisions of EU law had effect immediately before IP completion day;*
> *(b) differences between markets in the United Kingdom and markets in the European Union;*
> *(c) developments in forms of economic activity since the time when the principle or decision referred to in subsection (2)(b) was laid down or made;*
> *(d) generally accepted principles of competition analysis or the generally accepted application of such principles;*
> *(e) a principle laid down, or decision made, by the European Court on or after IP completion day;*
> *(f) the particular circumstances under consideration.*'

The door is therefore open for the courts to adopt a UK formulation of the threshold test for the application of competition law to public bodies.

2.3 Changing procurement landscape

There is an equivalent opportunity following Brexit for the UK procurement regime to introduce new definitions of bodies subject to procurement regulation.

Currently, the definition in clause 2 of the Procurement Bill allows room for interpretation but suggests an ongoing overlap of the two regimes:

> ' "*public authority" means a person that is— (a) wholly or mainly funded out of public funds, or (b) subject to public authority oversight, and does not operate on a commercial basis*'
> '*The following are examples of factors to be taken into account in determining whether a person operates on a commercial basis—*
> *(a) whether the person operates on the basis that its losses would be borne, or its continued operation secured, by a public authority (whether directly or indirectly);*
> *(b) whether the person contracts on terms more favourable than those that might reasonably have been available to it had it not been associated with a public authority;*
> *(c) whether the person operates on a market that is subject to fair and effective competition.*'

Conversely, a 'public undertaking' is defined as '*a person that (a) is subject to public authority oversight, and (b) operates on a commercial basis*'. Such entities are subject to the procurement rules only to the extent that they carry out a specified utility activity (in areas such as water or rail networks), though competitive utility markets are excluded from regulation.[17]

The draft definition of a public authority has similarities to that used under the PCR 2015.[18] However, it is not the same as it moves away from a test based on the purpose for which the body is established towards a test based on its activity. It is unclear whether it is intended to apply to buyer as well as provider activity. It is also unclear whether it means that a person could be considered a public authority for some (purely social) purchases, but not others (commercial purchases).

The definition appears to catch the unfortunate but possibly familiar scenario in which a state supported body operates on the market with an unfair advantage and thus distorts effective competition. That body would be subject to procurement regulation as a public authority because it does not act commercially in a competitive

market. Clearly, the need for competition regulation of its activities is all the greater given its advantages and it may be assumed that it would also be considered an undertaking, possibly a dominant one, subject to the CA 98.

The opportunity to draw a clear line between the application of the procurement and competition regimes has not therefore yet been taken. The overlap appears likely to continue, but could it have been otherwise?

2.4 A legislative solution

The Subsidy Control Act 2022 defines a 'public authority' in Section 6 as '*a person who exercises functions of a public nature*'. It might have been simpler if the same definition of a public authority had been used in the Procurement Bill or an improved version which limited it to bodies which exercise exclusively functions of a public nature and do not offer goods or services on a market.

CA 98 could then be amended to ensure that all bodies which are not public authorities are treated as undertakings. That might more clearly take certain categories of body outside the remit of procurement law (e.g. universities, housing associations, NHS Foundation Trusts, certain arms' length Government bodies)[19] but these bodies would be subject to the full rigour of the CA 98. This might achieve a degree of mutual exclusivity, though utilities would continue to be subject to both regimes.

2.5 The case-law options

As explained above, the current and draft legislation do not provide clear separation between the procurement and competition regimes.

However, assuming no further relevant changes to the definitions in the Procurement Bill or other legislation, there appear to be at least three directions that the UK case-law in this area could take, now that the courts are relatively unconstrained by EU rules.

The first is that there may continue to be a limited overlap between procurement and competition law, in that competition law will only apply to public procurement needed for market-based activity under a *FENIN* type analysis or similar. Utilities and state supported public bodies, such as Foundation Trusts, central purchasing bodies, some 'arms' length' Government bodies, housing associations and universities may continue to be subject to scrutiny under both regimes.

A second, more radical direction, would be if the courts were to find that any major public procurement is in essence a commercial activity with the potential risk to fair and effective competition and that competition law should always apply. On this approach, Government departments designing and conducting procurements would need to consider the competition law rules and this could restrict their ability to use procurement to make or shape markets or promote market entry. There will be limited tools under the Procurement Bill to vet this kind of market manipulation, particularly given that regulation 18 of the PCR 2015 is being dropped. The conduct of a procurement could also constitute an abuse of dominance if it unfairly favoured one tenderer over another. The difficulty with this approach is that if substantially all procurement were to be considered a commercial activity (such that competition law applies) it would follow that the new test for a public authority under the Procurement Bill would hardly ever be met and that the procurement rules would not therefore apply (save in relation to certain utility activities).

A third direction would be one of seeking to establish clear separation and mutual exclusivity between the two regimes. On this approach, any procurement conducted with a view to using the goods or services procured on a commercial basis (thus triggering competition law under the *FENIN* rule) would not be treated as procurement falling within the Procurement Bill definition as it is a commercial activity. The difficulty with this approach is where to draw the line between the two regimes. For example, a Foundation Trust procuring maintenance services may be servicing commercial needs (e.g. a private patient unit) as well as non-commercial needs (e.g. its A&E Department).

Given the uncertainty of the definitions and future case law, the prudent approach for public bodies may be to assume that both the procurement and competition regimes are applicable to all public sector procurement.

2.6 Conclusion

The interface between competition and procurement law remains unresolved. The current definitions under the CA 98 and the Procurement Bill sit alongside each other uneasily and the rules may need to be determined by litigation rather than legislation. This leaves public bodies and utilities in an uncertain position. In the meantime, it may be prudent for public bodies, as well as utilities, to ensure that all tender documents and proposed contractual terms are vetted for competition law considerations before being issued to tenderers.

3. First substantive remediation contribution order granted by the First-tier Tribunal under the Building Safety Act 2022: Sarah Dyer, Sean Garbutt and Emma Knight

The First-tier Tribunal (FTT) has handed down its decision on the first substantively contested remediation contribution order (RCO) under section 124 of the Building Safety Act 2022 (BSA).[20] Sarah Dyer and Sean Garbutt of Gowling WLG acted for the successful applicant, *Triathlon Homes LLP (Triathlon), in Triathlon Homes LLP* -v- *(1) SVDP (2) Get Living plc (3)*[21].

The FTT decision sheds valuable light on the interpretation of certain provisions of the BSA. Most notably, it confirms that:

- A RCO is a standalone 'no-fault' remedy introduced by Parliament in the BSA. It does not require that the payer under any order was factually the original 'wrongdoer' – that is

the contractor undertaking poor workmanship or a designer producing an incorrect or negligent design. Rather, the BSA and related regulations create a 'hierarchy' or cascade of liability with the developer sitting at the top ahead of freeholders and then subsequent landlords;

- The FTT was in 'no doubt' that section 124 allows RCOs to be made in respect of costs incurred before 28 June 2022 (i.e. the commencement date of section 124);
- Any '*measure which causes a building defect to cease to be a relevant defect, or which is part of a larger programme of measures for that purpose*' – including waking watch and fire evacuation officers as well as servicing and decommissioning temporary fire alarms – is capable of being the subject of a remediation contribution order;
- The FTT is well used to exercising its discretion on how to apply a test of 'just and equitable' and, in the context of RCOs, that discretion should be exercised having regard to the purpose of the Building Safety Act 2022 and all relevant factors. However, given the breadth of this discretion there is no single approach that should be taken by the FTT and each application will be dependent on its own facts;
- The existence and provision of funding from the Building Safety Fund was not considered, in this case, to be a reason by the Tribunal to not make an award (referred to as the 'Public Purse' argument).

3.1 What are remediation contribution orders?

RCOs (together with Remediation Orders) form part of what are collectively referred to as the 'leaseholder protections' established by the BSA. These are aimed at protecting leaseholders in multi-occupied residential buildings from the costs associated with remediating historical building safety defects.

Under section 124 of the BSA, the FTT may, on the application of an interested person – and if it considers it 'just and equitable' to do so – make a RCO in relation to a 'relevant building', requiring a company to make payments in connection with the remediation of relevant defects. Read our earlier insight to learn more about the definition of 'relevant building' and 'relevant defects'.

An RCO may be made against a landlord, a person who was a landlord at the qualifying time (i.e. the start of 14 February 2022), or the building's developer, as well as any person 'associated' with any of these parties. 'Associated' parties are broadly defined and encompass, for example, both parent companies, subsidiaries, and sister companies within a group structure, as well as companies that share or have shared a director in the five years leading up to 14 February 2022.

Schedule 8 of the BSA affords further protection to leaseholders by providing:

- that certain service charge amounts relating to 'relevant defects' in a 'relevant building' are not payable; and
- for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it).

3.2 Background to the application to the FTT

The application before 1the FTT was made by Triathlon, a limited liability partnership established to provide affordable housing at East Village, which is the former Athletes Village for the London 2012 Olympic Games. This application was made in respect of five particular buildings (the Blocks) in an area of the village known as N26.

The Athletes Village was owned and developed by a special purpose vehicle called Stratford Village Development Partnership (SVDP). At the time of development, SVDP was wholly owned by the Olympic Delivery Authority (ODA). Following completion of London 2012, SVDP was sold into the private sector and, at the time of the application, was ultimately owned by Get Living PLC (Get Living). Triathlon is the long leaseholder of all or part of each of the Blocks.

The properties at N26 were subsequently leased to individuals by both Triathlon and Get Living, with approximately 60% of the units leased by Triathlon, and the balance leased by Get Living.

Following the Grenfell Tragedy, inspections were undertaken across the village by the management company East Village Management Limited (EVML), which identified a number of building safety defects. Thereafter a waking watch was put in place and a remedial scheme designed and tendered.

Triathlon's share of the remedial works and professional fees were estimated at some £16 million (referred to in the judgment as the 'Major Works'). In addition, future costs of fire evacuation officers and fire alarm decommissioning to the conclusion of the works were estimated in the region of £760,000 as well as Triathlon's costs incurred in respect of the waking watch, fire evacuation officer and tender of the remedial works at just over £1 million (referred to in the judgment as the Triathlon Additional Costs).

Triathlon applied for RCOs to be made against SVDP (in its role as developer) and against Get Living plc (in its role as the parent company of SVDP as well as the freehold landlord entities SVPH-1 Limited and SVPH-2 Limited). Triathlon sought its share of the Major Works costs and future costs to be paid by SVDP/Get Living (together the respondents) to EVML (as the entity that will be incurring the Major Work and future costs), with the historic Triathlon Additional Costs being sought to be paid to Triathlon.

3.3 FTT decision

The FTT agreed with Triathlon and made five RCOs against the respondents (one in respect of each of the Blocks), ordering them to pay in total:

- over £16 million to EVML in respect of the Major Works;
- a further £767,438 to EVML in respect of the costs of other remedial measures including the forecast cost of servicing and decommissioning temporary fire alarms; and
- over £1 million to Triathlon in respect of the Triathlon Additional Costs.

In reaching this decision, the FTT addressed a number of key points which we describe further below.

3.4 Can a Remediation Contribution Order be made in relation to costs incurred before the commencement of section 124?

The respondents argued that a RCO could not be made under section 124 in relation to costs incurred before the section came into force on 28 June 2022. It contended that to do so would be to give the provision retrospective effect.

Triathlon submitted that applying section 124 to costs incurred before it came into effect would not involve giving it retrospective effect. Indeed, the provisions of Part 5 of the BSA were all 'backward looking' in the sense that they were all about defects that had occurred in the past. It would be absurd to limit the scope of section 124 by reference to the date remedial works were done or paid for, rather applying it generally to the defects which caused the legislation to be enacted.

Moreover, the Explanatory Notes to the BSA confirmed Parliament's intention that section 124 should apply to costs incurred before commencement, stating that: '*if leaseholders have already paid costs towards remediation before the coming into force of the leaseholder protections, they may wish to seek to recover these costs using a remediation contribution order*.'

The FTT agreed with Triathlon and confirmed that:

- it was in '*no doubt that section 124 allows remediation contribution orders to be made in respect of costs incurred before 28 June 2022*';
- this was plain from the 'clear and explicit' language of section 124(2) and the '*the absence of any temporal limitation or transitional provision*';
- the clear effect of the language is confirmed by paragraph 1012 of the Explanatory Notes to the BSA;
- it did not regard this interpretation of section 124 as '*either improbable or unfair*': Parliament has decided, in passing the BSA that '*irrespective of fault, it is fair for those with the broadest shoulders to bear unprecedented financial burdens*';
- the BSA '*provides for 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 has decided are necessary and fair*.'

The FTT further explained that given the protections provided under paragraph 2 of Schedule 8 of the BSA means that leaseholders are 'fully protected' against the costs of relevant measures if the landlord or superior landlord was responsible for the defect. That was a key factor in this case, as it was accepted by the respondents that those protections were engaged. Moreover, the FTT considered that it would be 'inconceivable' that Parliament could have intended that those leaseholders who benefited from that protection but had not yet paid for remedial works by 22 June 2022 would be protected, but those who had paid before 22 June 2022 would not be.

3.5 Meaning of 'just and equitable'

Until this decision, the meaning of 'just and equitable' in section 124 of the BSA has not been subject to any substantial judicial scrutiny.

The FTT observed that section 124 gives no guidance on how the FTT is to decide whether it is 'just and equitable' in any particular case to make an order. It further noted that whilst it is 'obvious' that the power is discretionary and should be exercised '*having regard to the purpose of the 2022 Act and all relevant factors*', it is not possible to identify a particular approach which should be taken.

In reaching its decision that, in this case, it was just and equitable to make a RCO against the respondents, the FTT considered all arguments put to it by the Parties. Ultimately it was persuaded that, whilst a number of matters were of little or no weight, the principal reasons pointing in favour of the FTT exercising its discretion to make an award in this case were as follows.

- It was accepted that SVDP was the developer of East Village and, given the hierarchy of liability created under the BSA and associated regulations described above, it was a strong indicator that it would likely be just and equitable for SVDP to be ordered to pay;
- It would also be just and equitable for an order to be made against Get Living, given that SVDP was dependent on Get Living for financial support. Indeed it was established in evidence that SVDP was balance sheet insolvent and was only being maintained as a going concern due to the continued support of its parent company.

The FTT ultimately rejected the respondents' argument that, given the remedial works were currently being funded by the Building Safety Fund, there was no need for a RCO to be made. The FTT was not persuaded that there was any clear and convincing reason why the remedial works should not be funded by SVDP/Get Living in place of the Building Safety Fund. Indeed, it was held that the public funding provided by the Building Safety Fund was a matter of last resort.

3.7 Jurisdictional issues

In February 2023, the application had been transferred to the Upper Tribunal, by reason of its complexity and significance. The transfer was made pursuant to rule 25 of the Tribunal Procedure (First-tier

Tribunal) (Property Chamber) Rules 2013 (the 'Tribunal Procedure Rules') which governs the selection of the appropriate forum and allows for transfer of individual cases to the Upper Tribunal when justified by complexity or value. However, at the commencement of the hearing, the Tribunal noted that '*[w]hether by inadvertence or design*' section 124 of the BSA allows RCOs to be made by the FTT alone, and does not confer a concurrent jurisdiction on the Upper Tribunal.

Accordingly, the case was transferred back to the FTT and heard by the Chamber President and Deputy Chamber President of the Upper Tribunal (Lands Chamber) in their capacity as FTT judges.

3.7 Commentary

Until now the only RCO made by the FTT was an uncontested order, in which a number of matters concerning interpretation – particularly the meaning of 'just and equitable' – were not subject to any legal argument before the Tribunal.

The FTT's decision in Triathlon therefore sheds welcome light on some of the key statutory definitions, in particular the meaning of 'just and equitable', and assists in understanding how the BSA will be applied in practice. In particular, the FTT agreed with Triathlon's submission that the BSA and related regulations create a '*hierarchy of liability, with the original developer and its associates at the top*'.

It further noted that to reach an '*interpretation of the Act which resulted in some leaseholders bearing the cost of remediation, and some developers, landlords and their associates avoiding responsibility, would not give effect to the obvious purpose of the Act to protect leaseholders to the fullest extent possible. Moreover, such an interpretation would create serious inconsistencies in the operation of the legislation*.'

This is one of the clearest indications to date that the courts will seek to give effect to the policy and intention of the BSA, where it is just and equitable to do so. In the circumstances of this case, it was plain to the courts that the protections afforded by the BSA were engaged and accordingly it was just and equitable to make an order against the original developer and its well capitalised parent.

Gowling WLG (UK) LLP acted for Triathlon in the RCO proceedings. It is also worth noting that the FtT has recently granted permission to SVDP / Get Living to appeal against the entirety of this decision.

4. Paper 3: Construction law article: the issue of set-off – Simply no one size fits all: Karen Gough

Everyone loves a trier and parties have been trying to find ways to set-off one claim against another with varying degrees of success and, mostly, failure. The recent case of *FK Construction* v *ISG Retail Limited*[22] is no exception. The point of interest is why in that case and others the attempted set-off failed.

Generally, set-offs – as with any other devices designed to frustrate the enforceability of an adjudicator's decision in a statutory adjudication do not fair well as a defence to proceedings to enforce the decision.

If there is a general rule applicable to claims to set-off one adjudicator's decision against another, it is that a party who has lost an adjudication brought under the aegis of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ('the Act')[23], cannot set off a claim for loss or damages which was not considered by the Adjudicator in the adjudication. There are a number of cases which support this proposition and most of the results are entirely predictable.

An early case is the Scottish Outer House's judgment in *Allied London & Scottish Properties PLC* v *Riverbrae Construction Limited*[24]. Here the result fits the 'entirely predictable' mould, and although now 24 years ago, the decision would be the same today. The Adjudicator decided that sums were due from the Petitioner to the Respondent, the Adjudicator rejected a claim to retain the sums he found to be due against sums claimed by the Respondent from the Petitioner on other contracts, alternatively the Respondent's application to have them put on deposit while the other claims were pursued. The Adjudicator, and then the Court rejected the set off, the application to have them put on deposit being simply another way of sustaining the retention claim which the Adjudicator had specifically rejected.

In *VHE Construction Plc* v *RBSTB Trust Co. Ltd*[25], the Court rejected the employer's attempt to refuse payment of the majority of an Adjudicator's decision in favour of the contractor by setting off its claim for liquidated damages ('LDs') for delay. The employer had not served any withholding notice, which the court found to be a necessary precondition to withholding payment stating: '*The words "may not withhold payment" [a reference to s111 of the Act] are in my view ample in width to have the effect of excluding set-offs…". The court also rejected the argument that the employer retained any "residual right" to set off its liquidated damages claim which "residual right" did not exist. It held that "…section 11 now constitutes a comprehensive code governing the right to set off against payments contractually due*.'

The court's decision was rooted in the fundamental principles settling by earlier decisions confirming that the intention of Parliament in enacting the Act was that adjudicators' decisions were binding and should be enforced pending [any] final determination by arbitration, litigation or agreement. He found that the obligation to comply with the Adjudicator's decision meant that the losing party must do so without recourse to defences or cross claims not raised in the adjudication.

The leading case on this issue is now [still] the decision of the Court of Appeal in *Ferson Contractors Limited* v *Levolus A T Limited*[26]. The appeal was from a judgment of the TCC enforcing an adjudicator's decision. The case arose out of a sub-contract

containing an adjudication agreement which complied with the mandatory provisions of s108 of the Act. Under the sub-contract Levolux claimed payment for work done and when served with a notice of withholding in respect of the majority of its claim, suspended performance. Ferson responded with a notice to Levolux to recommence work failing which it would determine the contract. Levolus responded by issuing a notice of adjudication. Ferson subsequently purported to determine the contract.

The Adjudicator found substantially in favour of Levolux and ordered payment within 7 days of his decision. Ferson did not pay and Levolux issued enforcement proceedings. By way of defence, amongst other matters, Ferson relied on an entitlement to terminate which would give rise to a right under the sub-contract not to pay any sums due or accruing due. The TCC judge held that it was implicit in the Adjudicator's decision that Levolux was entitled to suspend performance and therefore a purported termination based on a wrongful suspension of work had no contractual effect.

On appeal, the Court of Appeal agreed with the TCC's interpretation of the Adjudicator's decision and, after reviewing recent authorities which may have given rise to an assumption that in the face of clear contractual terms, or a contrary adjudication decision giving rise to a right of deduction or cross claim against the sum ordered by the Adjudicator, the earlier decision with either not be enforced or the judgment stayed. The Court of Appeal distinguished the earlier cases but equally rejected any broad statement of principle to such an effect and decided that the intention of s108 of the Act was clear and a contract must be construed so as to give effect to it. If that intention could not be construed from the contract then the offending clause must be struck down.

Subsequent cases have followed the *Ferson* v *Levolux* case. In relation to cross claims for LDs, the authorities were revisited in the case of *Balfour Beatty Construction Ltd* v *Serco Ltd*[27]. Jackson J derived two principles of law:

> a. Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of LDs, then the employer may set off that sum against monies payment to the contractor pursuant top the adjudicator's decision, provided that the employer has given proper notice (in so far as required).
>
> b. Where the entitlement to LDs has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set-off LDs against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

Sir Peter Coulson LJ, in Construction Adjudication, Fourth Edition, suggests a third principle:

> c. '*If it is to be said that the terms of the contract as to set-off are to override the effect of the adjudicator's decision, and deprive the successful party in the adjudication of the sum otherwise due pursuant to the adjudicator's decision, then those terms must clearly provide for such an outcome.*'

In each case, I would respectfully suggest that while such arguments are available in principle, they should be pursued only by losing parties in adjudication who have money to burn and/or everything to lose.

As to parties asserting a cross claim or set-off which has not been adjudicated upon at the time of enforcement, these and later cases indicate that it will fail. Enforcement proceedings and any interpartes reckoning is generally decided on the basis of parties' current rights and obligations as they stand at the end of each adjudication: see *Interserve Industrial Services Ltd* v *Cleveland Bridge UK Ltd*[28]; or '*…the claiming party is entitled to receive the payment it should have received at the date of the interim payment without taking into account subsequent events or other claims for set-off*.': *Ledwood Mechanical Engineering Ltd* v *Whessoe Oil and Gas Ltd and Another*[29]. As to cases which have proved to be exceptions to the general rule, these have broadly either been founded on the proper construction of the terms of the parties' contract, or the proper interpretation of the adjudicator's decision.

The case of *HS Works Limited* v *Enterprise Managed Services Limited*[30] involved disputes about the evaluation of HS's final account and a number of contra charges claimed by Enterprise. There were two adjudications, the first determined that £1,835,252.26 was due to HS, the second found that the proper value of the subcontract works was £23,253,931.09 after allowing for contra charges which meant that all or part of the sum awarded in the first adjudication should be repaid if paid at all. Both parties sought to enforce the decision which was in its favour arguing that the decision adverse to its interest was invalid on ground of jurisdiction or [breach of] natural justice. The applications were heard together by the Court.

The challenges in both adjudications were rejected, each was held to be valid and the judge ordered enforcement of both decisions. The effect was that FK was entitled to a payment as at 12 February 2009 but from 16 March 2009, ISG was entitled to the return of the money overpaid.

The Court set out the following steps which it said should be considered before deciding whether to permit a set-off of one decision against another:

> '*a. First, it is necessary top determine at the time when the Court is considering the issue whether both decisions are valid, if not, or it cannot be determined whether each is valid, it is unnecessary to consider the next steps.*
>
> *b. If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.*

> *c. if it is clear that both are so capable, the Court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The Court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.*
>
> *d. How each decision is enforced is a matter for the Court. It may be wholly inappropriate to permit a set off of a second financial decision as such in circumstances where the first decision was predicated upon a basis that there could be no set off.*' [Judgment of Akenhead J, para. 40]

In the event, the Court exercised its discretion as to how any order or orders on judgment should be drawn and decided to make orders reflecting the net position between the parties consequent on its judgment.

Turning to the very recent case of *FK Construction Limited* v *ISG Retail Limited*[31] what was the issue there? FK was a roofing and cladding sub-contractor to ISG, on a bespoke ISG sub-contract on a project in Bristol known as Project Barberry. The sub-contract incorporated the Statutory Scheme for adjudication with litigation in the English courts as the forum for the final determination of disputes. FK referred an unpaid application for interim payment which was the subject to a purported payless notice ('PLN') from ISG to adjudication. The Adjudicator found in favour of FK and directed ISG to pay £1,691,679.94 plus VAT and interest on the basis that ISG's PLN was out of time and invalid ('the Wood decision'). ISG did not pay and FK issued proceedings to enforce the decision net of VAT which FK accepted was not applicable. There were two earlier adjudications and one later decision ('the Molloy decision') issued after commencement of the enforcement proceedings, all in favour of FK but the last decided that FK was owed a lesser sum of £906,738.20. One of the earlier decisions was subject to a pending hearing of a Part 8 application issued by ISG.

The same parties were also engaged on another project known as Project Triathalon in respect of which there had been three decisions, two in favour of ISG and one in favour of FK. FK intimated its intention to challenge by way of Part 8 proceedings one of the decisions in favour of ISG which was to be heard with the Barberry Part 8 proceedings. The net effect of the Triathalon decisions was that FK owed ISG £66,620.68.

ISG's sole defence to enforcement of the Wood decision was based solely on its claim to have a valid set-off which the court should take into account. The Court reviewed the authorities on set-off, the most important of which are considered above. ISG relied on one of the limited exceptions to the rule against set-off which was considered in the cases of *HS* v *Enterprise and JPA Design and Build Limited* v *Sentosa (UK)*[32] where there are two valid and enforceable decisions involving the same parties whose effect is that monies are owed by each party to the other.

In *FK* v *ISG* the court noted that in *HS* v *Enterprise* and the *Sentosa* case the courts were dealing with the two decisions simultaneously. *Sentosa* case also concerned a decision where LDs had been awarded by the Adjudicator and so fell within one of the exceptions noted by Jackson J in the *Balfour Beatty* case.

ISG sought to avoid making an overpayment by arguing for enforcement of the Wood decision only up to the value of the Molloy decision and also by setting off the net effect of the Triathalon decision, namely a further £66,620.68. However, after considering the authorities, and working through the steps set out by Akenhead J in the *HS* v *Enterprise* case, the Court declined to permit any set off.

In the case of the Molloy decision recently issued, the Court had not been asked to determine its validity and could not do so in the instant proceedings where it was concerned only with the enforcement of the Wood decision. Effectively therefore ISG's defence failed at the first of Akenhead J's steps. On the second step, the Judge repeated the point about its inability to determine the enforceability of the Molloy decision and added that it could not give effect to a decision that was not yet enforceable. The application to set-off the Triathalon decisions was rejected for similar reasons. The Judge also noted that the suggestion that a decision in relation to one project could be set-off against another was entirely novel and the ISG contract term permitting such a cross project set-off potentially offended the statutory requirement for immediate enforcement of an adjudicator's decision.

The court also noted that it was not, as in *HS* v *Enterprise* or the *Sentosa* case, dealing with two decisions which were the subject of separate proceedings which were heard by the court at the same time so as to enable it to determine the enforceability of each of the decisions.

By way of conclusion, the court went on to state that it was important that parties are not encouraged to raise arguments over potential set-off and withholding as a means of seeking to defeat (or mitigate the effects of) otherwise legitimate enforcement proceedings save in the very limited circumstances identified in the exceptions referred to. By way of conclusion to this article, it is tolerably clear that the applications for set-off advanced in most if not all these cases were designed to do just that.

5. Paper 4: Why applications for payment really do have to be correct: Jon Miller

5.1 Introduction

We are all familiar with 'smash and grab' adjudications where, in the absence of a Payment Notice and a Pay Less Notice, the sum applied for has to be paid. The High Court case of *RGB Plastering Limited* v *Tawe Drylining and Plastering Limited*[33] emphasises the need to ensure that an application strictly complies with the underlying contract, even if it requires an application to be sent to a particular email address.

5.2 The payment terms

Tawe Drylining entered into a Subcontract with RGB with the usual provisions for interim applications to be made, but with some quite specific requirements:

- Applications were to be issued on the 28th day of the month, but were to value the Subcontract Works up to a different date – the 'Valuation Date'.
- Applications received after the 28th of each month were to be 'administered' with the following month's payments.
- All Applications had to be submitted to a specific email address.

5.3 Interim Application 6

Interim Application 6 was sent two days late, did not value the Works on the correct 'Valuation Date' and was not sent to the required email address. Shortly after Interim Application 6 was received, RGB terminated the Subcontract.

Tawe Drylining pointed out that:

- Interim Application 6 was sent using the pro forma template that had been used for previous interim applications – it was clearly in their view an application for payment.
- Interim Application 6 may have been late, but it should have been 'administered' as part of the following month's payments.
- Previous applications had been submitted late, but were paid.
- Whilst the Application had not been sent to the email address required by the Subcontract, it was, however, sent by email to RGB's employees who had dealt with previous interim applications.

5.4 The need to comply strictly with the Contract

The Court took into account the fact that Interim Application 6 used the template that had been used for previous applications. When considering whether an application should be paid as a result of the failure to issue a Payment Notice and Pay Less Notice, the Court referred to an earlier case which held that 'the document relied upon as an Interim Application must be in substance, form and intent an Interim Application … and it must be free from ambiguity …'[34]. However, whilst Interim Application 6 did indeed appear to be an application for payment, it still had to comply with the Subcontract.

Turning to the points raised by RGB the Court held that:

- Interim Application 6 had been sent late. Under the Subcontract it was to be 'administered' as part of the following month's payments. Being 'administered' did not mean that it would automatically be paid as part of the next month's payment cycle. The Subcontract terms would still apply and RGB were still entitled to examine the Application, and decide if it was to be paid.
- Interim Application 6 valued the work up to the wrong date – it did not value the Subcontract Works up to the Valuation Date required for the month in which it was issued, or the following month.
- Whilst it may have been sent by email to the RGB employees who dealt with payments, it had not been sent to the specified email address.

Taking all of these points into consideration the Court held that Interim Application 6 did not comply with the Subcontract, and was therefore a nullity. It turned out Interim Application 6 was not an Application at all and any attempt to 'smash and grab' recover monies based on this document was bound to fail.

5.5 Previous conduct

Tawe Drylining pointed out that previous Applications that were issued late, sent to the same email addresses, had been paid. As is often the case, Tawe Drylining sought to argue that RGB were prevented (i.e. 'estopped') by their conduct from denying that Interim Application 6 was a bona fide application in accordance with the Subcontract.

However, Tawe Drylining's witness statement dealing with this point was submitted very late – and accordingly the Court refused to consider this evidence.

5.6 Conclusion

The RGB Plastering case emphasises the need for Applications, particularly when trying to instigate payment via a 'smash and grab' adjudication, to comply with all the terms of the Subcontract. Here, sending the Application late, valuing the Subcontract Works up to the wrong date and dispatching the Application to the wrong email address, all led to the Court holding that it was not in fact an Application at all.

Following this logic it may encourage some payers to simply reject applications on the basis that they do not comply with even trivial terms of the underlying agreement – the onus is clearly on those seeking to recover funds to make sure they comply with the contract.

REFERENCES

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2. Public Contracts Regulations 2015 (PCR 2015) and the Utilities Contracts Regulations 2016 (UCR 2016). The Stationery Office Ltd, London, UK.
3. *Abbvie Ltd* v *The NHS Commissioning Board* [2019] EWHC 61 (TCC)
4. The definition of 'procurement document' in regulation 3(1) expressly includes 'proposed conditions of contract'.
5. Regulation 42, PCR 2015.
6. Section 2, CA 98.
7. Section 18, CA 98.
8. Articles 362 – 375.
9. Subsidy Control Act 2022

10. See most recently *R* (Good Law Project Limited) v *The Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [407] – [497].
11. See *Arriva the Shires Ltd* v *London Luton Airport* [2014] EWHC 64 (Ch). While this case related to a tender for a bus route concession, the case was brought under the CA 98.
12. The reader is referred to a comprehensive and scholarly analysis of the legal and economic issues in '*Public Procurement and the EU Competition Rules, Second Edition*' by Albert Sanchez Graells, published by Bloomsbury, 2014.
13. *Höfner and Elser* (C-41/90): [1991] E.C.R. I-1979 paragraph 21. See also *Bettercare Group Limited* v *The Director General of Fair Trading* [2002] CAT 7, in which it was held that an entity providing State funded residential care and nursing home services was acting as an undertaking and December 2011 Guidance of the Office of Fair Trading: Public bodies and competition law.
14. *Ambulanz Glöckner* v *Landkreis Südwestpfalz* EU:C:2001:284, [2001] E.C.R. I-8089. Applied by the CAT in *Strident Publishing Limited* v *Creative Scotland* [2020] CAT 11. See also *UKRS Training Limited* v *NSAR Limited* [2017] CAT 14 at [57] to [67].
15. C-205/03P *FENIN* v *Commission* EU: [2006] E.C.R. I-6295.
16. *Achilles Information ltd* v *Network Rail Infrastructure Ltd* [2019] WL 038992580 and [2020] EWCA Civ 323
17. See regulation 34 of the UCR 2016, clause 2(1) and Schedule 4, Part 2 of the Procurement Bill.
18. In particular, bodies '*established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character*', as interpreted in cases such as *Korhonen Oy* (Case C-18/01) and, in the UK, *Alstom Transport* v *Eurostar International Limited* [2012] EWHC 28 (Ch).
19. This would require modifications to the UK GPA coverage Annexes.
20. Building Safety Act 2022 (BSA).
21. *Triathlon Homes LLP (Triathlon), in Triathlon Homes LLP* -v- *(1) SVDP (2) Get Living plc (3) EVML* [2024] UKFTT 26 (PC)
22. *FK Construction* v *ISG Retail Limited* [2023] EWHC 1042 (TCC)
23. Housing Grants, Construction and Regeneration Act 1996 (as amended)
24. *Allied London & Scottish Properties PLC* v *Riverbrae Construction Limited* [1999] BLR 246
25. *VHE Construction Plc* v *RBSTB Trust Co. Ltd* [2000] BLR 187 (TCC)
26. *Ferson Contractors Limited* v *Levolus A T Limited* [2003] EWCA Civ. 11
27. *Balfour Beatty Construction Ltd* v *Serco Ltd* [2004] EWHC 3336 (TCC)
28. *Interserve Industrial Services Ltd* v *Cleveland Bridge UK Ltd* [2006] EWHC 741 (TCC)
29. *Ledwood Mechanical Engineering Ltd* v *Whessoe Oil and Gas Ltd and Another* [2007] EWHC 2743 (TCC)
30. *HS Works Limited* v *Enterprise Managed Services Limited* [2009] EWHC 729 (TCC)
31. *FK Construction Limited* v *ISG Retail Limited* [2023] EWHC 1042 (TCC)
32. *HS* v *Enterprise and JPA Design and Build Limited* v *Sentosa* (UK) [2009] EWHC 2312 (TCC)
33. HT-2020-CDF-000012.
34. *Henia Investments Inc* v *Beck Interiors Ltd* [2015] EWHC 2433.

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