FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Issue 305 – November 2025

Dispatch

Adjudication: payment notices

Vision Construct Ltd v Gypcraft Drylining Contractors Ltd

[2025] EWHC 2707 (TCC)

VCL sought a Part 8 declaration in relation to the proper construction of a subcontract payment mechanism. An adjudicator had awarded Gypcraft £217k plus interest on the basis that Gypcraft had served a valid Interim Payment Application 23, but VCL had failed to serve either a payment or a pay less notice in response, with the result that Gypcraft's Interim Payment Application 23 was payable in full under section 110B(4) of the HGCRA.

VCL said that the subcontract failed to adequately identify a relevant *"Interim Valuation Date"* for Payment Cycle #23. This was given short shrift by the judge who, by way of an initial observation, referred to the comments of *Coulson LJ in Bennett Construction Ltd v CIMC MBS Ltd* [2019] BLR 587:

> *"the courts expect the parties to adopt business common sense as to the arrangements for invoicing and payment."*

Here, the judge considered that the Payments Schedule did set out a scheme for Interim Valuation Dates. The adjudicator had been able to give effect *"clearly and methodically"* to the dates and regime contemplated by the subcontract.

VCL also said that Gypcraft was estopped from relying on the alleged late submission of the notices because none of the payment notices had been issued in accordance with the contractual timetables.

The initial hurdle for VCL was whether a claim for estoppel could be brought using Part 8. The judge noted that claims involving estoppel are generally not suitable for Part 8 where there is a substantial dispute of fact. It was an: *"unusual (albeit not impossible) argument to raise in the evidence-free zone of Part 8"*.

In short, VCL said that none of the payment notices had been issued in accordance with the contractual timetables. VCL said that:

> *"The estoppel by convention … arose by reason of the parties communications across the line, objectively construed, as found in the interim payment applications, the payment notices, and the invoices … in which Gypcraft represented to VCL that the net summary position as at the start of that payment cycle was to be found only in the gross value of the work done less the amounts invoiced by Gypcraft in accordance with the previous payment cycles. In particular, by those representations Gypcraft impliedly represented there were no other notified but uninvoiced sums which had to be taken into account when assessing movement in the month (i.e. since the time of the last valuation)."*

The relevant legal ingredients of this type of estoppel were set out in *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC). For an estoppel to arise, there must be a clear and unequivocal communication from one party to the other as to a state of affairs, or a shared understanding between both parties. The first party must have intended that the other rely on its clear and unequivocal communication (or shared understanding). Further, the second party must have reasonably relied on the clear and unequivocal communication (or shared understanding). And finally, the first party must now seek to resile from its clear and unequivocal communication (or shared understanding), and it must be unconscionable and unjust for that party to go behind the convention or understanding.

The judge said that there were several reasons why such an estoppel could not arise here. Firstly, in saying that the *"Previous Net Payments"* were as set out in the Application, Gypcraft did not *"impliedly represent there were no other notified but uninvoiced sums which had to be taken into account when assessing movement in the month."* Second, the estoppel was said to have had the effect that the parties had entered into a convention whereby Payment Notices could be given *"out of time."* The judge said that there was no evidence or document which showed that there was such a convention. Whilst applications 20, 21 and 22 were all dealt with out of time, that did not give rise to a convention without more. There were a number of possible other reasons, including confusion or inefficiency.

Third, there was no evidence of reliance. To establish this, VCL would have to show that it fell into the habit of issuing their payment notices late because they were subject to some sort of convention. And finally, to understand whether it had been unconscionable and unjust on VCL to seek to go behind the convention if there was one, would require a full investigation of the facts – which cannot be done under Part 8.

Finally, VCL submitted that the document it issued on 7 February 2023 in response to Interim Payment Application 23 was, in fact, a pay less notice. The judge described this as an *"ambitious submission"*:

> *"The covering email referred in the subject box, in two places, to 'PN 23'. The body of the email twice referenced the provision of a 'Payment Notice.' The attached document was headed 'Payment Notice' and stated that 'the basis on which the sum stated in this Payment Notice has been calculated is set out in the attached breakdown'."*

The document was what it said it was; any *"other reading of the document would be entirely artificial."* The judge concluded that:

> *"it would, in my view, entirely undermine the Act and the Sub-Contract if what the parties clearly intended at the time to be a Payment Notice could somehow retrospectively be converted into a Pay Less Notice."*

Defective properties

Mallas v Persimmon Homes Ltd & Anor

[2025] EWHC 2581 (TCC)

It was common ground that, because the Claimant's new home lacked appropriate foundations, Persimmon had breached its contract and was liable in damages. The key question for Bates DJ

was whether the Claimant was entitled to damages based on the cost of demolishing the superstructure and effectively building a new house. What was the appropriate measure of the "*cost of cure*," i.e. the remediation works required to provide the Claimant with substantively that he was entitled, under the Contract, to expect?

The Claimant paid for a property that complied with the relevant building standards, was supported by appropriate foundations, and was fit for purpose. There was broad agreement as to the appropriate remediation scheme for the house in terms of the *substructure*, namely the building of a new loadbearing piled *substructure*. The difference was about whether or not the *superstructure* should be preserved.

The judge had *"considerable sympathy"* for the Claimant, who had invested in a newly built property in the expectation that this would free him from the burden of having to deal with significant property maintenance issues. The discovery that the property was beset by ground heave problems would have caused a great deal of stress and worry. It was understandable that the Claimant perceived that the construction of a new superstructure, in addition to new foundations was the route to enabling him to *"get what he paid for"*, namely, a new house that he was confident was free from latent defects and could, in future, be sold without needing to disclose a complex history to prospective purchasers.

However, the judge noted that it would be: *"legally wrong for me to award the Claimant damages based on the cost of demolishing the superstructure and effectively building a new house."*

The Claimant had failed to prove, on the balance of probabilities, that demolition and rebuilding of the superstructure were required to remedy defects in, or other breaches of contract relating to, the existing superstructure.

Under Clause 1 of the Contract, Persimmon had warranted: *"that it has built or will build the home on the property in a good and workmanlike manner in accordance with the terms of the relevant planning permission and building regulation consent to the standard of the New Home Warranty Provider"*. Persimmon admitted that it had breached Clause 1 because the house was built on foundations that were inappropriate for the ground conditions.

The Claimant said that he was entitled, under the Contract, to receive the following in exchange for the purchase price:

> *"a Property which was properly designed and constructed, with a certain future in the sense that it was not so uncertain that it still needed to be monitored and investigated many years after completion; which had a normal appearance and performance, not with cracks and other defects; which had a normal value to ordinary residential purchasers; which was safe and convenient to occupy without external peculiarities; and which was ready to occupy without inconvenience, distress and loss of amenity. The respective experts have agreed that the house should have a design life of 60 years ...".*

However, the fact that there were defects in, or had been damage to, the superstructure of the house did not necessarily mean that the appropriate remedy for the Claimant's expectation loss was an award of damages sufficient to enable him to build a new house. The judge agreed with Persimmon that, in making an award of damages for defective premises:

> *"(1) In an action against a contractor for defective work, the appropriate measure of loss is generally taken to be the cost of reinstatement/repair, because that is the foreseeable consequence of the defective work.*
>
> *(2) The cost of reinstatement/repair will not be used as the measure of loss if such cost is disproportionate to the end to be attained.*
>
> *(3) A claimant who carries out either the repair or reinstatement of his property must act reasonably.*
>
> *(4) The court is unlikely to adopt demolition and rebuilding as the correct measure unless two conditions are satisfied: first, the cost of demolition and rebuilding is less than the cost of remediation, and secondly, that remedying the defects represents a reasonable course of action, so that 'the amount awarded is objectively fair as between the claimants and the defendants' [Hudson, [7-006]].*
>
> *(5) If there are two equally efficacious alternative remedial schemes, and one is cheaper than the other, then prima facie the claimant is obliged to put in hand the cheaper of the two schemes.*
>
> *(6) As regards betterment, if a claimant chooses to rebuild to a higher standard than is strictly necessary, it can recover the cost of the works less a credit for betterment."*

The judge also referred to McGlinn v Waltham Contractors [2007] EWHC 149 (TCC), where Coulson J (as he then was) said:

> *"It is, on any view, an extreme course: to knock down a newly completed building because it is said to be defective, particularly where the majority of the defects can fairly be described as aesthetic matters only ... If such a course of action is to be justified at all, it will ordinarily be because the building is dangerous or structurally unsound."*

The Claimant said that the appropriate remedial scheme was demolition and reconstruction, as this was the only certain way for the Claimant to receive what had been contracted for. The judge disagreed. A court, when determining the appropriate remediation scheme, is not applying a test of identifying which scheme affords a *"certain way"* for the Claimant to receive what he contracted for. The Claimant did not receive what he contracted for. Therefore, the court's task is to assess the amount of compensation that was, in consequence, due to him. The compensation amount would not include the costs of a remediation scheme involving demolition and rebuilding unless the court was satisfied that this was a reasonable course of action.

Such a scheme was unlikely to be reasonable if there was another remediation scheme available which would be substantially less costly and reasonable to adopt. On the basis of the expert evidence, that was the case here. It was unlikely to be reasonable to demolish a house simply because there was some degree of risk that it may be subject to some type of defect or damage that had not yet been discovered. Further, it was unlikely to be reasonable to award damages based on the costs of demolition and rebuilding, simply because there was a risk of *"known unknowns"* of that kind. That was especially the case here where any concerns about the possible presence of relevant defects could have been explored by opening up works, which the Claimant had declined to carry out.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN