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Dispatch

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

Adjudication: same dispute

Eurocom Ltd v Siemens PLC
[2014] EWHC 3710 (TCC)

This decision of Mr Justice Ramsey has rightly attracted a lot of comment with respect to the manner in which applications for the nomination of an adjudicator are made. However, the judgment has a number of other interesting features. There had been two adjudications. Siemens submitted that the claims in the Notice of Adjudication (and the Referral Notice) in the Second Adjudication (and so subsequently, the decision), contained a substantial overlap with the claims that had already been made and decided in the First Adjudication. A significant part of Eurocom's claim in the Second Adjudication related to the value of its work. However the value of the work as at the date of termination on 1 August 2012 had been decided in the First Adjudication and no further work had been done since that date to give rise to a further claim. Most of the claims in the Second Adjudication were not brought on the basis of any new analysis or new material.

Eurocom argued that the Second Adjudication differed in nature from the First Adjudication on the basis that it related either to a new claim for damages or that it was a final account claim as distinct from the interim account claim decided by the adjudicator in the First Adjudication. The dispute referred and decided by the adjudicator in the First Adjudication arose out of Eurocom's applications for payment prior to termination which Siemens had valued in a negative sum. The First Adjudication was limited to the determination of Eurocom's entitlement to an extension of time for Siemens' delay and disruption to Eurocom's works, to payment under the subcontract for five heads of financial claim and payment for variations for which payment had been claimed and rejected by the date of the First Adjudication. Eurocom said that the dispute referred to and decided by the adjudicator in the Second Adjudication was for damages for Siemens' breach of contract in delaying and disrupting Eurocom's work, damages for Siemens' repudiatory breach of contract in terminating the subcontract and payment for the variations that remained "to be advised" at the date of the First Adjudication. Even if the two decisions did overlap, the areas of overlap should be and could be readily severed.

The principles to be applied in deciding whether an adjudicator is precluded from deciding a claim because of the effect of an earlier adjudication decision were considered in the *Quietfield Ltd v Vascroft Construction Ltd* decision (see Issue 79).

Mr Justice Ramsey did not accept that here there was a clear distinction between the First Adjudication being based on an interim application, and the Second Adjudication being based on a final account. The adjudicator in the Second Adjudication had allowed sums which overlapped with the decisions made in the First Adjudication. In relation to compensation events, the Judge said that the First Adjudication and the Second Adjudication dealt with the same variation claims. It was not the case that one adjudication dealt with an interim application and the other with a final application. A party who has sought and obtained an adjudication decision dealing with the value of all variations cannot then seek to have another adjudicator determine claims for the same variations by way of a "second bite of the cherry".

In relation to management costs, the Judge held that in the First Adjudication the adjudicator decided on preliminaries up to 18 September 2011. He then compared the delay claim in the First Adjudication and the delay claim in the Second Adjudication and noted that the grounds for the delay until September 2011 were the same or substantially the same. The management claim was therefore for the same period up to 18 September 2011. Further, it was not possible for the adjudicator in the Second Adjudication to come to a conclusion on this claim without taking account of the decision in the First Adjudication. This meant that any new element could not be severed given the basis of the decision in the Second Adjudication.

In relation to extended working, there was a similar overlap in both the time periods where awards were made and in the figures awarded. With the subcontractor claims, the Judge gave an example of one subcontractor, where the first adjudicator made an award of £2,300 which was the same claim dealt with in the Second Adjudication and allowed in full by the second adjudicator. In doing so the adjudicator in the Second Adjudication sought to make decisions on claims which had already been adjudicated on and he did not have jurisdiction to do so.

Siemens had identified some new claims which it acknowledged did give rise to severable and enforceable parts of the decision in the Second Adjudication (or would have done had the Judge decided that the adjudicator had jurisdiction in the first place), but the remaining heads contained elements of claim which had already been raised and determined in the First Adjudication. The adjudicator in the Second Adjudication did not have jurisdiction to decide those elements. Further as the adjudicator in the Second Adjudication did not make any allowance for the claims decided in the First Adjudication but treated the claims as being new claims in the Second Adjudication, it was not possible to isolate the new elements of claim. It was therefore not possible to sever those elements from the decision in the Second Adjudication and thereby enforce the new elements of those parts of the claims in respect of which the adjudicator did have jurisdiction.

Adjudication: payment/payless notices

ISG Construction Ltd v Seevic College

[2014] EWHC 4007 (TCC)

Seevic engaged ISG to carry out works on the basis of the JCT Design and Build Contract 2011. The contract requires the contractor to submit monthly interim applications for payment stating the amount the contractor considers to be due to him, and the basis on which that sum has been calculated. The final date for payment of an interim application is 14 days from its due date. The contract also contains a standard procedure requiring the employer not later than five days after the due date to serve a payment notice, stating the amount it considers to be due. If the employer intends to pay less than the sum stated in the payment notice or interim application, it must serve a pay less notice no later than five days before the final date for payment.

In accordance with the contract, ISG submitted for payment Interim Application No. 13. Seevic failed to make payment or issue either a payment notice or a pay less notice. As a result, ISG referred the dispute to adjudication (Adjudication No 1). The adjudicator found that ISG was entitled to the sum of £1,097,696.29 stated in its Interim Application No. 13 on the basis that Seevic had failed to comply with the notices procedure in the contract.

Seevic refused to pay and, instead, four days before the adjudicator's decision in Adjudication No 1, issued a second Notice of Adjudication to determine the correct value of ISG's works at the date of Application No 13. It was successful in obtaining a decision that the value of ISG's works up to the date of Interim Application No 13. was less than the amount claimed by ISG.

ISG applied for summary judgment to enforce the decision made under Adjudication No 1 and for a declaration that the decision under Adjudication No 2 was invalid for want of jurisdiction. ISG argued that the value of its works at the date of Application No 13 had been agreed because, in the absence of any notices served by Seevic, the value must be taken to be that stated in the application.

Mr Justice Edwards-Stuart, compared it to the case of *Watkin Jones & Sons Ltd v Lidl UK Gmbh*, where the employer also failed to comply with the notice provisions under the contract and, to avoid paying the amount requested by the contractor, brought adjudication proceedings to query the value of the contractor's application for payment. Mr Justice Edwards-Stuart agreed with the decision of Judge LLoyd QC and concluded that:

(i) Absent fraud, in the absence of a payment or pay less notice issued in time by the employer, the contractor becomes entitled to the amount stated in the interim application irrespective of the true value of the work actually carried out. The employer can defend itself by serving the notices provided for by the contractual provisions;

(ii) However, it is not open to either party to go back over such ground in order to revisit the amount of the valuation by issuing adjudication proceedings.

On that basis, Mr Justice Edwards-Stuart ruled that the question of the value of the works decided in Adjudication No 2 had been decided in Adjudication No 1 because the effect of the payment notice regime meant that there could be no dispute about the value of the work that was the subject of Application No. 13. It was the same dispute. Therefore, he allowed the enforcement of the decision in Adjudication No 1 and held that the adjudicator in Adjudication No 2 had no jurisdiction to make the decision he did.

Mr Justice Edwards-Stuart then went on to consider the consequences of allowing Seevic to demand a valuation of the contractor's work outside the stated dates and concluded that:

"the statutory regime would be completely undermined if an employer, having failed to issue the necessary payment or pay less notice, could refer to adjudication the question of the value of the contractor's work at the time of the interim application (or some later date) and then seek a decision requiring either a payment to the contractor or a payment by the contractor based on the difference between the value of the work as determined by the adjudicator and the sums already paid under the contract."

This judgment reinforces the need for employers to ensure that either they or their advisors follow to the letter the requirements set out by the contract for the service of the correct notices if they disagree with the amounts sought in a contractor's payment application

As a postscript, the Judge was asked to give guidance on what was alleged to be a practice by which the responding party serves its response to the referral later than the deadline directed by the adjudicator and, therefore, much closer to the deadline for the adjudicator's decision. Although reluctant to do this, the Judge did agree that whilst the right to be heard was important, it was also a right to a reasonable opportunity to be heard and he repeated the words of Mr Justice Akenhead in the case of *CJP Builders Ltd v William Verry Ltd* (Issue 99), namely:

"It is [of] course open to any adjudicator in setting his or her procedure under Clause 38A to impose 'unless order' type arrangements, provided that the parties are given the right first to argue whether that is appropriate. It is sometimes said by some commentators that adjudication is or can be 'rough justice'. There is no need to make it even rougher by construing provisions such as those contained in Clause 38A as circumscribing a party's basic right to be heard."

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