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.

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Dispatch

Adjudication: valuing a post-termination account

WRW Construction Ltd v Datblygau Davies Developments Ltd

[2020] EWHC 1965 (TCC)

WRW sought summary enforcement of an adjudication decision. DDD had sought a valuation of the post-termination final account. DDD claimed around £3.3milion. In reply, WRW had said that:

"The proper valuation of the post-determination final account in accordance with Clause 8.7.4 of the Contract leads to a position in which DDD is indebted to WRW. Whilst WRW accept that the Adjudicator has no jurisdiction to order payment to be made to WRW, the Adjudicator has been asked by DDD to value the post-terminational final account. It is respectfully submitted that the Adjudicator should find that the proper value of the post-termination final account is as set out above. Put another way, the Adjudicator should conclude that the sum due and payable by WRW to DDD is -£695,035.63."

Recorder Singer QC noted that it was clearly accepted by WRW during the adjudication that the Adjudicator did not have jurisdiction to order a payment of money from DDD, even though DDD were seeking a decision that sums were due to it. The Adjudicator's assessment of the total value of the account was that there was an amount due to WRW of £568k. The Adjudicator stated that:

"I decide that WRW shall pay to DDD the sum of -£568,597.32 (negative) within 7 days of the date of my Decision."

The Judge held that , despite the "opaque language", this meant that the Adjudicator was seeking to award payment to WRW from DDD, having decided the balance of account between the parties. The issue before the court was whether the Adjudicator had jurisdiction to order a payment to WRW and whether payment was due to WRW as a result of the valuation exercise which temporarily bound the parties. Recorder Singer QC accepted that the Adjudicator did not have jurisdiction to award a monetary sum to WRW. However, the issue before the Judge was whether on the basis of a valid, binding valuation of the post-termination account a court's enforcement of that valid award can include an order for payment of the sum due as a consequence of the binding valuation, or not. The Judge said:

"there is no bar on the basis of the authorities ... enforcing a temporarily binding valuation in an adjudication award by making an order for payment of the monies due as a result of that valuation. Indeed...it would be contrary to principle and established authority for the Court to effectively force a party who has the benefit of an award in its favour as far as a balance being due to it, thereafter to have to commence a further adjudication (to which there is no defence) for the purpose of obtaining an order for payment from the Adjudicator before returning to the Court if necessary, for further enforcement proceedings."

Failing to honour adjudication decisions and starting TCC claims

Kew Holdings Ltd v Donald Insall Associates Ltd

[2020] EWHC 1862 (TCC)

DIA was retained to provide architectural services to KEW. In February 2019, DIA obtained a court order against Kew summarily enforcing the decision of an Adjudicator in the sum of £210k. Kew did not pay, but in March 2020 commenced a TCC claim for damages of approximately £2million. DIA issued an application seeking that the claim be either struck out unless KEW pay DIA the sums ordered by the court until the £210k was paid or stayed. In the case of *Anglo-Swiss v Packman Lucas* (see *Issue* 115) Mr Justice Akenhead had had to consider whether an established refusal to honour or satisfy a previous adjudication decision and court judgment would justify the stay of separate legal proceedings concerning the same subject matter, pending payment. He said that:

"(i) The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it.

(ii) In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.

(iii) The power is one that is to be used sparingly and in exceptional circumstances.

(iv) Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably."

Unsurprisingly therefore, Kew did not oppose the application to stay proceedings pending payment of the sums ordered in February 2019. The strike out application was opposed. Mrs Justice O'Farrell noted that:

"There is nothing in the HGCRA or in the above authorities that would render the current proceedings unlawful or an abuse of process as submitted by the Defendant. The HGCRA provides that an adjudication award is binding only until the dispute is finally determined by legal proceedings, arbitration or by agreement. Therefore, it expressly contemplates the commencement of legal proceedings to establish the parties' rights and obligations by way of a final binding determination. Unlike the adjudication provisions, which are subordinate to

the payment provisions in the HGCRA, the right to bring legal proceedings to determine rights and obligations and seek remedies is more fundamental."

Kew said that there was no reason why it should not be entitled to pursue its claim once payment of sums due under the February Order had been paid. DIA was relying on the "pay now, argue later" regime of the HGCRA to justify the application for a stay. However, to strike out the claim would be contrary to that regime since it would deprive Kew of the ability to "argue later". The Judge found in favour of Kew:

"I am satisfied that the Claimant is in deliberate and persistent breach of the Order dated 5 February 2019. The Claimant's repeated promises to pay the outstanding sum indicate that it could satisfy the judgment but has chosen not to do so. The commencement of these proceedings without honouring the adjudication award and the judgment, in flagrant disregard of the "pay now, argue later" regime of the HGCRA, amounts to unreasonable and oppressive behaviour. However, I accept the submissions by Mr Smith that striking out the claim at this stage would be too draconian; the Defendant is entitled to the protection afforded by a stay of proceedings unless and until the judgment has been satisfied but the Claimant should be allowed to pursue its claims once it has paid the outstanding judgment sum."

Kew was also ordered to provide substantial security for DIA's costs.

Expert determination

Empyreal Energy Ltd v Daylighting Power Ltd

[2020] EWHC 1971 (TCC)

An expert made a determination that DPL pay EEL the sum of £1.7million in respect of the costs of remedying works. DPL said that the dispute referred was not a dispute permitted to be referred to expert determination and that EEL had not served its notice of intention to refer the dispute in accordance with the contract. Mr Justice Stuart-Smith noted that resort to expert determination was only available where the Contract provided for the dispute to be referred to an expert. The process of referral to an expert was commenced by a party serving notice on the other "of its intention to refer the dispute" either to the ClArb or such other expert as may be agreed. Notice must be given of "intention to refer" and notice must be given of the party's intention to refer "the dispute" to the expert. The dispute identified in the Notice as the dispute intended to be referred and the dispute which the expert is entitled and required to decide are therefore one and the same. The parties only had five working days to make their submissions to the expert who was to provide a decision within seven working days.

Taking the Notice first, EEL submitted that its letter of 25 February 2020 and email of 4 March 2020 should be read together as constituting an adequate notice of intention to refer. The Judge was not troubled by the failure to state in those documents that they were intended to be a Notice of Intention to Refer: *"it is much more important to look at the substance than the form"*.

Reading the two documents together, the Judge did not "characterise" them as being a mere threat. The email of 4 March 2020 indicated a settled intention to refer, albeit that it would not be necessary to do so if DPL were to pay the sum claimed or agree to adjudication. However the Judge was troubled by what he termed the "confusion" that permeated the documents about the nature of the dispute that was being referred. Mr Stuart-Smith said:

"Viewed objectively, it cannot be concluded that the composite notice was sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt that it was intended to be a claim for adjustment of the Contract Price pursuant to the operative provisions of clauses 13.7(b) and 13.8... The purported notice was therefore inadequate and invalid."

This mattered because of the first objection to the expert determination. Was the dispute referred by EEL and decided by the expert one which the Contract permitted to be resolved by expert determination? The Judge thought not. The Contract provided that where the contractor failed to remedy a defect, under clause 13.7(a) EEL could arrange for the work to be carried out and claim the cost of this remedial work from DPL as a debt. Or, under clause 13.7(b) EEL could determine and agree a reasonable deduction in the Contract Price. Clause 13.8 stated that where the amount of reimbursement pursuant to Clause 13.7(b) could be agreed then it should be resolved in accordance with clause 36 (i.e. expert determination). However, EEL had advanced a claim for the cost of repairs and not, as required by clauses 13.7(b) and 13.8, a claim for an adjustment of the Contract Price in relation to which the notional cost of repairs was supporting evidence. EEL's submissions were confusing and failed to identify the true basis for a claim under clause 13.7(b).

Accordingly, the Expert did not have jurisdiction and the Expert's Determination was null, void and not binding.

Virtual hearings & meetings

Re C (A Child)

[2020] EWCA Civ 987

With everyone spending much of their time making virtual calls on a variety of different systems, this family case provides a salient warning of the need to be extremely careful when shutting down the virtual link in question. The CA noted that:

"The court accordingly rose to allow arrangements to be made. An associate took the judge's closed laptop through to her room but, unbeknownst to the judge, the remote link to the court room remained open. The judge was therefore overheard having a private conversation on the telephone with her clerk about the Appellant by a number of people who still remained on the call. During the course of that conversation, the judge's frustration at what represented a further delay in a case which was already substantially overrunning its three week time estimate, manifested itself in a number of pejorative comments made by her about the Appellant including that she was pretending to have a cough and was trying 'every trick in the book' in order to avoid answering difficult questions."

Remember that sometimes, your virtual app might still be open on your phone, even if your laptop is shut down.

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.

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