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Welcome to the April 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue examines six adjudication decisions in turn, many of which follow on from the cases we have previously looked at, and consider what can be learnt from them in practice.

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Adjudication practice points over the past 12 months

There continues to be a regular number of interesting adjudication decisions coming out of the courts. This issue of *Insight* examines six of these decisions in turn and considers what can be learnt from them in practice.

Is it a breach of natural justice if an adjudicator makes good deficiencies in the claiming party's case and/or plugs a gap in that case without prior notice to the parties?

No. An adjudicator is not bound to accept figures advanced by parties in circumstances where the material provided to him forming the basis of a claim is unclear and unhelpful.

Wycombe Demolition Ltd v Topevent Ltd [2015] EWHC 2692 (TCC)

In April 2014, Topevent Ltd ('Topevent') engaged Wycombe Demolition Ltd ('Wycombe') to carry out demolition works at a site at Lane End, Wycombe. It was common ground that there was an oral construction contract between the parties, but the date on which the contract was made and the relevant terms of the contract were disputed.

On 26 February 2015, Wycombe commenced an adjudication under the TeCSA rules claiming payment of outstanding invoices which it sought to increase through a re-valuation, as well as damages in lieu and damages for breach of contract by Topevent for alleged wrongful termination. In its response, Topevent counterclaimed £180,000, contending that Wycombe had left substantial works incomplete and was in breach of contract for wrongful termination. Topevent also challenged Wycombe's valuation of variations, extra works and sums contractually due, and requested that the adjudicator visit the site in order to complete his assessment of any re-valuation.

The Ajudicator refused Topevent's request for a site visit, which he considered neither necessary nor cost-effective for making a determination of the value of the works. In his decision of 22 April 2015, the Adjudicator found that the parties had "*probably ended the Contract by mutual consent*" and that the re-valued increased amount claimed by Wycombe was justified. The Adjudicator awarded Wycombe £114,000 plus costs, and dismissed Topevent's counterclaim.

Topevent did not pay and Wycombe subsequently issued enforcement proceedings in the TCC.

Topevent resisted enforcement on three grounds, that the Adjudicator:

1. lacked jurisdiction as he had determined multiple disputes;
2. had acted in breach of natural justice by refusing to visit the site; and
3. had acted in breach of natural justice by deciding the valuation on a basis that had not been advanced by either party.

As regards the multiple disputes point, the Judge observed that the Notice of Adjudication made it clear that the dispute between the parties concerned the outstanding payment due to Wycombe following the cessation of works on site. Both elements of the payment said to be due, those being the value of variations and the financial consequences of termination and demobilisation, were part of the same dispute – they were simply different components of the total sum in dispute. The Judge therefore rejected this ground.

The Judge also noted that, in any event, the TeCSA Rules provide at paragraph 11.1 that the adjudicator can deal with "*any further matters*" which the parties agree should fall within the scope of the adjudication. Topevent's acquiescence in, and/or failure to object to, the Adjudicator dealing with both disputes gave the Adjudicator the necessary jurisdiction.

The Judge also rejected Topevent's argument – described as "*hopeless*" - that the Adjudicator had breached the rules of natural justice by refusing to make a

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site visit. The Judge said that it was for the Adjudicator to decide what he must do in order to reach his decision, and in this case, the Adjudicator had carefully explained why a site visit was not a proportionate use of his time or cost-effective. The Judge also noted that a site visit would have been of no assistance to the Adjudicator in valuing the works and variations, and that no submissions to the contrary had been made.

In rejecting Topevent's third ground, the Judge noted that the Adjudicator was "*faced with a myriad of different approaches to valuation*" complicated by the unhelpful way in which the claims were set out. Having reviewed the submissions in the adjudication, the Judge concluded that the Adjudicator had looked at the muddled claim documentation and the even more muddled response, and then considered the evidence, including the witness statements, and come to a conclusion. The Adjudicator had not strayed beyond the boundaries of natural justice by either making good the deficiencies in the claiming party's case or by plugging a gap in that case without prior notice to the parties.

Practice Points

- Parties should note that an adjudicator must do his best with the material provided to him. He has considerable latitude to reach his own conclusions based on that material and is not bound to accept the figures advanced by the parties.
- This latitude will be wider now that adjudication can encompass contracts not recorded in writing.
- The adjudicator's conclusions about the nature and terms of the contract could affect his approach to valuation issues.
- Parties should try and ensure that the material provided to the adjudicator is clearly set out is clearly set out and easy to follow.

Will an adjudicator's decision be enforced in circumstances where he has delegated tasks to a third party without expressly seeking permission from both parties to the dispute?

Yes, provided that the third party is not responsible for making any material decision or valuation.

John Sisk & Son Ltd v Duro Felguera UK Ltd [2016] EWHC 81 (TCC)

Sisk applied to the court to enforce a decision of an adjudicator in which in which it had been awarded a sum in excess of £10 million. The Defendant, Duro, resisted the application on the grounds that there were breaches of natural justice and/or a wrongful delegation of the adjudicator's decision making function.

Duro resisted the application on three grounds. First, it said that there was a real danger that the Adjudicator had approached certain issues with a closed mind. Second, the Adjudicator had delegated, or at least he had appeared to have delegated, certain parts of his decision making role to a third party, without notifying the parties or seeking their consent. Third, he purported to rectify or to amend the contract in circumstances where neither party had submitted that it should be rectified and without giving the parties any notice of his intention to take that approach.

In his judgment, Mr Justice Edwards-Stuart dealt with many issues which commonly arise in adjudication enforcement proceedings, relating to a breach of the rules of natural justice, such as bias or pre-determination, the adjudicator not consulting the parties and going off on a "*frolic of his own*". In this instance, he enforced the Adjudicator's decision, holding that the Adjudicator did not breach the rules of natural justice and that he did not wrongfully delegate parts of his decision making role to a third party.

The third party concerned was a quantity surveyor and a qualified lawyer. He was not an adjudicator. He attended a meeting but no comment was raised by or on behalf of Duro about his involvement until over two weeks after the adjudicator had issued his decision and nearly two months after the meeting in question.

When queried as to the third party's role, the Adjudicator responded by saying that he had taken a note for him so that the Adjudicator "could concentrate on the matter in issue." The Adjudicator had further explained:

> *"At other times he also did certain items of checking and research into matters that I directed he review on my behalf. I have made no charge for his involvement for the time he worked on this application".*

Further enquiries of the Adjudicator then followed, with the Adjudicator describing the inference that the third party was the author of integral parts of his decision as "*plainly incorrect*".

The Judge said that he could see no basis for doubting the Adjudicator's statement that he had asked the third party to produce spreadsheets that assembled similar items of work from different areas of the project so that the Adjudicator could deal with all similar items in a consistent manner. The Judge said that:

> *"In my judgment, that exercise is simply one of assembling information in a particular order; it does not involved any decision making (save the very*

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mundane level of deciding which items should be grouped together)".

The Judge could find "*no evidence that any material decision or valuation*" was taken by the third party, rather than by the Adjudicator and, felt that, on the contrary, the documents were entirely consistent with the Adjudicator's explanation that the third party's role "*was that of a data handler and manipulator and a general administrative assistant*".

The Judge said:

"61. Stepping back for a moment and looking at the position overall, I have to say that the more that I have examined Duro's submissions in relation to the role of Mr Hutchinson [the third party] the less compelling I have found them to be. The Adjudicator had to assimilate within the very short timescale allowed in an adjudication information that was in some 20 lever arch files. Without the assistance of someone who could assemble and manipulate the data in a manner that made the figures manageable, the Adjudicator's task would have been almost insuperable. I find it surprising that the court has been given no explanation for the delay of almost two months that elapsed after the meeting of 3 September 2015 before [Duro's solicitors] raised the question of Mr Hutchinson's involvement in the adjudication. It seems extraordinary that no one in Duro's camp asked about his role unless, of course, it had been explained at the outset of the meeting on 3 September 2015 as the Adjudicator has described. Adjudication is a private and confidential process and so, if there was an outsider at that meeting whose position and role was not explained, I find it hard to believe that Duro's representatives… would not have asked what he was doing…

62. In these circumstances, Duro has come nowhere near persuading me that any relevant part of the decision making process was delegated to Mr Hutchinson. Regrettably, it appears that Duro is effectively challenging the honesty of the Adjudicator's responses to the questions put to him without having any reasonable justification for doing so."

Duro's challenge to the Adjudicator's decision failed on every ground, and Sisk was awarded summary judgment.

Practice points

- If a party suspects that an adjudicator has delegated his decision making function to a third party, it should raise an objection as soon as it becomes aware of the possibility.
- A breach of natural justice will not arise in circumstances where a third party is appointed to carry out a purely administrative role.

Will the court penalise parties that resist enforcement on grounds without proper merit?

Yes. The court may impose a higher than average rate of interest on a party that resists enforcement of a decision on grounds with no merit.

AMD Environmental Ltd v Cumberland Construction Company Ltd [2016] EWHC 285 (TCC)

This case concerned a disputed adjudication enforcement. The judgment contains no new law; however, it is notable because of the way that the court dealt with the award of interest in circumstances where the defendant's position was categorised as hopeless.

Under a sub-contract made in June 2014, the defendant, Cumberland Construction Company Limited ("Cumberland"), engaged AMD to carry out mechanical and electrical works at a London hotel.

AMD claimed a final account sum of £527,770.33 by application dated 31 March 2015. Cumberland did not agree and following numerous exchanges between the parties on 2 September 2015, AMD issued a notice of adjudication. The Adjudicator made a decision on 21 October 2015, determining the value of the works undertaken by AMD at £464,448.34, and that Cumberland pay AMD £77,993.26. AMD was also awarded interest in the sum of £2,044.92 up to the date of the Adjudicator's decision. Cumberland refused to pay these sums and so on 15 December 2015, AMD issued enforcement proceedings.

Cumberland had sought to resist enforcement of the decision on two grounds. The first jurisdictional ground relied on was that the dispute had not crystallised by 2 September 2015. It was alleged by Cumberland that it had asked AMD for particulars of certain elements of the claim which had not been provided before the notice was served. The second ground was that the Adjudicator failed to address matters in issue.

The Judge dismissed the first crystallisation ground because in its communications with the Adjudicator prior to, and following, his ruling on 17 September 2015, Cumberland made no reference to any reservation of right to challenge the decision. The Judge noted that, on the contrary, the communications on the face of it appeared to accept the Adjudicator's jurisdiction. Alternatively, if the Judge was wrong on this point, in response to Cumberland's argument, he considered that it was wrong in principle to suggest that a dispute could not arise until every last particular of every last element of the claim had been provided.

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An alleged absence of particularisation was therefore not a proper ground for resisting enforcement.

The Judge also dismissed Cumberland's second ground as hopeless. He noted that Cumberland's argument in effect was that in respect of three variations, because the Adjudicator came to a decision contrary to the submissions Cumberland had put forward, his reasoning was illogical and must have resulted from a failure to consider those submissions. Upon reading the Adjudicator's decision, it was evident that he had carefully considered all the relevant matters put before him. The Judge also added that were he wrong on this point, he was not persuaded in this case that any failure on part of the Adjudicator led to a material breach of natural justice.

Regarding interest, AMD had argued for 8.5% pursuant to the Late Payment of Commercial Debts (Interest) Act 1998, whereas Cumberland had asked for 2.5%. Typical figures in the Rolls Building were said to be between 4 and 5%. The Judge awarded AMD 6% on the grounds that the adjudication decision should have been rightly honoured some time ago.

The Judge decided to award a high interest rate to the claimant because he was concerned that too many adjudication decisions are not being complied with, which has led to too many disputed enforcements where the grounds of challenge are without merit. The judgment makes clear that the court will punish defendants who do not honour adjudication decisions and improperly resist enforcement by way of higher interest charges. In conjunction with awarding indemnity costs, the stated aim of the court is to deter the need for enforcement claims in circumstances where the original decision should have been rightly honoured by the parties.

Practice points

- A lack of particularisation of the other party's claims is not alone a justifiable argument against the enforcement of an adjudicator's decision.
- The court made clear that, as a matter of policy, where a party resists enforcement on grounds with no real merit, the court will award a higher than average rate of interest to the party seeking enforcement. Parties resisting should therefore consider their position carefully before attempting to resist enforcement.

Can summary judgment be granted in circumstances where the original payment application included sums for works that fall outside the HGCRAs definition of construction operations?

No.

Severfield (UK) Ltd v Duro Felguera UK Ltd [2015] EWHC 3352 (TCC)

This was a claim for summary judgment which, although it was not an adjudication enforcement case, included discussion of the payment principles under the Housing Grants Act ("HGCRA"). Mr Justice Coulson provided a useful summary of the recent case law:

> *"Over the course of the last year, there has been a flurry of cases in which Edwards-Stuart J has considered the situation in which a contractor has notified the sum due in a payment notice, and the employer has failed to serve either its own payment notice or a payless notice. Those cases … are authority for the proposition that, if there is a valid payment notice from the contractor, and no employer's payment notice and/or payless notice, then the employer is liable to the contractor for the amount notified and the employer is not entitled to start a second adjudication to deal with the interim valuation itself.*
>
> *All of these cases concern the situation where the contractor is seeking to take advantage of the absence of any notices from the employer to claim, as of right, the sum originally notified. That approach is in accordance with the amended provisions of the 1996 Act. But because of the potentially draconian consequences, the TCC has made it plain that the contractor's original payment notice, from which its entitlement springs, must be clear and unambiguous."*

The Judge then reminded the parties of the words of Mr Justice Akenhead in the Henia v Beck case:

> *"If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."*

Here the contract between the parties was for the design, supply and erection of steel structures on a site in Manchester. The project involved the construction of two power generation plants, each comprising several different structures. In the terms of the HGCRA, it was a "hybrid" contract. Some parts fell under the provisions of the HGCRA, other parts did not. The court had to decide how to treat payment applications made under the contract. Mr Justice Ramsey had said this in the case of *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC):

> *"It also follows that the right to refer disputes to adjudication under section 108, the entitlement to stage payments under section 109, the provisions as to dates of payment under section 110, the*

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provisions as to notice of intention to withhold payment under section 111, the right to suspend performance for non-payment under section 112 and the prohibition of conditional payment provisions under section 113 will only apply to the Subcontract in this case, insofar as the Subcontract relates to construction operations."

Mr Justice Coulson rejected the suggestion that the provisions of the HGCRA ought to be incorporated wholesale, even in a hybrid contract, to apply to all the works. In the Judge's view, the court must uphold that different regime in respect of all claims to payment with regard to the works which were excluded by the 1996 Act. Although it was "*uncommercial, unsatisfactory and a recipe for confusion*", the result of Parliament, excluding certain construction operations from the HGCRA, was that in situations as the one here there would be two very different payment regimes.

The Payment Notice relied upon here was for some £3.7 million, of which £1.4 million related to works under the HGCRA element of the contract. However, the notice of December 2014 identified the sum due as £3,782,591.12. The £1.4 million now claimed was not said to be the sum due, and was not the notified sum. There was no reference in the payment notice to the sum of £1.4 million. It was not therefore a payment notice in respect of that claim. You cannot "*convert the sum notified by refining it later on*".

It was not sufficient to say that, because the application was supported by a spreadsheet with a number of line items, the "notified sum" consisted of each of the sums in each line item. In the view of the Judge, this was not the purpose or intention of the payment provisions of the HGCRA. It would make for unnecessary complexity to say that the notified sum was not the net total claimed, but each (or just some) of its individual components. In order to be a payment notice, the notice has to set out the basis on which the sum claimed has been calculated. The December 2014 Notice and the accompanying spreadsheet did not begin to address the complexities of what were and were not construction operations. It was not at all clear or unambiguous from either the notice or the accompanying spreadsheet that £1.4 million was the minimum due in respect of construction operations within the HGCRA. All of which led the Judge to conclude that:

"Adjudication, both as proposed in the Bill and as something that has now been in operation for almost 20 years, is an effective and efficient dispute resolution process. Far from being a 'punishment', it has been generally regarded as a blessing by the construction industry. Furthermore, it is a blessing which needed then - and certainly needs now - to be conferred on all those industries (such as power generation) which are currently exempt. As this case demonstrates only too clearly, they too would benefit from the clarity and certainty brought by the 1996 Act."

Practice Points

- Payment notices must be clear and unambiguous.
- A dual payment regime can apply in the case of a hybrid contract which does not contain HGCRA compliant payment provisions. It is therefore important to ensure that the contractual payment provisions under any hybrid contract comply with the HGCRA.

Does a contractor have a right to make interim payment applications following the expiry of an agreed payment schedule but whilst the works are still ongoing?

No.

Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC 168 (TCC)

The Claimant and Employer, Grove Developments Ltd ("GDL"), entered into a contract with the defendant, Balfour Beatty Regional Construction Ltd ("BB") on 11 July 2013 for the design and construction of a hotel and serviced apartments adjoining the O2 Complex in Greenwich, London (the "Contract"). The Contract was a JCT Design and Build form with bespoke amendments and the Contract Sum was £121,059,632.

The works began in July 2013 and the original completion date was 22 July 2015. At the date of the hearing in January 2016 the works were still ongoing. The parties had agreed a Schedule of 23 valuation and payment dates covering the period from September 2013 to July 2015 which governed the making of interim applications and payments during that period.

In August 2015, BB issued an application for a further interim payment, IA24, and received an adjudicator's decision enforcing payment. GDL issued Part 8 proceedings seeking a declaration from the court that BB had no right to issue a 24th payment application. Alternatively, GDL argued that it had served a Pay Less Notice in time.

The Judge found that the Scheme could not be applied so as to imply payment terms into the Contract because the parties had already agreed the amounts and intervals of the payments. This was so even where the Schedule did not cover all of the works. BB was therefore not entitled to issue IA24.

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Practice points

- Contractors must ensure that any agreed schedule of payments should include a provision which allows for additional payment in the event that the works are not complete by the final date specified in the schedule.
- Here, as a the result of the parties' bespoke amendments, payment provisions were not linked to the progress of the works as intended in the original JCT drafting. When bespoke amendments are made which affect the payment provisions, care should be taken by contractors in assuming such risk.

What constitutes a valid payment application?

The court will not construe as valid a payment application which on the face of it is not clearly identified as such.

Jawaby Property Investment Ltd v The Interiors Group Ltd and another [2016] EWHC 557 (TCC)

Under a Contract dated 31 July 2015 (the "Contract") Tekxel Limited engaged The Interiors Group Limited ("TIGL") to carry out construction works at Holborn Tower, High Holborn, London. The Contract was novated to Jawaby Property Investments Limited ("JPIL") who became the new Employer under the Contract.

The Contract was an amended JCT 2011 Design and Build form, and the HGCRA applied. JPIL sought declaratory relief against TIG in relation to certain payment obligations under the Contract and a related Escrow Agreement. The was asked to consider if there had been a default as defined by the Escrow Agreement.

Under the terms of the Contract, TIG was to submit Interim Applications for payment on or before the eighth of each month, which was the due date. TIG's first 6 interim applications were submitted to JPIL in the form of a valuation attaching excel spreadsheets and setting out a statement of the final sum applied for (or total work done) at the conclusion, From Valuation 5 onwards, there was a summary sheet followed by detailed back-up sheets. Each of Valuations 1 to 6 valued TIG's works up to the due date (of the eighth of each month).

Upon receipt of these documents, JIPL's agent would "walk the job" with TIG to assess and check that the work was done, following which it would issue a Certificate of Payment accompanied by detailed excel spreadsheets showing how the assessment had been made.

On 7 January 2016, TIG submitted Valuation 7 for the sum of £2,352,937.29, which was marked as an "initial assessment", by email to JPIL. On 11 January 2016, JPIL "walked the job" and on 15 January 2016, JPIL issued a Certificate of Payment for a negative value of £124,604.00, based on a valuation of the works of £1,634,540. JPIL did not, however, provide any breakdown or back up documentation at his time. On 18 January 2016 JPIL provided marked up documentation explaining how they had reached a negative valuation. Both the Payment Certificate of 15 January 2016 and the supporting documents of 18 January 2016 were out of time to constitute Payment Notices under the Contract.

TIG issued proceedings. JPIL argued that it had served a valid Pay Less Notice on 18 January 2016. JPIL had previously issued two formal Pay Less Notices, described as such, on 2 December 2015 and 23 December 2015. No similar document was issued for Valuation 7. JPIL at the same time argued that TIG had failed to serve a valid interim application because Valuation 7 did not describe itself as such. Conversely, TIG stated that there was no requirement for the document to be expressly described as an interim application.

The Judge concluded that Valuation 7 was not a valid application because it was materially different to TIG's previous applications and failed to comply with the provisions of the Contract. It was described as an "initial assessment", the valuation summary sheet had been erroneously marked as Valuation 6, and unlike TIG's previous applications, the value did not include works up to the contractual due date. No default event had therefore occurred under the Escrow Agreement.

Practice points

- Yet again, this decision highlights the importance of contractors' applications for payment being free from ambiguity.
- If a contractor wishes to take the benefit of an Employer's failure to issue a valid payment notice, its own application must be clear in substance, form and intent.
- Employers should also be aware that, equally, informal communications may well not amount to a Pay Less Notice unless it is made clear that that is what they are intended to be.

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