Fenwick Elliott
The construction & energy law specialists

Issue 158 August 2013

Dispatch

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

Adjudication: set-off against an adjudicator's decision

Thameside Construction Co Ltd v Mr & Mrs Stevens
[2013] EWHC 2071 (TCC)

Mr and Mrs Stevens employed Thameside to carry out extensive construction works at their home. Thameside served a Notice of Adjudication claiming that a dispute had arisen "following the Employer's failure to pay amounts due" and seeking "a peremptory Decision from the Adjudicator". The Notice sought £190k and that Mr and Mrs Stevens should pay such sum "without set-off". Mr and Mrs Stevens' Response noted that the adjudicator had not been asked to determine the question of practical completion and so this fell outside of his jurisdiction. They also asserted that a final certificate could not be issued due to quality and other issues and raised a counterclaim, £88k for defects and £60k for liquidated damages, which they said they were entitled to set-off against any sum decided to be due to Thameside. Thameside said that no counterclaim could be raised as there was no withholding notice.

The Adjudicator awarded Thameside £88k and specifically on one of the supporting schedules put the figure of £0.00 against the LADs. Six days later the Contract Administrator issued an Interim Payment certificate, certifying a net sum due for payment of £88k. On the same day, Mr and Mrs Stevens wrote to Thameside purporting to give a withholding notice stating that it was their intention to withhold payment of £40k in relation to liquidated damages. They paid the balance. In the enforcement proceedings, Mr and Mrs Stevens said that the decision could be and was to be treated in effect as equivalent to an interim certificate and they were therefore entitled to set-off or withhold against the sum payable pursuant to the decision provided that the withholding was done in accordance with the contract between the parties. Having reviewed the previous cases, Mr Justice Akenhead set out the following "broad conclusions" on the issues arising where a party seeks to set-off against or withhold from sums which an adjudicator has said are to be paid:

"(a) The first exercise should be to interpret or construe what the adjudicator has decided. In that context, one can look at the dispute as it was referred to him or her. That can involve looking at the Notice of Adjudication, the Referral Notice, the Response and other "pleading" type documents. One can have regard to the underlying construction contract. Primarily, one needs to look at the decision itself.
(b) In looking at what the adjudicator decided, one can distinguish between the decisive and directive parts of the decision on the one hand and the reasoning on the other, although the decisive and directive parts need to be construed to include other findings which form an essential component of or basis for the decision (see Hyder).
(c) The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.
(d) There are limited exceptions. If there is a specified contractual right to set-off which does not offend against the statutory requirement for immediate enforcement of an adjudicator's decision, that is an exception albeit that it will be a relatively rare one. Where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing that a balance should actually be paid, it may well be that a legitimate set-off or withholding may be justified when that amount falls due for payment or certification in the future. (See Squibb).
(e) Where otherwise it can be determined from the adjudicator's decision that the adjudicator is permitting a further set-off to be made against the sum otherwise decided as payable, that may well be sufficient to allow the set-off to be made (see Balfour Beatty)."

Here, if you just looked at the wording used by the adjudicator, there could be no doubt that there would be no right of set-off or withholding. The adjudicator directed that payment should be made within 14 days and made it clear that he had allowed nothing for liquidated damages and that there should be no set-off albeit that Mr and Mrs Stevens were entitled to set-off the specific sums already allowed to them in the adjudicator's calculations. However some confusion arose because the adjudicator formed the view that issues as to the date of practical completion, extension of time and liquidated damages should be left over "to another day". This provisional view was set out in a footnote, which was described by the Judge as being in the nature of an obiter type of finding, albeit it was clearly not part of the decision.

The Judge was of the view that, in deferring this issue "to another day", the adjudicator had fallen into error. The issue of liquidated damages was part of the dispute which he was required to resolve because it was raised at least as a defence by way of set-off to the disputed claim put before him. Although Mr and Mrs Stevens had stated that "the question of whether practical completion was achieved" fell outside his jurisdiction, what did not fall outside his jurisdiction was the question of whether there was any entitlement to liquidated damages, something which involved considering issues related to the question of when practical completion was achieved. Of course, Mr and Mrs Stevens actually paid out over half of what the adjudicator ordered and in that sense had accepted that he had jurisdiction. This was why they argued that the adjudicator was treating his decision as if it were an interim certificate and hence he must be taken to have envisaged that there could be a later set-off or withholding against his decision.

However taking the decision as a whole, the adjudicator was explaining his reasons as to why he was ordering an immediate payment. The adjudicator was not saying that he was expecting, anticipating or permitting the loser in the adjudication to be able to set-off the clearly and obviously disputed claim for liquidated damages. The adjudicator did not, for example limit himself simply to declaring what the net sum outstanding was; he actually directed that payment of the sum was to be made. There was no good reason to assume that the adjudicator meant anything other than that the specified sum would be paid within 14 days. That said, the Judge noted that Mr and Mrs Stevens were not left without a remedy: they could themselves proceed to adjudication or to a final dispute resolution in respect of the liquidated damages claim. However, they did have to pay the £40k plus costs.

Adjudication: breach of natural justice

ABB Ltd v Bam Nuttall Ltd

[2013] EWHC 1983 (TCC)

Here, the Claimant successfully argued that an adjudicator's decision should not be enforced because there had been a material breach of the rules of natural justice. It was common ground that the adjudicator had referred in his decision to a particular clause of the contract which neither party had raised and which the adjudicator did not refer to the parties before issuing his decision. Mr Justice Akenhead said it was perfectly legitimate for an adjudicator to raise new points with the parties and invite comment, argument or even evidence. Having done that, it will generally be perfectly fair and proper for an adjudicator to rely upon that point in reaching his decision. That did not happen here and the issue was an important one. The Judge noted that:

"Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process."

Public procurement - the 30-day time limit

Corelogic Ltd v Bristol City Council

[2013] EWHC 2088 (TCC)

This case, where Corelogic sought to amend its Claim arising out of an alleged breach of the procurement regulations, provides a useful reminder about the 30-day limitation period that applies. Claims must be issued and served in this period which runs from the date when a claimant first knew or ought to have known that grounds for starting proceedings had arisen. A party cannot seek to get round this by adding "new claims" which, at the time of the amendment, are barred by limitation.

Corelogic were told on 22 March 2013 that their tender was not successful. Two days later, they asked for a debrief. On 27 March 2013, Bristol extended the standstill period until 8 April and provided some information. Correspondence continued with some further information being provided. Eventually Corelogic issued proceedings and asked for a general extension of time for service of the Particulars of Claim. Bristol agreed and again further correspondence followed until on 17 June 2013, Corelogic's solicitors wrote to Bristol with a draft amendment to the Claim Form. Bristol objected saying that this would raise new causes of action and so wouid be statute barred under Regulation 47D (2).

The problem was this. The Claim Form was based on complaints relating to the lack of provision of appropriate information prior to the issue of the Claim. The draft amended Particulars relied on other alleged breaches such as the "manifest error of assessment", "failure to treat tenderers equally or act in a transparent way", "failure to clarify" and the use of "undisclosed criteria". Bristol argued that the addition of these items did raise new claims because the Claim Form in its original wording only related to the alleged inadequate provision of information post-tender.

It was agreed that the standard of knowledge required to start time running in these types of case was a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an "infringement". It was also accepted that if one was just construing the words on the Claim Form, they could and would be taken to be referring only to complaints about failure, post-award, on the part of Bristol, to provide the requisite information to the unsuccessful tenderer. All the complaints raised in correspondence before the Claim Form was issued related to the non-provision of information to which Corelogic thought it was entitled. The amendments which added breaches for manifest error in the assessment of the Claimant's tender price and for the non-disclosure of formulae for translating prices into scores, therefore raised new claims.

Corelogic attempted to argue that all the claims arose out of the same or substantially the same facts. However, the original complaint related to the period after the tender was rejected and arose in the post-award period whilst the new complaints related to the award of the contract and the period leading up to it. This meant that the amendments were barred by limitation. Corelogic had been aware since 9 May 2013, if not before, that the new claims could be pursued. Its letter of that date set out in sufficient detail the new complaints and no further information was provided to it by Bristol thereafter. Thirty days had clearly elapsed. That left the question as to whether there was a "good reason" for permitting an extension. None was put forward. The amendments were not allowed.

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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