

## Legal Briefing

### Ted Lowery looks at a Scottish decision concerning serial adjudications

*Engenda Group Ltd v Petroineos Manufacturing Scotland Ltd* [2024] CSOH 36

In the Outer House, Court of Session

Before Lord Young

Judgment delivered 26 March 2024

#### The facts

During November 2021 Engenda and Petroineos entered into a contract for works at the latter's refinery at Grangemouth on the Firth of Forth. The contract was based on the NEC3 form and provided for adjudication in Option W2. There were two adjudications during 2022 and following completion of the works, on 22 August 2022 Petroineos commenced a third adjudication seeking several declarations and an order for payment of £1,134,547.15 in damages for breach of contract – a sum it had already withheld – on the grounds that Engenda had failed to complete the works by the agreed date.

In a decision dated 2 December 2022 the adjudicator made certain declarations including that Engenda had been in breach of contract but made no order for payment, finding that there was no contractual basis upon which an award of unliquidated damages for late completion could be made. Engenda promptly applied for payment of the £1,134,547.15 but on 9 December 2022, Petroineos issued a pay less notice in this amount. Engenda then commenced a fourth adjudication challenging Petroineos' withholding and the same adjudicator was appointed.

In his decision dated 13 February 2023 the adjudicator applied a set off in respect of Petroineos' claim for unliquidated damages for late completion that extinguished Engenda's entitlements and he accordingly made no order save in relation to his fees. He rejected Engenda's submission that Petroineos' set off defence

was out of jurisdiction on grounds that the unliquidated damages claim had been determined in the third adjudication, finding that: (i) in the fourth adjudication, Petroineos' claim for unliquidated damages had a different contractual underpinning and was supported by new evidence, and, (ii) that in the third adjudication, Petroineos had not framed their case on the basis of losses incurred as a result of Engenda's failure to complete the works by the completion date, nor provided any expert evidence demonstrating such losses.

Engenda commenced court proceedings seeking a declaration that in the fourth adjudication, the adjudicator had exceeded his jurisdiction.

#### The issue

In the fourth adjudication did the adjudicator have jurisdiction to consider Petroineos' claim for unliquidated damages for late completion?

#### The decision

The judge found that the adjudicator had been clearly wrong to distinguish between Petroineos' claim for unliquidated damages for late completion in the third adjudication and the claim for a set off in the fourth adjudication. He said it was clear from the decision in the third adjudication that what had been considered was a claim by Petroineos for unliquidated damages consequential upon Engenda's failure to complete on time. The adjudicator's view that the claim for unliquidated damages in the fourth adjudication had a different contractual unpinning to that claimed in the third adjudication was simply not borne out by an analysis of Petroineos' referral or the decision in the third adjudication: the introduction of new or additional evidence in the fourth adjudication did not in itself indicate that the dispute was different to that considered in a previous decision, which remained a question of fact and degree.

The judge highlighted the distinction between the situation in which an adjudicator made it clear that the absence of supporting evidence was such that no decision could be made and the situation in which the adjudicator decided that a claim had failed through lack of proof. Here, in his decision in the third adjudication, the adjudicator had not limited the scope of his determination when finding that Petroineos had not established its claim for unliquidated damages: the

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language used was synonymous with a failure to prove the case rather than an indication that no decision was being made at all.

The judge considered it significant that the third adjudication commenced after completion of the works: Petroineos ought to have been able to put forward their definitive case for damages in the third adjudication and the substantive issue as to the financial consequences of delayed completion had not changed between the third and fourth adjudications.

Thus the adjudicator had incorrectly entertained a claim for unliquidated delay damages that had already been decided in the third adjudication.

### Commentary

This case follows the English authorities which hold that if a party fails to prove a claim due to inadequate documentary substantiation, that will normally preclude re-adjudicating, unless the adjudicator makes it clear that no decision is being made on the particular claim.

This case also highlights the relevance of the developing contractual position (or the lack of it): a re-presented claim is less likely to be distinguishable if there have been no substantive changes between the parties' respective positions since it was first presented.

**Ted Lowery**  
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