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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

The HGCRA payment regime under "hybrid" contracts

C Spencer Ltd v MW High Tech Projects UK Ltd

[2019 EWHC 2547 (TCC)

This was a Part 8 claim for £2.7 million based on the alleged failure by MW to serve a valid payment notice or pay less notice in response to CSL's interim payment application. MW was engaged as the main contractor to design and construct a power plant, capable of processing refuse-derived fuel produced by commercial and industrial waste. CSL was engaged by MW to design and construct the civil, structural and architectural works for completion of the facility. The subcontract works included construction operations for the purposes of Part II of the HGCRA but also the assembly of plant and erection of steelwork which fell outside the HGCRA. It was therefore a "hybrid" contract.

Initially, the parties operated the payment machinery provisions without any regard to the division between works that fell within or outside the definition of construction operations. However, following an adjudication where MW had said that the dispute as framed failed to distinguish between the works that fell within and those that fell outside the ambit of the HGCRA, on 4 February 2019 CSL issued its application for interim payment 32. This application was split between the construction operations and the other works.

By letter dated 19 February 2019, MW served payment notice number 35. The attached spreadsheet contained a breakdown of the measured work and variations, indicating a negative sum due to CSL. The sums were not allocated to or divided between construction operations and non-construction operations. CSL said that on a proper construction of the HGCRA and the subcontract, any certificate of payment must identify the sum assessed as due at the payment due date in respect of those works that comprised construction operations and the basis on which that sum is calculated. Here, the certificate of payment was invalid because it failed to identify that part of the amount assessed as due in respect of construction operations and the basis of that calculation. It simply assessed the overall sum due in respect of both construction and non-construction works.

MW said that the payment provisions were compliant with the HGCRA. The parties decided that all operations would be subject to the same payment regime. They were entitled to do so and it did not make an otherwise compliant scheme thereby non-compliant. MW also said that the subcontract was a milestones contract and it was not possible to distinguish between included and excluded operations.

The contractual regime for interim payments was that CSL was entitled to make an application for an interim or instalment payment on a monthly basis upon completion of each milestone. Each application submitted by CSL must set out CSL's assessment of the amount due in respect of completed milestones and any other amounts to which CSL considered itself to be entitled. There was then a process for issuing payment and payless notices.

The dispute resolution provisions under the contract included an entitlement for either party to refer any dispute to adjudication, such right being limited to disputes in respect of those parts of the subcontract works that constituted construction operations within the meaning of the HGCRA.

Mrs Justice O'Farrell noted that where, as here, the contract was a hybrid, it was necessary to consider the impact of section 104(5) of the HGCRA. Section 104(5) limited the application of the statutory payment requirements to the construction operations forming part of the subcontract. The parties were not permitted to contract out of the statutory payment requirements in so far as they relate to construction operations. However, the parties were also free to agree that non-construction operations should be subject to the same requirements as those contained in the HGCRA. Here, the subcontract contained one payment regime that applied to both construction operations and non-construction operations. For each interim payment there was one application made by CSL, one payment certificate issued on behalf of MW, one pay less notice (if any), and one sum payable by the final payment date.

In the Judge's opinion, where, as here, a hybrid contract contained a payment scheme that complied with, or mirrored, the relevant provisions of the HGCRA for both construction and non-construction operations, a payment notice that did not separately state the sums due in respect of the construction operations was capable of constituting a valid payment or payless notice. The express words of the HGCRA did not stipulate separate identification of the sums due in respect of construction operations. It was also open to the parties to agree a payment scheme that sat alongside the statutory provisions, such that it complied with the statutory provisions in respect of construction operations and mirrored those provisions in respect of other operations. In those circumstances, a payment notice could satisfy both the statutory requirements (in respect of construction operations) and the contractual requirements (in respect of non-construction operations). Such a payment notice could be valid under the contract and under the HGCRA.

As a matter of principle, it was possible to implement section 111 where the same provisions applied to both construction and non-construction operations. If parties agreed a payment scheme that complied with, or mirrored, the statutory scheme in respect of construction and non-construction operations, the cash flow benefits conferred by the HGCRA were simply extended to cover those additional works.

This meant that whilst in order to bring an adjudication, CSL had to distinguish between the sums claimed for construction operations and sums claimed for other works because it sought to limit its claim to the notified sum payable, it was open to MW to defend that claim by relying on a payment notice setting out the basis on which no sum was due in respect of any construction or non-construction operations. The MW payment notice here set out the sum which was considered due at the relevant date and the basis on which it was calculated. Therefore, MW had issued a valid payment notice in response to CSL's application no. 32.

Concrete & adjudication

Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant And Waste Management Ltd

[2019] EWHC 2360 (TCC)

This was an application for summary enforcement of an adjudicator's decision. USL were engaged by A One+ Integrated Highways Services to carry out works on the A1 in Gateshead. Sanders supplied concrete as part of those works. A dispute arose over whether the right type of concrete had been supplied and whether or not it was fit for its purpose. Sanders participated in the adjudication, having reserved its right to contest jurisdiction. Sanders said that the adjudication was commenced under the wrong contract and also that the HGCRA did not apply because the delivery of concrete fell within one of the exceptions in s. 105(2)(d).

In terms of the contract position, there was evidence about phone calls and emails. However, the key event was the sending by USL of its subcontract order. The order referred to the grade of concrete, the rate and a delivery charge. The subcontract order referred to USL's terms and conditions, which could be found via a link on the internet. USL's case was that the initial phone calls were an invitation to treat and that the subcontract order was an offer to purchase M50 concrete, which offer was accepted by the delivery of concrete to the site.

Mrs Justice Jefford agreed. The order was accepted by the delivery of the concrete to the site. There was then a concluded contract on the terms of that order. The production of the delivery note on different contract terms was too late to be a counteroffer.

The second issue was whether or not there was a "construction contract" for the purpose of the HGCRA. If there was not, there was no right to refer the matter to adjudication. Now the placing of concrete could fall within the definition of "construction operations", including the *"manufacture or delivery to site of — (i) building or engineering components or equipment, (ii) materials, plant or machinery . . . except under a contract which also provides for their installation"*.

The contract was for the supply of concrete. There was no express reference to installing the concrete in the subcontract order and no rate or price for doing so. Sanders said that this was a contract for the supply of materials, not one that also provided for their installation so as to fall within the exception to the exclusion. The question for the court was: can you install concrete? The supply of concrete to a site, which is what Sanders said they did, was to the Judge "patently within the exclusion" unless the exception applied, because it is quite simply the delivery of materials.

It was accepted that you do not normally talk about installing concrete. However, the key was what happened. The Judge explained that you can supply bricks to a site, an act which would fall within the exclusion unless you also laid them. The key is that some work is done to the materials after delivery. Both sides agreed that concrete, once it is mixed, starts to set. So the Judge concluded:

"In this case, the act of delivery and pouring amount to the same thing. That ... means that the pouring is ... part of the delivery and not an additional act of installation involving some work on, or related to, the materials. There is nothing in this contract which also provides for installation. It is simply the case that in order for the materials to be delivered to site in the normal way the concrete will be poured where it is required, rather than, as would be unusual, placed into some sort of storage facility until it could be poured by someone else."

The decision was not enforced.

Adjudication & liquidation

Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd

[2019] EWHC 2651 (TCC)

This was an application for summary enforcement of an adjudicator's decision in the sum of £32k. The action was brought by Meadowside, a company in liquidation both at the time of the adjudication and now. HSMC did not take part in the adjudication, saying that the adjudicator lacked jurisdiction and the decision would be unenforceable. However, in the recent *Bresco* case (see Issue 224) the CA overturned a decision at first instance that an adjudicator did not have jurisdiction where the referring party was in insolvent liquidation. Having said that, the CA then upheld an injunction to prevent the adjudication from continuing because they considered that the adjudication was a futile exercise. In doing so, the CA did leave open the possibility that in exceptional circumstances a company in insolvent liquidation might be able to obtain summary enforcement of an adjudicator's decision.

Here, there was no dispute that the adjudication was, in effect, dealing with the substance of full extent of the parties' mutual dealings. It was far from being a "smash and grab" adjudication. It was therefore very similar to the process which the parties would have to undertake in the liquidation in any event. It was also different from the situation in Bresco.

Mr Adam Constable QC concluded that where the adjudicator is deciding the net mutual position between the parties, or at the very least a substantial part of it, the utility to the liquidator of pursuing the debt in the first instance in adjudication should not of itself be regarded as a reason to refuse summary judgment or grant a stay of execution. As a matter of public policy, a court should be slow to hinder the liquidator's efforts to ascertain and recover debts in accordance with their statutory obligations.

Therefore where the adjudicator determines the final net position between the parties, exceptional circumstances might exist to allow the summary enforcement of that decision. That is provided that adequate security is given in respect of the decision amount and any potential adverse costs orders (including a potential enforcement hearing and any action to challenge on a final basis the issues in dispute). The security might include the liquidator undertaking to the court to ring fence the sum enforced so that it is not available for distribution for the relevant duration, a third party providing a bond or guarantee, or after the event (ATE) insurance.

Here, the liquidator had engaged a third party to fund the pursuit of the debt, who, as is typically the case, would be entitled to a percentage payment from any recovery. However, the problem for those trying to enforce the decision was that they had not disclosed the terms of the funding agreement. It appeared to the court that the third party would be paid more than 50% of the sum awarded which would have been a breach of the 2013 Damages-Based Agreement Regulations. This meant that the funding agreement was champertous (an illegal bargain) and the adjudication decision was not enforced.

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.

Dispatch is a newsletter and does not provide legal advice.

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