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.

Issue 261 - March 2022

Dispatch

Adjudication enforcement

RHP Merchants And Construction Ltd v Treforest Property Company Ltd

[2021 EWHC B40 (TCC)

TPC applied to stay and strike-out a claim by RHP for £105k on the grounds that RHP had failed to comply with an adjudicator's decision despite there being a court order requiring them to pay the sum of £300k. RHP relied on the fact that, eight days after the enforcement judgment, there was a second adjudication decision where TPC was ordered to pay RHP £245k, including the adjudicator's costs. This sum was calculated on the assumption that RHP had paid the first adjudication award to TPC. The Judge, Roger Stewart QC, noted the need to strike a balance between the general HGCRA policy of "pay now, dispute later;" and the rights of parties to have access to the courts with any litigation being conducted promptly and efficiently.

Amongst other issues, TFC issued a petition for a winding-up order against RHP. This application was dismissed and TFC were ordered to pay indemnity costs at £23k. The Judge noted that this appeared to be because the alleged debt or petition sum was disputed substantially in the court proceedings here. Other offers were made. TFC offered to set off the costs order which they were subject to. RHP offered to pay the sum of £36,494.69 (a figure based on netting off the two adjudication decisions) on the basis that the TFC application was withdrawn.

One of the options, TFC sought was that proceedings should be stayed pending payment of the outstanding amount of the judgment debt, subject to a six-month longstop whereby the claim should be struck out if payment was not made. RHP's position was that the proceedings should not be stayed at all, but if the Court was minded to grant a stay, that should be on the basis that proceedings were stayed until RHP paid the balance of the sums owed between the parties pursuant to the respective adjudication and court orders. TFC relied on the case of *Anglo Swiss Holdings LTD & Ors v Packman Lucas Ltd* (See Issue 115) where Mr Justice Akenhead had said:

"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."

In that case, the Judge held that the claimants were ignoring the contractual and statutory requirements to honour an adjudicator's decision, and that they were, therefore, avoiding the pay-now-argue-later approach of the HGCRA. The bad faith involved putting forward claims which they either knew or significantly exaggerated.

TFC said that RHP was ignoring the contractual and statutory framework; that, had the applicant been paid, it would have the money in hand; that they were not insured; RHP could fund solicitors and counsel; and, that the parties were not in an equal footing. TFC said that RHP had "commenced a barrage" of different forms of dispute resolution and had confirmed in a solicitor's letter that it had no intention of complying with the Court's previous order of 5 November.

RHP said the situation was different, in particular because of the existence of the second adjudication. The policy of pay-now-and-argue-later should apply with equal force to the second decision, which affected the majority, though not the entirety of the sums due under the first adjudication decision. TFC said that there was a substantial difference between the position of the first adjudication award which has been found to be enforced, and that of the second adjudication decision, which had not been enforced, but where there were obvious question marks as to the jurisdiction.

The Judge noted the tension between access to justice and the core essence of the adjudication pay-now-and-argue-later regime, which necessarily involved the ability to argue later. In balancing these considerations, the Judge cautioned that in line with the *Anglo Swiss* case, a stay would only apply in clear cases.

Here, the Judge felt that the second adjudication was of importance, in the context of pay-now-argue later, when looking at the overall position. This was despite the fact that the Judge had considerable doubts as to whether or not the second adjudicator did in fact have jurisdiction. Further, the insolvency Judge had decided that there was a real dispute which was going to be decided in these proceedings.

That said, there was no valid reason why RHP had not paid the net sum which was due to TFC on the basis of the two adjudication decisions, and even taking into account the costs orders. Taking account of the fact that RHP had managed to achieve success in the second adjudication award, it owed a minimum sum of £36,494.69, always taking into account the fact that they could, in due course, seek to reopen that.
This was not a case where RHP had acted in bad faith. RHP's actions were consistent with a "determined view" that they were owed money rather than the other way around. However, it was not right to simply give an order to that effect without any time limit and without any sanction, given that RHP had said that it could pay that sum. The Judge, therefore, ordered that, unless RHP paid the sum of £36,494.69 to Treforest within 28 days of today, these proceedings would be struck out.

Expert Determination

Eastern Motor Company Ltd v Grassick & Ors

ScotCS CSIH_67

One of the issues here was the circumstances in which the Scottish Court of Session could interfere with the decision of an expert appointed under a contractual dispute resolution procedure, where parties had agreed to be bound by the expert's determination. The starting point for the court was that the parties entered into a contract whereby they agreed that the price adjustment expert's decision as to any matter referred to him would be final and binding unless they were guilty of fraud or manifest error. A clause in such terms leaves little scope for a court challenge to the expert's ruling. This was simply because the parties agreed to accept the expert's decision on any matter referred except where the decision was vitiated by fraud or was manifestly wrong. The law attached a strong degree of respect to the parties' agreement as to the finality of their chosen dispute resolution procedure. If it could be shown that the expert departed from their instructions in some material way, and the expert had not done what the parties agreed that they were appointed to do, then the decision was open to challenge. Hoffman LJ in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48 had said:

"So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority."

Here, there was no question of the price adjustment expert having gone outside the limits of their authority in the sense that they misunderstood their remit, or addressed themselves to questions which were different from those that the parties asked him to address. On the contrary, it was clear that the expert understood perfectly well what they had been instructed to decide. The questions referred were plainly ones of mixed fact and law, involving consideration of practice in the motor trade. In those circumstances, the court had no jurisdiction to interfere with the expert's conclusions. A manifest error required there to be "a glaring mistake that jumps off the page." A mere difference of opinion could not be described as a "blunder".

Expert evidence

Struthers & Anr v Davies (t/a Alastair Davies Building) & Anr

[2022] EWHC 333 (TCC)

This was a claim for the costs incurred as a result of defective work, where the evidence of experts played a key role. The Judge preferred the evidence of the expert who had the benefit of visiting the property three times before and during the remedial works. This included witnessing the uncovering of the foundations. The other expert's views were largely derived from viewing site photographs The first expert was also prepared to comment on and consider the other expert's views; "surprisingly," the other was not prepared to discuss the views of their opposite number notwithstanding that the role of an independent expert assisting the Court clearly involved that task. This meant that the evidence was, at times, "positively unhelpful and throughout it was lacking in persuasive weight." There were also doubts on their impartiality in the way, for example, an "unheralded and unsupported allegation" was made in oral evidence. Further, the other's calculations as to the quantum of items claimed were less than transparent and derived either from price book items or in a significant number of cases from attempts to rely on figures discussed in without prejudice meetings. By contrast, the first expert's figures were all clearly set out and supported by objectively supportable reasoning.

An issue arose over whether or not defects in the First Defendant's work necessitated the demolition or rebuild of the extension. Had the Claimants, in relying on the opinion of their expert, had failed to act reasonably and/or mitigate their loss. The relevant principles here come from the 1987 *Great Ormond Street* case (19 Con LR 25) where Judge Newey QC said:

"The plaintiff who carries out either repair or reinstatement of his property must act reasonably. He can only recover as damages the costs which the defendant ought reasonably to have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not however mean that the minimum amount which with hindsight it could be held would have sufficed. When the nature of the repairs are such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it."

When it came to the question of costs, what mattered was whether or not the costs were in the overwhelming number of cases reasonable for similar remedial works. Here, they were.

Termination notices

Struthers & Anr v Davies (t/a Alastair Davies Building) & Anr

[2022] EWHC 333 (TCC)

A question also arose about the Notice of Intention to Terminate, which was sent by the Claimants. The First Defendant disputed its validity pointing out correctly that the contract required the contract administrator to issue the Notice of Intention. If the Notice of Intention was not valid, no further notice to terminate could be sent. The usual approach is that termination clauses must be construed strictly. The Claimants relied on Mr Justice Akenhead's judgment in *Obrascon Huarte Lain SA v. The Attorney General for Gibraltar* (Issue 167) where, despite a notice being sent to the incorrect address (site office, not head office), the Judge upheld the validity of the notice.

Here, the Judge thought that there were sound reasons for requiring the initial Notice to come from the contract administrator rather than the client. There was also no previous authority where the wrong person had sent a contractual notice triggering termination but the notice was still held to be valid. Further, the Judge was not satisfied that the First Defendant did receive the Notice of Intention a clear 14 days before the Termination Notice was sent and received. In the end, however, this did not matter, as the First Defendant was found to be in repudiatory breach of contract before the Notice was sent. This meant that the Notice acted as an acceptance of that breach, if not a contractually valid notice in its own right.

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