FENWICK ELLIOTT

The construction & energy law specialists

Issue 210 - December 2017

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

Dispatch

Adjudication: pay less notices

Adam Architecture Ltd v Halsbury Homes Ltd

[2017] EWCA Civ 1735

This case concerned a professional services appointment. Adam had been engaged by Halsbury, a property developer, in connection with a residential development in Norfolk. Adam provided a fee proposal to carry out design works under an appointment that would be subject to RIBA Conditions. Following acceptance of the proposal on 19 October 2015, Adam commenced work. However, Halsbury terminated the engagement with no prior notice to Adam on 2 December 2015 opting to proceed with a local architect instead. The following day, Adam submitted a final invoice for work done up to 2 December 2015 in the sum of £46,239. Halsbury did not provide a pay less notice and did not pay Adam's invoice.

Adam commenced an adjudication to recover payment of its final invoice, together with payment of an earlier invoice in the sum of £747 and taking into account a credit for the sum of £1,246. The adjudicator found in favour of Adam, essentially because Halsbury had failed to serve a pay less notice in respect of either invoice.

Halsbury did not comply with the decision, instead issuing Part 8 proceedings seeking, amongst other things, a declaration that the pay less regime did not apply to the 2 December 2015 invoice and so Halsbury was not liable to pay it. Adam issued adjudication enforcement proceedings. Mr Justice Edwards-Stuart found in favour of Halsbury, granting the declarations as sought by Halsbury and dismissing Adam's claims. The Judge considered that:

(i) Halsbury's email to Adam dated 2 December 2015 was a repudiation of the contract.

(ii) Adam had accepted the repudiation by its two emails of 2 December 2015, by stopping work on 2 December 2015, and by issuing its invoice on 3 December 2015.

(iii) Halsbury was not contractually required to serve a pay less notice, for three separate reasons. The contract had been discharged which meant that neither party was required to perform its primary obligations under the contract. The 3 December 2015 invoice was a final account within the meaning of the last sentence of clause 5.14 of the RIBA Conditions, with the consequence that the invoiced sum was not "the notified sum" as defined in the first sentence of clause 5.14. And finally, the 3 December 2015 invoice was a termination account under clause 5.17 of the RIBA Conditions, with the consequence that the invoiced sum was not "the notified sum" as defined in the first sentence of clause 5.14.

On this basis, the issue had been finally determined and the temporarily binding decision of the adjudicator had been superseded.

Adam appealed. The principal issue was whether section 111 of the HGCRA applies only to interim payments or whether it also applies to payments due following completion of the works or termination

of the contract. Adam said section 111 of the Act applied equally to payments due under a final account or a termination account when the building contractor or construction professional has completed or ceased work as it did to interim payments.

Halsbury challenged this on the basis that sections 110 and 111 of the Act were limited in their scope. Halsbury relied upon the wording of section 109, which is limited to interim/stage payment instalments, and the principal objective of the Act being to maintain the cash flow to contractors and subcontractors during the course of a project. LJ Jackson concluded that it seemed clear that:

"section 111 relates to all payments which are 'provided for by a construction contract', not just interim payments.

...

Section 111 of the 1996 Act applies to both interim and final applications for payment. I reach this conclusion on the basis of the clear words of the Act and also in the light of the authorities cited. Therefore if Halsbury wished to resist paying Adam's final account or termination account, then (subject to the repudiation issue) it was obliged to serve a pay less notice. I therefore uphold the first ground of appeal."

As for repudiation, Halsbury said that it was entitled to terminate the contract of engagement upon reasonable notice. However, it argued that as it had not given reasonable notice, its termination without any notice was a breach going to the root of the contract and so had repudiated the contract. Adam pointed out that under the applicable conditions Halsbury had an unfettered right to terminate the contract. Accordingly, a mere failure to give due notice would be a breach of contract, but not a repudiation.

In dealing with this issue, LJ Jackson assumed (but did not decide) that Halsbury was correct. However, even on this basis, he was not persuaded that Adam had accepted any repudiatory breach. Adam treated the email dated 2 December 2015 as a termination without appropriate notice. Accordingly Adam stopped work and sent an invoice for work actually done under the contract of engagement up to 2 December 2015, and no more. The invoice submitted was an account following termination pursuant to clause 5.15 of the RIBA Conditions, or alternatively simply a bill for work done; either way, it was not a claim for damages for breach of contract. He concluded that in the circumstances, and in the absence of any pay less notice:

"Adam had a cast iron case to recover payment on both of its outstanding invoices."

Adjudication: failure to consider a defence

DC Community Partnership Ltd v Renfrewshire Council
[2017] CSOH 143

DC entered into a contract with Renfrew for the construction of a new special needs school at Linwood. The contract incorporated the 2005 NEC3 Form, Option C. A dispute arose as to the sum Renfrew was liable to pay the pursuer in respect of payment certificate number 33. The amount due was £287k, no pay less notice was served and Renfrew paid the sum notified.

On 6 June 2017, DC served a notice of adjudication in respect of three aspects of its dispute with payment certificate number 33. There were three limbs to the dispute, relating to separate subcontract packages. The project manager had assessed one item at £254k and the other two at nil. DC said the three items had been under-assessed in the amount of £821k. The adjudicator agreed.

Renfrew defended enforcement proceedings saying that the adjudicator had failed to address a material defence, also known as failing to exhaust his jurisdiction. During the adjudication, Renfrew had submitted that DC were in delay and that they were accordingly entitled to deduct delay damages (of £469k) from Renfrew. Had the project manager's assessment included the claims being made in the adjudication, Renfrew would have issued a pay less notice to limit the payment. Renfrew further said that if the adjudicator opened up the assessment and decided that further sums were due, they would rely on their right of set-off. The delay damages were £468,666 (from 18 November 2016 to the due date amounting to 162 days x £2,893) and should be offset against any sums which might become payable to the Referring Party.

The adjudicator in his Decision listed the submissions he had received and confirmed that:

"I have considered all the submissions and their accompanying documents, but have not found it necessary to refer to all of the material provided to me in explaining the reasons for my decision."

The adjudicator did not make any reference to Renfrew's claim for delay damages to be offset, even though he decided he could open up the assessment.

DC said that the adjudicator had not failed to consider the set-off submission. A court should not be overly critical of the adjudicator's reasons. Where, as here, the defence had been raised at a very late stage, it was legitimate to bear that in mind. A court should only interfere in the plainest of cases. Further, if the adjudicator had failed to deal with the delay damages defence, the court should conclude that it had not been a material line of defence, and it should enforce the adjudicator's decision. Renfrew could not make the defence because it had not issued a pay less notice.

Renfrew said that the defence of set-off of delay damages fell within the scope of the adjudication and that the adjudicator failed to address it. This omission was a failure to exhaust his jurisdiction. There was no discussion of set-off in the decision. One could not place reliance upon the adjudicator's general statement that he had considered all of the submissions or that the relief sought was declined. It was held that:

"The adjudicator was under an obligation to provide adequate, intelligible reasons dealing with all material matters. If he [the adjudicator] *had rejected the set off defence, he had not explained the basis upon which he had done so."*

Further, Lord Doherty noted that

"The scope of an adjudication is defined by the notice of adjudication together with any ground founded upon by the responding party to justify its position in defence of the claim made..."

Although DC had had the opportunity to respond, it did not. The Judge was not persuaded that the adjudicator had addressed the set-off defence. He made no explicit reference to it in the decision, and the general comments such as *"The Council's relief sought is declined"* fell far short of being sufficient to show that the defence was considered but was rejected for stated reasons, especially as the adjudicator was obliged to give written reasons for his decision. Lord Doherty said that:

"the adjudicator required to give at least some brief, intelligible explanation of why the defence of set off was being rejected..."

This was not a case where the rejection of the defence was implicit in the reasons given. The failure to address the set-off defence was material. The claim had a substantial potential value equivalent to more than half of the principal additional sum which the adjudicator decided was due.

Further, Lord Doherty said that it was not a prerequisite of the set-off defence that a pay less notice should have been given. Where a compliant payment notice has been given, the notified sum is the amount specified in the notice. A pay less notice only needs to be given if the payer intends to pay less than the notified sum. If, on the other hand, the payer is content to pay the notified sum, there is no basis for a notice that the payer intends to pay less. By advancing the set-off defence in the adjudication, Renfrew did not alter its position in relation to the notified sum. Rather, it sought to set off delay damages against any additional sums that the adjudicator might decide were payable. Renfrew was entitled to deploy that defence to the claim for additional sums. The decision was not enforced.

Relief from sanctions: taking bad points

Freeborn & Anr v Marcal (t/a Dan Marcal Architects)
[2017] EWHC 3046 (TCC)

On 20 September 2017, the TCC court office wrote to the parties fixing the Case Management Conference (CMC) on 24 November 2017. The letter required the parties *"to file and exchange costs budgets not less than 7 days before the CMC"*. This was in contrast to CPR 3.13, which requires all parties to file and exchange budgets no later than 21 days before the first CMC. Marcal's solicitors relied on the letter and did not serve the costs budget until 16 November 2017. At no point prior to this did Freeborn's solicitor complain that he was waiting for the costs budget. However, on service of the costs budget, Freeborn's solicitor did take the point. Marcal's solicitor explained its position but noted that if they were forced to make a court application to address the alleged delay, then they would seek any associated costs. Freeborn's solicitor persisted and took the point that as a result of the late service of the costs budget, Marcal should be treated as having filed a budget comprising only the applicable court fees, and no legal or expert costs. Marcal's solicitor therefore had to make a formal application for relief from sanctions, supported by witness evidence.

Mr Justice Coulson held that Marcal was not required to make an application for relief from sanctions. Rule 3.13(1) stated that the 21-day period applied, *"unless the court otherwise orders"*. The court office letter amounted to the court *"ordering otherwise"*. It set out when the costs budget should be provided. Marcal was quite entitled to conclude that the court had "ordered otherwise"

and to rely on the content of the letter. The Judge said that a *"busy litigation solicitor is entitled simply to rely on the date specified in writing by the court office, rather than embarking on an investigation into whether or not the letter contained an error"*.

The breach was not serious and significant. No hearing was lost and there was no delay to the costs budget process. Once the error was pointed out, Marcal's solicitor took immediate steps to discuss the budget. As a consequence, the costs budget was dealt with at the CMC and the estimated figures were agreed. It was just and reasonable to grant relief. There was no deliberate breach. There was, at worst, an inadvertent breach because there was reliance on a letter from the court office. There would be considerable prejudice to the defendant if he was not able to rely on his costs budget. As a result, the application was granted and the claimant had to pay the costs of £1,300. Mr Justice Coulson concluded that:

"It is, of course, extremely important ... for the parties to civil litigation to ensure that they comply with the CPR. Courts will be far less forgiving of non-compliance than they ever used to be. But that tougher approach must not be abused in the way that occurred here. Parties need to consider carefully whether the alleged breach of the rules is, on analysis, any such thing and, even if it is, whether it is proportionate and appropriate to require or oppose an application for relief from sanctions in all the circumstances of the case."

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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