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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

Adjudicator's fees & natural justice

Platform Interior Solutions Ltd v ISG Construction Ltd

[2020] EWHC 945 (TCC)

This was an application by Platform to enforce an adjudicator's decision in the sum of £420k plus VAT. In the adjudication, ISG had challenged Platform's case that ISG had repudiated the sub-contract, saying instead that Platform's own purported rescission of the sub-contract was unlawful with the result that ISG's termination was itself valid. Both ISG and Platform set out their cases on the amounts said to be due. The adjudicator found in favour of ISG on termination and went on to decide the value of any sums payable as a result of that decision. ISG replied to Platform's demand for payment, noting that they had received advice that the decision was unenforceable. ISG also wrote to the adjudicator saying that whilst they were arranging payment of her fee:

"For the avoidance of doubt payment of your invoice does not constitute agreement that your decision is correct nor does it constitute agreement or acceptance that your decision is valid or enforceable. Accordingly we fully reserve all rights available to us to challenge the validity and enforceability of your decision and all rights available to us to resist any attempt to enforce the same."

Before Deputy Judge ter Haar QC, Platform submitted that by paying the adjudicator's fees ISG had waived any right to challenge the validity of the Decision. In *PT Building Services Ltd v ROK Build Ltd* (see Issue 105), Mr Justice Ramsey had held that in the absence of any circumstances to the contrary, by making the payment of the fee, ROK elected to treat the decision as being valid. Here, the Judge considered that there was strong authority that payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid. However, here it would be wrong to do so. ISG's primary challenge to the Decision was on the basis that the adjudicator had made a "fundamental error" in the Decision. That complaint only arose after the adjudication process had ended with the issue of the Decision. Further ISG's letters had made it clear that ISG regarded the Decision as invalid and reserved their position.

ISG's position was that in determining the sums that may be due, the adjudicator had decided to take into account the saving that ISG achieved by the termination. This was an error, and further, neither party in the adjudication had contended that that approach could be adopted. The Judge referred to the case of *Roe Brickwork Ltd v Wates Construction Ltd* (see Issue 163) where it had been held that there was:

"no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator."

The adjudicator decided a point of importance on the basis of the material before her, but on a basis for which neither party had contended. The point was one of contractual construction and the adjudicator was perfectly entitled to reach the conclusion that she did. She was not bound to accept only one of the two alternatives put to her by the parties. Questions of contractual interpretation will often (if not usually) be capable of more than two possible answers, and so the correct answer may not have been expressly proposed by either party. Here, the parties were agreed on the way in which the adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the sub-contract. The problem was that, in the view of the Judge: "*the result of that approach produced a result which I suspect neither party had expected.*" This may have led to separate Part 8 proceedings, but did not mean that there had been a breach of natural justice.

Adjudication: insolvent claimants

Balfour Beatty Civil Engineering Ltd & Anr v Astec Projects Ltd (In Liquidation)

[2020] EWHC 796 (TCC)

This was an application for an injunction to restrain three adjudications which Astec wanted to bring arising out of subcontracts with BB at Blackfriars Station, London. Astec went into administration in April 2014 and then liquidation in October 2014. Astec said that it was owed £4m; BB said that it had claims which would result in a net sum due of £1m. Nothing really happened after the liquidation, until 24 December 2019, when Astec's solicitors sent a claim letter. This was followed by a first notice of adjudication on 24 January 2020. Astec had obtained funding from a legal funder, Pythagoras, which would be entitled to a significant (but not beyond 50%) fee from any recoveries ultimately made. Astec also had legal expenses and after the event insurance, and the insurer attended the court hearing.

BB said that the adjudications should not proceed because they fell outside of the "very limited number of cases" where the court will contemplate allowing adjudications where the claiming company was in liquidation. This followed *Bresco v Lonsdale* (see Issues 219 and 214), which was argued before the Supreme Court on 22/23 April 2020. In *Bresco*, whilst Coulson LJ held that there was no absolute jurisdictional bar to holding an adjudication if the claimant was insolvent, he also held that in very many cases an adjudication in such circumstances would be pointless.

The *Bresco* case was discussed in detail in *Meadowside v Hill Street* (see Issue 223) where the Judge made it clear that an adjudication proceeding in these circumstances was going to be the exception rather than the rule. However, 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 obligation, again provided that adequate security was given in respect of the decision amount and any potential adverse costs orders (including at enforcement and any subsequent action to bring about a final resolution of the dispute).

Mr Justice Waksman held that if there were three adjudications and each one produced a net result in favour of one or other of the parties, then by netting those results off against each other one would arrive at a complete and comprehensive account of the parties' mutual dealings. However, the key question was whether to allow the adjudications to proceed. The Judge's solution was, once the adjudication decisions had been given, to order an immediate stay on enforcement against Astec, provided that BB started litigation within six months. This was much simpler and easier than say Astec seeking to obtain the monies and paying them into court. The Judge did not accept the suggestion that the right course was litigation now rather than adjudication(s) because the adjudication would be too complicated (due to the three subcontracts). A court does not prevent adjudications because one party considers that they would be unduly complex.

Mr Justice Waksman considered that Astec should be allowed to bring those adjudications subject to certain conditions. Security for the costs was originally offered by Astec at £250k, but that was only in relation to one notice of adjudication and hence one contractual dispute. If there were three contractual disputes, logic suggested that the amount of security should be £750k. Astec disagreed, saying that this did not follow because you would not know how much cost would actually be incurred until the adjudications had taken place. The Judge disagreed. The initial security must be £750k. This was subject to the right of BB to seek further security if that sum had been or was likely to be expended. The Judge noted that he had seen a letter from insurers giving an indication that they would be prepared to increase the amount. However, the Judge was not prepared to leave that to chance and so made an order.

BB also objected to clause 3(c) of the insurance policy, which said that if there was any material deterioration in the prospects at trial for the insured (i.e. Astec) then insurers may terminate the policy, at which point the costs protection in favour of BB would stop. BB said that if it was pursuing a claim where it had to overturn an award in favour of Astec, even if Astec's claim was struck out since security was no longer available, BB would still have to continue to trial to obtain a judgment in excess of the award. The Judge disagreed noting that any stay on enforcement of the adjudicator's decisions in Astec's favour would become permanent if Astec's claims in the litigation came to a premature end. BB would not therefore be out of pocket and there would then be no commercial interest in BB continuing with the litigation unless it decided speculatively to continue and take its chances whether it could recover something from Astec.

Therefore, subject to the points above, Mr Justice Waksman did not see: *"any fatal jurisdictional objection to the adjudications proceeding or that any exercise of discretion must inevitably prevent them from occurring."*

Adjudication, applications for a stay & Covid-19

Broseley London Ltd v Prime Asset Management Ltd

[2020] EWHC 944 (TCC)

BLL is a small family-run company, specialising in the building and refurbishment of properties and listed buildings. PAML contracted with BLL to carry out refurbishment works at one such property. On 11 July 2019 BLL made a payment application, valuation 19, for the net sum of £485k. No payment notice was given and the pay less notice was late, something confirmed in an adjudication. Two adjudications followed, one in relation to payment certificate 20 and a second which held that BLL had lawfully terminated the contract. On 17 March 2020, PAML accepted that the first decision should be honoured, but sought a stay of execution for the entire judgment sum of about two months in order to allow a "true value" adjudication to take place. PAML said that a proper evaluation of the account would result in a substantial sum being due to PAML from BLL.

The Judge was prepared to accept that there was a genuine dispute as to the amount of the final account, but he had to set that against the length of time which had passed since the first adjudication decision (September 2019), during which little had been done by PAML, to seek to resolve the true state of accounts. The Judge drew attention to the last sentence of paragraph 17.28 of *Coulson on Construction Adjudication* which says: *"a failure by the defendant to pursue its cross-claim or challenge with diligence may itself be a bar to a successful application for a stay of execution"*.

Here, there was no dispute that once the application for payment in Valuation 19 had been affirmed by the adjudicator in September 2019, the effect of the CA decision in *S & T (UK) Ltd v Grove Developments* (Issue 222) was that PAML not having paid the amount due as held in Adjudication No. 1, could not itself start a "true value" adjudication as to Valuation 19 but had to commence litigation in order to establish the true value, a course which it had not yet taken.

This raised the question whether PAML could now raise a "true value" final account adjudication without first paying the sum awarded in Adjudication No. 1. PAML suggested that the answer to that question was "yes" because of Adjudication No. 3 and because the "true value" adjudication is of the final account post-termination. However, the basis of Decision No. 3 was that PAML had failed to pay sums due to BLL, including the amount found due in Decision No. 1. The Judge was clear that this would amount to a: *"remarkable intrusion into the principle established in S & T: it would permit the adjudication system to trump the prompt payment regime, which is exactly what [the CA] said... would not be permitted to happen."*

Although this dealt with the application, the Judge went on to consider the question of whether it was improbable that BLL would be able to repay the judgment sum at the end of the trial of the underlying issues between the parties. The Judge was clear that it was for PAML to make out this ground.

The Judge had a list of BLL's current projects and projects which BLL had won. The turnover suggested by that list seemed to him to render it likely that if those contracts were executed BLL would be able to repay the judgment sum in its present financial position. However, the Judge did accept that the Covid-19 emergency measures might well have an impact upon whether all these projects would continue or commence, as the case may be. This made the assessment of BLL's position more difficult, but the Judge could not say whether because of Covid-19 BLL would in due course be unable to repay the judgment sum. Given where the burden of proof lies, that made PAML's position difficult. The PAML application failed. All the Judge could say was that:

"if PAML had moved with due diligence and in accordance with S & T, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would, on my findings, have been able to repay."

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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