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.

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Dispatch

Expert Evidence

Good Law Project Ltd, R (On the Application Of) v Secretary of State for Health and Social Care Action

[2021] EWHC 2595 (TCC)

Here, the GLP was seeking judicial review in respect of the award of certain contracts by the Secretary of State for Health and Social Care (HSC), to Abingdon for the manufacture and supply of rapid Covid-19 antibody tests. HSC wanted to rely upon expert evidence. The economist relied upon by the HSC prepared a report in July 2021 which the GLP objected to. The expert then prepared a further report in August, which again was objected to by the GLP.

Mr Justice Fraser was not prepared to allow the HSC to rely upon either expert report because they both failed to comply with the Civil Procedure Rules and with the principles that the Judge said: "*underpin the deployment of expert evidence in court proceedings*", namely fairness and equality of arms. In particular, the Judge noted that this had been drawn to HSC's attention in July and part of the purpose of the interval between that hearing and this one was to give time to cure the defects. In fact, the defects became more pronounced.

In Dispatch 252, we referred to the case of *Dana UK AXLE Ltd v Freudenberg FST GmbH* where the court refused to allow FST to adduce expert evidence noting that an expert: "*should be focussed on the need to ensure that information received by them has also been made available to their opposite numbers*." The same point was made here:

"experts for both parties must have access to the same material. Expert evidence cannot fairly be considered by the court if one expert has an unfair advantage, or access to material to which an opposite number has no comparable access. Equally, in order to properly consider expert evidence, the court ought to be able to consider the material upon which the expert's conclusions are based, and an opposing expert is entitled to consider that same material."

Further, the principle of identifying material relied upon by one expert, and making it available to the other party, was expressly brought to the attention of the HSC at a hearing in July. In the July report, the expert referred extensively to "discussions" they had had with Abingdon and unnamed personnel within the HSC. The expert used phrases such as: "I understand from discussions with", "based on my discussions with" and "I understand that". The August report, however, included exactly the same conclusions as those reached in the July report from the discussions referred to, but with any reference to those discussions having taken place at all being deleted. There was no reason in the view of the Judge why those discussions could not have been identified properly. In fact, there was: "every reason to have done so".

The Judge was not prepared to allow the HSC to have a third go to remedy the breaches. The objection was not new and had been expressly identified. No reason for the failure to remedy was provided. Further, the substantive hearing was fast approaching. If there was a "third report", GLP would be entitled to have time to consider it, and to instruct and adduce their own expert evidence. There was insufficient time available to do this. The Judge commented that:

"the court has little sympathy with any litigant who simply ignores the rules in this way. Endless opportunities for compliance are not in accordance with the overriding objective. These requirements are not optional extras, only to be complied with by a litigant and their expert if the court states in a specific case that they are to apply. They apply in all cases."

Remote hearings in the TCC

In September 2021, further guidance was issued about virtual hearings in the TCC (and Business and Property Courts). For all hearings under half a day,(including adjudication enforcement) the default position is that they will take place remotely. The court will consider a live hearing in such cases only if there is a particular reason why an in-person hearing was more appropriate. The approach for longer hearings and trials will, whilst parties will be asked to express a preference, be a matter for the judge on the facts of each case. The guidance noted that remote and hybrid hearings may cover a full menu of options, from proceedings that are fully remote and accessible live to anyone who is in possession of a link, down to proceedings to which remote access is afforded to a single participant, everyone else being in court. Finally, the guidance noted that for: "*the foreseeable future, the default format for bundles will be electronic bundles*."

Adjudication: one or three disputes?

Quadro Services Ltd v Creagh Concrete Products Ltd

[2021] EWHC 2637 (TCC)

Quadro sought summary enforcement of an adjudication decision against Creagh, who said that the adjudicator had no jurisdiction because three disputes were referred to them. An adjudicator will not have jurisdiction to adjudicate more than one dispute in a single adjudication.

Here, during the course of the project, Quadro made applications for payment and raised invoices for the amounts claimed. Three invoices were outstanding, two were approved by Creagh's QS, one was apparently not replied to at all. The payment applications were cumulative, with each payment application being for the full value of the work done, less the previous payment applications. No pay less notices were issued in respect of any of the applications. The total value outstanding was £40,026.

Quadro was owed monies by Creagh on four other contracts and an issue was said to have arisen over works at one of these sites. In the adjudication, Creagh said that the adjudicator did not have jurisdiction because Quadro had referred three separate disputes under one notice and referral, i.e., the three applications for payment. Quadro said that the dispute was the failure to pay a debt in the sum of £40k under one contract for works that they had carried out for Creagh. Any issue as to the consideration of the sums agreed and rendering of the invoices were sub-issues to be considered in resolving that one dispute – namely, the debt. Creagh took no further part in the adjudication. The adjudicator considered that "a single dispute had been referred, namely a dispute over an amount owed".

Before HHJ Watson, Creagh said that the claims here could be decided without reference to each other. The questions of whether there was a valid payment application, the due date, the final date of payment, whether a pay less notice was served, and whether the final date for payment had passed, had to be considered separately for each claim.

The Judge considered that one dispute could include numerous sub-issues which might be capable of being determined independently from each other. Whether they were sub-issues or separate disputes was a question of fact.

Here, the dispute that was referred was the failure to pay £40k. Whilst Creagh were correct to say that the adjudication involved the consideration of the payment process of three separate payment applications, each of which could be decided in isolation from the other, this was not the case here, because Creagh had not taken any issue with the payment process before the adjudication. It had not raised any issue as to the validity of the payment applications or suggested that it had issued any pay less notices. It had simply not paid and had raised a claim on another project.

The result was that, in the absence of any substantive dispute as to liability to pay the invoices, the adjudicator considered the validity of the payment notices and concluded they were valid applications for payment. That it was "technically" possible to determine whether each individual invoice was due without determining whether the other invoices were due did not mean that those issues could not be sub-issues in the wider dispute as to whether Quadro was entitled to the sum it claims it was due under the contract. The Judge further noted that, if Creagh's argument was correct, then:

"the result would be that the parties would be put to the very significant cost and inconvenience of numerous separate adjudications to recover a single claimed balance under a single contract. That would be contrary to the policy underlying the adjudication process of efficient, swift and cost-effective resolution of disputes on an interim basis."

Adjudication: natural justice

CC Construction Ltd v Mincione

[2021] EWHC 2502 (TCC)

Mr Mincione engaged CCCL to design and build the shell and core of a new house. The contract was based on the JCT Design and Build Contract (2011 Edn). Mr Mincione refused to pay £485k which the CCCL said was due following the service of a Final Statement and an adjudication decision. Mr Mincione said that the Final Statement was not conclusive, a balance was owing to him, and the decision was not enforceable. One of the issues before the court was whether there had been a material breach of natural justice in the adjudicator's treatment of Mr Mincione's liquidated damages argument? The adjudicator had dealt "very briefly" with that saying:

"It is established law that an Adjudicator cannot open up a certificate considered to be conclusive, as such, once the due date has been determined, the Adjudicator will have no further power to open up the Final Statement. In respect of liquidated damages, I conclude that it is not a part of the dispute I have been asked to decide and therefore cannot be raised in set-off in these circumstances."

The Judge applied the principles set out by Mrs Justice O'Farrell in the case of *Global Switch Estates Ltd v Sudlows Ltd* (Dispatch Issue 247). Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases. If there is a material breach of the rules of natural justice, the decision will not be enforced. HHJ Eyre QC said that, where there is a claim for payment, a defence of set-off can be raised and will necessarily be part of the dispute which an adjudicator addressing such a claim has to determine. That said, it was important to keep in mind the distinction between (a) considering an asserted defence and then concluding, as a result of that consideration, that it was not a tenable defence in the particular circumstances; and (b) declining to consider an asserted defence. It is the latter which is likely to be a breach.

CCCL said that the adjudicator did consider the liquidated damages defence concluding that Mr Mincione was not entitled to raise a claim for LADs in set-off against sums found due in respect of the Contract Sum. When the adjudicator said that the absence of a Pay Less Notice meant that "the sum to be paid ... is the sum stated as due in the Final Statement ..." they were accepting the argument that the absence of a Pay Less Notice precluded the setting off of the liquidated damages. That was an adequate consideration of the set-off defence and so the adjudicator had addressed the defence.

Here, it was clear that the adjudicator said that he had declined to consider the liquidated damages claim as a potential set-off. This was because he did not regard it as part of the scope of the dispute before him. That view was incorrect and meant that the adjudicator had failed to address a defence which was before him. The Judge noted that, in considering whether that defence should have been addressed, and the consequences of any failure to do so, it was important that CCCL had sought (and, indeed, it obtained) a decision that a particular sum was to be paid. It followed that this was a case where the Employer was "entitled to rely on all available defences".

A conclusion that the absence of a Pay Less Notice prevented Mr Mincione advancing the liquidated damages claim as a set-off may or may not have been correct and would have been a decision within the adjudicator's jurisdiction, but that was not the conclusion reached by the adjudicator. Instead, they declined to consider the set-off defence in its entirety. This amounted to a material breach of the rules of natural justice.

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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