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 275 - May 2023

# Dispatch

## Adjudication enforcement & Part 8 claims

### Sleaford Building Services Ltd v Isoplus Piping Systems Ltd

[2023] EWHC 969 (TCC)

There were two claims before Mr Alexander Nissen KC. Isoplus sought enforcement of an adjudication decision for some £325k. It was common ground that the decision was valid. Whether judgment should be entered depended on the Part 8 proceedings brought by Sleaford who said that clause 21.4 of the subcontract contained a pre-requisite to payment with which Isoplus had not complied, such that Isoplus was not entitled to any further payment:

*"21.4 The Subcontractor in subcontracting any portion of the subcontract works to a Sub-subcontractor:*
*o procures that the terms of each sub-subcontract are compatible with the terms of this subcontract; and*
*o as a precondition to payment of any sum related to their work provides to the Contractor within 7 days from the earlier of commencement of their work or the execution of the relevant sub-subcontract a certified copy of the sub-subcontract and compatible with the terms of this subcontract (save for particulars of the sub-subcontract sum or fee), together with evidence of the professional indemnity insurance (or where applicable product liability insurance) held by such sub-subcontractor complying with the terms of the sub-subcontract and the requirements of this subcontract."*

Isoplus said that these matters were unsuitable for resolution through Part 8 proceedings. Sleaford had commenced the adjudication alleging that Isoplus had installed incorrect fittings causing a catastrophic failure. The redress sought included asking that the Adjudicator, if awarding payment to Isoplus:

*"advises if all pre-requisites for payment have been complied with in respect to insurances and provision of sub-subcontract conditions etc to enable payment to be made without being in breach of the Subcontract."*

In the Adjudication, Sleaford said that the sub-subcontracts provided were not compatible with the subcontract, no evidence of insurance had been provided and that, accordingly, no award of payment could be made. Isoplus said that no particulars had been given on either issue. Despite Sleaford having initiated the referral, the Adjudicator concluded that £325k was now due to Isoplus. The Adjudicator agreed that:

*"I am satisfied on a balance of probabilities that compliance with clause 21.4 is required as a precondition to payment of any sums related to a sub-subcontractor. Based on the information provided I am not able to confirm whether IPS have complied with this obligation."*

In written evidence, Isoplus said that it was inconceivable that Sleaford could have been unaware of the involvement of the sub-subcontractors in carrying out a portion of the works between November 2020 and September 2021. Applications for payment were issued during that period. There was no assertion of non-compliance with clause 21.4 and payments were made in full. Sleaford said that it was clear that clause 21.4 was a pre-condition and, on the evidence before the Court, Isoplus was incontrovertibly in breach. None of the sub-subcontracts were provided within 7 days; the purchase order from at least one sub-subcontract was not certified; and no insurance had been provided for any of the three sub-subcontractors.

The Judge noted that it was "unfortunate" that Isoplus chose to issue its Part 7 proceedings in Manchester given that the Part 8 claim had already been issued in London. No satisfactory explanation for this was offered by Isoplus. As a result, public resource was needlessly spent resolving the question of where the proceedings would be heard. The Judge was clear that the proper approach to these two sets of proceedings was that identified by Coulson LJ in *A&V Building Solutions Ltd v J&B Hopkins Ltd* [2023] EWCA Civ 54:

*"The proper approach to parallel proceedings was outlined by O'Farrell J in Structure Consulting Limited v Maroush Food Production Limited [2017] EWHC 962 (TCC). The judge should usually give judgment on the claim based on the adjudicator's decision and then – to the extent possible – endeavour to sort out the Part 8 proceedings."*

It followed that the Judge should first determine whether there was there any defence to the Part 7 claim? It was accepted by Sleaford that the adjudicator's decision was enforceable.

Second the Judge had to consider whether the matters raised were suitable for determination by means of Part 8? Here, the Judge was not so satisfied, referring again to the *A&V* case and this time Coulson LJ's comment that:

*"Warnings have continued to be given as to the over-liberal and inappropriate use of Part 8 in adjudication cases:"*

In considering whether sub-clause 21.4 was operable, the Judge had to consider whether the requirements of a condition precedent are satisfied. Here, the Judge referred to another decision of Coulson J, *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2008] EWHC 2379 (TCC):

*"It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of the event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered ..."*

Sub-clause 21.4 contained multiple sub-elements within it. Here, it was possible that only some, but not all, of those elements contained conditions precedent. The Part 8 proceedings did not identify, still less draw any distinction between, the differing elements or allow for individual declarations to be given in respect of them. The multi-faceted elements within clause 21.4 were such that a properly particularised claim should be pleaded out so that each issue of construction can be separately resolved.

Second, it was necessary to consider whether, or not, Isoplus had, in fact, complied with such conditions precedent as may exist. The failure by Sleaford to have adequately particularised its breaches meant that there was no proper agenda for determination of the matter at this stage. It was also necessary to consider waiver. It was common ground that Sleaford had made at least three payments to Isoplus in respect of milestone achievements. Isoplus said that the making of these payments in full and with knowledge of any non-compliance with clause 21.4 amounted to a unilateral waiver of any preconditions. The Judge was satisfied that Isoplus had an arguable case that the payment in this case amounted to a waiver. But a good deal more evidence was required in order to finally determine the matter. Further, valuation evidence would be required because, at present, there was no basis upon which the Court could determine what part of any milestone payment related to the work of a given sub-subcontractor in respect of which a breach of clause 21.4 has been proven.

The Judge concluded that it would be better for separate proceedings to be issued so that Sleaford could start afresh. The Part 8 claim was dismissed but that did not mean that Sleaford was shut out from advancing the same essential points again.

## Case update: insurance, all-risk policies

### FM Conway Ltd v The Rugby Football Union & Ors

[2023] EWCA Civ 418

We discussed this case in Issue 263. During works to upgrade Twickenham rugby stadium for the 2015 World Cup, the RFU engaged Clark Smith to design the ductwork and Conway to install it. The RFU and Conway entered into a JCT Standard Building Contract without Quantities 2011. The RFU also obtained an all-risks insurance policy. The RFU said that there were defects in the ductwork which caused damage to the cables when they were pulled through it. The RFU was indemnified under the terms of the all-risks policy in respect of the replacement and related costs, but said that Clark Smith and Conway were liable for those losses because of defects in the design of the ductwork and workmanship deficiencies. Conway said that it was co-insured with the RFU under the all-risks policy and so had the benefit of the cover to the same extent as the RFU. The result was that the RFU could not bring claims in respect of those alleged losses as they were covered by the policy, and it could not make a subrogated claim (on behalf of insurers) in respect of sums already paid out under the policy.

At first instance, the Judge agreed with the RFU. Coulson LJ commented that this appeal revealed "*at its heart, a potential tension*." On the one hand, the appellant Conway was seeking to rely on the co-insurance policy to avoid liability for what was alleged to be its own defective work, which was a type of cover which the first respondent employer, the RFU, was not obliged to (and did not) procure pursuant to its building contract with Conway. On the other hand, there could be no argument that the policy covered the loss that eventuated, because, if it had not, the second respondent insurer, RSA, would not have paid out to the RFU under the policy and would not now be behind the subrogated claim against Conway. So, if Conway were a co-insured under that policy, it might seem odd that their cover was different to that of the RFU.

Although the Judge noted that he was well aware of the dangers of summarising the applicable principles in what is "*a notoriously complex area of law,*" he said that the following broad propositions could be derived from the authorities:

(i) The mere fact that A and B are insured under the same policy does not, by itself, mean that A and B are covered for the same loss or cannot make claims against one another.
(ii) In circumstances where it is alleged that A has procured insurance for B, it will usually be necessary to consider issues such as authority, intention (and the related issue of scope of cover). Such issues are conventionally considered by reference to the law relating to principal and agent.
(iii) An underlying contract between A and B is not a necessary pre-requisite for a proper investigation into authority, intention and scope. However, as the same case shows, a contract may well be implied in any event.
(iv) On the other hand, where there is an underlying contract, then, in most cases, it will be much the best place to find evidence of authority, intention and scope.

Coulson LJ considered that the Judge, at first instance, had expressly considered authority and intention, paying particular attention to the underlying contract between the RFU and Conway. The Judge, at first instance, concluded that the RFU's authority to insure was co-extensive with its obligation to do so. In other words, the RFU was obliged and intended to provide Option C cover, but nothing more. The Judge had considered whether anything passed between the parties in the course of the pre-contractual negotiations which indicated that Conway gave authority, and/or the RFU intended, to effect cover that was wider than Option C, concluding there was no such extraneous evidence of authority and/or intention. For example, whilst there were discussions about the creation of a fund recourse to which would be the sole remedy for loss suffered by the RFU, this was of no legal significance because it was overtaken by the subsequent negotiations. Coulson LJ noted that this finding was fatal to the appeal.

There was no issue that the RFU intended to procure insurance for Conway; the issue was the extent of the cover they intended to provide. This was a composite insurance policy, which meant that each co-insured was to be treated as if they had their own policy. Thus, the mere fact that Conway and the RFU were insured under the same policy was insufficient to allow the co-insurance defence. The all-risks policy insured both the RFU and Conway, but they were not insured to the same extent in respect of the same risk. In particular, they were not co-insured in respect of the losses which the RFU was said to have suffered by reason of damage to the cables resulting from defects in the ductwork and for which the RFU had been indemnified by insurers. The result was that the co-insurance defence failed; a conclusion that Coulson LJ considered to be unassailable.



Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
**Fenwick Elliott LLP**
Aldwych House
71 - 91 Aldwych
London WC2B 4HN