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

Adjudication enforcement & final statements

Atalian Servest AMK Ltd v BW (Electrical Contractors) Ltd

[2023] ScotCS CSIH_18

In 2020, AMK carried out electrical sub-contract work on the Edrich and Compton stands at Lord's cricket ground, London. The final account process required that BWE had two months from completion to submit a detailed Final Account. AMK then had 28 days to produce a final account statement of the sums due. Under sub-clause 33.4, that statement was stated to be:

"final and binding on BWE unless the parties agreed to modify it or BWE commenced an adjudication or court proceedings within 20 working days."

AMK duly produced a final statement on 6 May 2022. BWE disagreed with the statement and commenced adjudication proceedings on 19 May 2022. BWE also commenced court proceedings on 27 May, in which they repeated their claims. On 15 June 2022, the adjudicator resigned. BWE did not commence a second adjudication until 8 September 2022. In the intervening period, there had been some attempts at negotiating a settlement. AMK said that the FAS was final and binding. The second adjudicator decided that the final statement was not final and binding and determined that AMK should pay BWE £1.4 million. AMK defended enforcement proceedings again saying that the final statement was binding.

Lord Carloway said that the contract was clear. If BWE either institute an adjudication, or raise court proceedings, within the specified period, the final statement was not binding. BWE did institute an adjudication. The first adjudicator resigned. That did not bring the adjudication to an end. BWE followed the procedure set out in paragraph 9(3) of the Scheme and served a fresh notice. The two referrals were very similar, other than a reduction in AMK's figures and the addition of BWE's extension of time claim. The fundamental question remained the same: what sum was properly due? The adjudication continued notwithstanding the fresh notice. The resignation of the first adjudicator did not terminate BWE's right to challenge the final statement; BWE had their foot firmly in the door, as permitted by clause 33.4, by virtue of both the adjudication and perhaps crucially, the "*timeous, and still pending, litigation*." The challenge to the adjudicator's decision on this ground failed.

The first adjudicator had resigned because they took the view that having received nine packing cases of files with the Referral, the dispute was "absolutely incapable of proper resolution in the timescales set by the Construction Act." The Referral in the second adjudication was accompanied by some 26,000 pages. Lord Carloway noted that:

"The adjudicator took on a nigh impossible task. The volume of written materials was enormous. It was redolent of what was described in Re Fundao Dam Disaster [2020] EWHC 2471 (Turner J at para 11) as amounting to "a fractal pattern of progressively complex and ever-finer recursive detail of sharply declining significance" ... It would have required a super-human effort to carry out a precise valuation exercise before the 11 November 2022 deadline ..."

The Judge also commented that:

"The presentation of an excessive amount of material, as both parties did, and the tabling of a wide range of legal and factual issues, could not be allowed to derail the robust and summary adjudication process. That process is not intended to resolve disputes by reference to innumerable rounds of pleadings and submissions."

During the adjudication, the adjudicator had written to the Parties, observing that the scope of the original works "*has long since been drowned out by ... a 'Beck and Call Contract'*". They doubted whether the charges amounted to variations and invited comment on how to evaluate the work done. BWE replied on the same day, agreeing that the contract had developed into a beck and call arrangement but referred to detailed costings in line with the contractual valuation provisions. AMK complained that neither party had suggested that a new beck and call contract had been formed and they did not have time to respond to BWE's figures. The adjudicator should apply the contract, i.e., detailed rates for individual items had to be applied and then only if each variation were proved. AMK did respond, in some detail, on the reliability of the man hours figure. The adjudicator took note but explained that their overarching task was to determine the "true value" of the "account". Just before the decision was due, AMK again repeated their position; BWE replied. The adjudicator said in reply that there was no new contract: "*The contract is varied. AMK piled on the work and BW piled on the men ... My award is coming to you on Friday. Now is the time to stop commentary.*"

In the decision, the adjudicator noted that they had aimed to do "*broad justice at high speed*" but disagreed with AMK's "*enthusiastic arguing*" in their lengthy submissions. Lord Carloway noted that, in terms of fairness, the primary complaint was the introduction, at what was said to be a late stage, of the notion of the beck and call contract; notably, in relation to the man hours worked. But the Judge disagreed. There was no unfairness. The adjudicator gave parties due notice of their line of thinking and invited comment. AMK took advantage of this and set out in detail, and repeatedly, why they submitted that all of the variations had to be valued in terms of the contract and why the number of man hours was: (a) irrelevant; and (b) unreliable. The adjudicator did not have to accept AMK's submissions. It is clear that he rejected them.

Lord Carloway concluded that the adjudicator did not ignore the terms of the contract:

"The adjudicator's determination is, when set against that background, an exemplary piece of work. He cut the issue down to a straightforward one of assessing roughly what he considered to be payable by AMK to BWE. That was the question which he was asked to answer. He answered it in a clear and succinct way. The several questions that he posed for himself were merely stations on the road to the overall valuation. They were not issues separate from the main question."

Assessment of costs

Partakis-Stevens & Anor v Sihan & Ors
[2023] EWHC 1051 (TCC)

Following a judgment on a claim brought in nuisance by the Stevens, the parties were not able to agree what consequential costs order was appropriate. The parties were able to agree the rate of interest on the judgment sum and costs, 3% p,a, However, whilst the Sihans accepted that the Stevens were the successful party and that the starting point was that they should pay the Stevens' costs, a number of arguments were put forward to suggest that the court should depart from this starting point.

Firstly, the Stevens failed on parts of their case. In particular, there were two unsuccessful attempts at pursuit of claims for an injunction and there was the largely unsuccessful pursuit of the claim for consequential damages, including the very substantial claim for residual diminution in value and for damage to the swimming pool. HHJ Davies noted that:

"It cannot be disputed that there was a substantial difference between the value and significance of these claims as advanced and the end result. It cannot sensibly be disputed that if the claim had been pleaded from the outset on the basis of the eventual outcome: (a) the parties ought – acting sensibly – to have approached the claim in a far more constructive way and, probably, resolved it without the need for a trial; and (b) the court would have been far more ready to cut down the directions and the allowable budgeted costs to a level commensurate with the real value and significance of the case."

That said, the actual time and cost of these unsuccessful claims was relatively limited compared to the time and cost of investigation of all of the issues in the case, including the significant issues which were vigorously contested and on which the Stevens succeeded, namely breach and causation: "*The victory was far from pyrrhic in that the Stevens have achieved a judgment of real benefit to them.*"

However, the Judge commented that the Stevens' determined pursuit of these claims had something of the nature of a "crusade" with some items only being accepted during cross examination. Further, this had to be balanced against: "a similar dogged and unreasonable defence by the Sihans". Further, their liability expert was: "*at least as, if not more, dogged than the Stevens*" and the valuation expert did not engage in any meaningful way with the key issues.

However, some reduction from the costs otherwise recoverable by the Stevens would be required by reference to their lack of success on all issues and the extent to which their conduct of their case was unreasonable. Further, a number of without prejudice save as to costs ("WPSC") offers (not Part 36 offers) had also been made. However, this WPSC correspondence about settlement showed that the parties attempted, in good faith, to achieve a settlement but were unable, for a number of different reasons, to do so.

The result was that the Stevens received 75% of their costs against the Sihans, reflecting a reasonable discount for their relative lack of success and unreasonable conduct.

Adjudication enforcement: exhausting jurisdiction

AGB Scotland Ltd v McDermott
ScotCS CSOH_31

During works to upgrade McDermott resisted enforcement of a (smash and grab) adjudication decision, saying that it did not properly address their line of defence that, as the appendix to a letter of 14 March 2022 had not been sent with the Interim Payment Notice or otherwise previously supplied to the Quantity Surveyor, there had not been proper specification given of the sums claimed in the Notice. McDermott said that:

"An adjudicator could not seek to rely upon general assertions to the effect that he had considered all submissions and documents - for a decision to be valid and enforceable, there must have been some effort made by the adjudicator to address the lines of defence advanced and to explain the basis upon which they had been accepted or rejected."

Lord Sandison agreed to some extent, noting that:

"Put short, the Court will...be slow to refuse to enforce an adjudicator's decision. However, if the adjudicator's decision plainly indicates that he failed in arriving at his conclusions to take into account and deal with a line of defence advanced before him, then that may (not necessarily will) lead to the conclusion that he failed to exhaust his jurisdiction and that his decision should be set aside."

However, the Judge did not accept the factual argument put forward, noting that it was not possible to read the decision, other than as the adjudicator had decided, in that the letter of 14 March 2022 was validly included by reference in the Interim Payment Notice sent to the Quantity Surveyor in October: "at least in circumstances where that letter and its appendix had previously been sent to the Contract Administrator as a representative of the defender, and that the letter with its appendix contained sufficient detail to meet the requisite standard" In other words, had the specification to the contractual standard of the composition of the loss and expense claim been provided to the Quantity Surveyor? Yes, the Interim Payment Notice contained a reference to a document already in the hands of the defender's agents which contained adequate specification. Lord Sandison concluded that:

"The defender's criticism amounts merely to the suggestion that the adjudicator's reasoning was flawed and the resultant decision wrong. That is an irrelevant assertion in this context."

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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