Gray's Inn Construction Chambers

Annual Construction Law Review 2023

GRAY'S INN CONSTRUCTION CHAMBERS
Construction and Engineering Barristers

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ANNUAL CONSTRUCTION AND ENGINEERING LAW REVIEW 2023

Contents

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Introduction

Welcome to Gray's Inn Construction Chambers' Annual Construction and Engineering Law Review 2023. This review focuses on amongst other things, some of the relevant developments and updates in construction and engineering law, in relation to payment and construction contracts and the continuing guidance from the Technology and Construction Court (TCC) and the Court of Appeal. Charles Edwards, Construction Barrister and Head of Chambers at Gray's Inn Construction Chambers, successfully acted in the Court of Appeal representing the successful sub-contractor in the Court of Appeal in the matter of A & V Building Solutions Ltd v J & B Hopkins Ltd [2023] EWCA Civ 54.

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Construction Contracts - Payment and risk with contracting with a dormant company

In **WRB (NI) Ireland v. Henry Construction Projects Limited [2023] EWHC 278 (TCC)**, the Technology and Construction Court ("TCC") provided useful guidance on the risks of contracting with a dormant company, in this case a sub-contractor. The TCC declined granting the contractor a stay of execution in the adjudication enforcement proceedings, in order to allow the contractor to establish its cross-claim against the sub-contractor which was a dormant company, or to allow the contractor to mitigate its risk of it not recovering damages from the sub-contractor which was a dormant company.

WRB (NI) Limited ("WRB"), a sub-contractor and Claimant was seeking to enforce an adjudicator's decision in its favour against Henry Construction Projects Limited, the contractor and Defendant in the adjudication enforcement proceedings. The contractor by a sub-contract engaged the sub-contractor to design, "supply, install, test and commission the mechanical, electrical and public health systems for the development for a total sum of £2,180,000 plus VAT." The sub-contractor submitted it was a dormant company and claimed it was not party to the sub-contract by arguing that the sub-contract was with WRB Energy Limited. Conversely, the Contractor claimed that it contracted with the claimant, WRB (NI) Limited as sub-contractor. This issue was resolved by an earlier adjudication. The key issue in this case was that the contractor was seeking a stay of execution of any judgment.

On 30 March 2022, WRB issued a notice of adjudication regarding the value of its interim application for payment number 15. The total of £1,757,483.36 had been paid by the contractor but WRB claimed that it was entitled to a further payment of £815,618.37. By its response, the contractor claimed that it had overpaid WRB and sought a repayment of £563,395.65. By a corrected decision dated 18 May 2022, the adjudicator concluded that the true balance owed was £120,655.35 plus interest of £96.79. Further the contractor should pay any VAT payable upon the capital sum.

In accordance with the adjudicator's decision, WRB who were successful in the adjudication sought payment from the contractor. The contractor did not make payment. WRB applied for summary judgment. The Technology and Construction Court granted summary judgment £140,000. However, the contractor by a cross application applied for a stay of execution. Due to WRB being a dormant company, the contractor contended that if their counterclaim were to be successful, it would be highly likely that monies owed to them, would not be paid. The contractor asserted that it had cross-claims totalling £754,495.72 for liquidated damages and costs incurred in supplementing WRB's labour, plant and materials. The contractor stated it anticipated issuing a notice of adjudication the following week. The contractor stressed that it only required a short stay while it establishes its alleged entitlement to its larger cross-claim. The contractor argued that "*WRB's parlous financial standing means that it is highly probable that any monies paid now will not be repaid in the event that*" the contractor succeeds in its own claim.

WRB objected to even a short stay of execution on the basis it would undermine the statutory purpose of adjudication. Further, WRB has always been a dormant company and if the contractor chose to place the subcontract with a dormant company, then it accepted the risks inherent in doing business with such a company.

WRB argued that a stay should be refused upon a proper application of the principles summarised by His Honour Judge Coulson QC (as he then was), in **Wimbledon Construction Company 2000 Ltd v. Vago [2005 EWHC 1086 (TCC)**, (2005) 101 Con LR 99. The point was made that it should not be necessary, however, if the court would otherwise be minded to grant a stay of execution, WRB confirms that WRB Energy Limited offers to guarantee the repayment of any part of the judgment sum in the event that contractor obtains a valid order, decision or judgment in its favour for payment within three months of the contractor's own payment. Further, WRB offers to extend such period to six months should the court consider three months to be too short.

The TCC refused to order a stay of execution and in particular, at paragraph 21 of the judgment, the TCC highlighted the special circumstances established and helpfully summarised by Judge Coulson QC (as he then was) in **Wimbledon Construction Company 2000 Ltd v. Vago [2005 EWHC 1086 (TCC)** as set out below, which the court will consider in such a matter.

The TCC considered the authorities and stated amongst other things that:

"…

21. *Rule 83.7(4)(a) of the Civil Procedure Rules 1998 provides that the court may stay the execution of a judgment or order if there are "special circumstances which render it inexpedient to enforce the judgment or order." In Wimbledon Construction Company 2000 Ltd v. Vago, Judge Coulson QC helpfully summarised the applicable principles at [26]:*

    "(a) Adjudication … is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

    (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

    (c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion … with considerations a) and b) firmly in mind (see AWG Construction Services v. Rockingham Motor Speedway [2004] EWHC 888 (TCC)).

    (d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances … rendering it appropriate to grant a stay (see Herschell Engineering Ltd v. Breen Property Ltd (unreported) 28 July 2000, TCC).

    (e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd (2000) 73 Con LR 135, [2001] 1 All ER (Comm) 1041, CA and Rainford House Ltd v. Cadogan Ltd [2001] BLR 416).

    (f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

    (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschell); or

    (ii) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals v. Glencor Enterprises Ltd [2000] C.I.L.L. 1637)."

22. *In LXB RP (Crown Road) Ltd v. Squibb Group Ltd [2016] EWHC 2669 (TCC), Stuart Smith J, as he then was, cited Wimbledon and added, at [11]:*

    "Without derogating from that statement of principle a decision to enforce or not is an exercise of the court's discretion, which must balance the well-known interest in enforcing valid adjudication decisions – for reasons that have been repeated frequently elsewhere and do not need further repetition now – against the perceived or actual risk of future injustice if the party subsequently becomes unable to reciprocate in the payment of what it owes under the same contract."

23. *In Herschel Engineering Ltd v. Breen Property Ltd the defendant sought a stay of execution where the claimant company had only been formed three months before the contract was entered into. In refusing a stay, His Honour Judge Lloyd QC considered this highly relevant. He observed:*

    "In my view, on an application for a stay where a party has [entered] into a contract with a company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position it is in? It has, as it were, contracted for the result. That is not normally a ground for avoiding the consequences of a debt created by the contractual mechanism … It is very easy (and prudent and relatively inexpensive) to carry out a search or to obtain credit references against a company whose financial status and standing is unknown. Not to do so inevitably places a person at a significant disadvantage. It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration in its finances since the date of contract)."

24. *Likewise, in Granada Architectural Glazing Ltd v. PGB P&C Ltd [2019] EWHC 3296 (TCC), Nicholas Vineall QC, sitting as a Deputy Judge, refused a stay in a case where the claimant was balance-sheet insolvent at the date of the contract and at the time of*

enforcement but, based on support by way of inter-company loans, had always paid its debts as they fell due. While the primary ground for refusing a stay was that the judge rejected the argument that the company would probably be unable to pay, the deputy judge added that he would in any event have rejected the application for a stay because the claimant's position had not changed. He observed pithily, at [43], that:

"RGB chose to contract with Granada. In the absence of a material change in the financial position of Granada, it seems to me that it would be unfair and contrary to the spirit of the adjudication regime to allow RGB to escape its liability to meet an adjudication award on the basis of the essentially unchanged financial position of Granada. Accordingly, I decline to order a straightforward and unconditional stay of execution."

25. *Of particular note is the case of Westshield Civil Engineering Limited v. Buckingham Group Contracting Limited [2013] EWHC 1825 (TCC), 150 ConLR 225, in which Akenhead J refused a stay. There are a number of parallels with the instant case in that the claimant had been a dormant company both at the time of the sub-contract and enforcement proceedings, and had itself contended that the true contracting party was a different and solvent company. The parties were, however, bound by an earlier adjudication decision that the claimant was the true sub-contractor. In Westshield, the associated company that claimed to be the true sub-contractor offered to guarantee the repayment of the judgment sum in the event that it was later determined that it was the true contracting party.*

The further court acknowledged that this is a case where it is probable that, should the court refuse a stay and the contractor later establish its own cross-claim, WRB would be unable to repay the judgment sum. While such risk could be addressed, or at least mitigated, by the guarantee offered by WRB Energy Limited, the court was not satisfied that the contractor has established that it would be inexpedient to enforce the adjudicator's decision. The TCC in refusing to grant a stay of execution made the following three points in summary:

- Firstly, the contractor chose to place the sub-contract with a newly formed dormant company. The risk that it now complains of is, to quote Judge Lloyd's observations in Herschell, the **"inevitable consequence"** of having placed this sub-contract with a dormant company. It is "**the result for which it contracted.**" As the deputy judge observed in Granada, **it would be unfair and contrary to the spirit of the adjudication regime to allow Henry Construction now to escape its liability to meet an adjudication award on the basis of WRB's essentially unchanged financial position**. [Emphasis added]

- Secondly, it was the contractor that resisted the argument that the true sub-contractor was WRB Energy Limited. **It is not clear whether it considered there to be some forensic advantage in taking that line but it has essentially made its own bed**. [Emphasis added]

- Thirdly, this judgment became regrettably delayed behind a judgment in another very substantial TCC case. **By the time it is handed down, the contractor will have had ample opportunity to establish its alleged entitlement upon its cross-claims**. [Emphasis added]

Payment - Adjudication - Will the complexity and time pressures due to the sheer quantity of documentation /evidence in adjudication prevent enforcement?

The recent judgment in **Home Group Limited v MPS Housing Limited [2023] EWHC 1946** (TCC) where the enforcement of adjudicator's decision (which ran to 74 pages) was challenged on the basis of a breach of natural justice due to the sheer volume of the Defendant's Referral (which included a quantum expert report of 155 pages, with 76 appendices, which consisted of 202 files in 11 sub-folders, amounting to 338 megabytes of data and an additional 2,325 files in 327 sub-folders and five factual witness statements (which amounted to 88 pages, with hundreds of exhibited pages) was dismissed provides useful guidance from the Technology and Construction Court.

The Claimant ("Home Group") sought summary judgment of an adjudicator's decision dated 28 April 2023. The Adjudicator in his Decision ordered payment by the Defendant ("MPS") to the Claimant Home Group of £6,565,831.94 plus interest and 85% of his fee.

Pursuant to a JCT Measured Term Contract (the "Contract"), the Claimant engaged the Defendant to carry out maintenance and repair works to some of its properties. The Claimant claimed termination losses caused by the Defendant's repudiatory breach of a JCT Measured Term Contract. On 11 May 2022, the Defendant, pursuant to Clause 8.7.2 of the Contract, purported to terminate the Contract. The Claimant did not agree that Defendant were entitled to terminate the Contract and claimed that the Defendant's termination was a repudiation of the Contract. The validity of the termination was addressed in the first adjudication. On 25 November 2022, it was decided that the Defendant had repudiated the Contract, hence its

attempted termination was invalid. The second adjudication proceeded with regards to recuperating the Claimant's losses.

On 17 March 2023, the Claimant served a Referral which included: a quantum expert report of 155 pages, with 76 appendices, which consisted of 202 files in 11 sub-folders, amounting to 338 megabytes of data and an additional 2,325 files in 327 sub-folders and five factual witness statements (which amounted to 88 pages, with hundreds of exhibited pages).

In the adjudication, the Defendant were given a timeframe of 19 days (or 13 working days) to provide its response to the Referral. Due to the sheer quantity of material, the Defendant claimed that this was an insufficient timeframe for it to respond. The Defendant argued that it was not feasible to adequately consume and respond to the quantity of material served and that this was a breach of natural justice which has led to a material difference in the result, and that as such the adjudicator's decision was not enforceable. The Defendant did not argue that the dispute was incapable of adjudication; but rather, it asserted that the Claimant should have provided a more reasonable timeframe to understand the claim, whether in advance of the Notice of Adjudication or by agreeing to an extended timetable.

After the termination of the Contract by the Defendant, but preceding the outcome of the first adjudication, on 5 October 2022, the Contract Administrator provided the parties with the Final Account issued pursuant to clause 4.6.3 of the Contract. This outlined that a total of £7,813,201.89 was due from the Defendant to the Claimant. The calculation included a sum of £7,532,049.48 as the sum the Claimant was entitled to recover from the Defendant as a result of the Defendant's breaches of contract.

Following the termination decision, on 23 December 2022, the Claimant requested payment in the sum of £8,297,521.01 plus VAT as applicable, from the Defendant, stating that if they did not make payment by 6 January 2023, a dispute would have crystallised, and it would have no option but to recover its losses by way of a third-party tribunal. The letter did not give more than a high-level breakdown of how the sum of £8,297,521.01 had been calculated and there was no supporting analysis. The sums claimed by Claimant essentially comprised sums said to have been paid out to third parties to complete works that the Defendant ought to have completed, and the sums it would have had to pay the Defendant (plus several other heads of claim).

On 4 January the Defendant observed that despite claiming more than £8m, the Claimant had not provided either the information or level of detailed required to assess and respond to the claim, nor any supporting documents and, as a result, any reference to adjudication would be premature. The Defendant proposed a method for resolution of the claim and requested that particular documents (listed in a schedule to the letter) were issued by Claimant. It was suggested that following the receipt of the requested information, the Defendant would require 8 weeks to respond. The Claimant rejected the timetable and proposed the agreement of a random 5% sample of Orders which had been placed by Claimant with third parties for work which was required under the Contract as a representative sample. They proposed that the Defendant would attend the Claimant's office to review the information and evidence in relation to the sample. The Claimant asserted that within 7 days of Defendant's review of the information, it would require the Defendant to issue an offer of payment of the Claimant's losses. It gave a short timetable for the agreement of a sample and attendance at its office.

On 10 January 2023, the Defendant did not accept the sampling proposal, and requested a spreadsheet which showed for each work order, with eight categories of information as a minimum. On 12 January 2023, the Defendant commenced its assessment of the claim, considering the data on a spreadsheet appended in due course to its Response. The Claimant responded to the Defendant on 10 January 2023 by letter revising its claim upwards by £478,087.812 and providing eleven spreadsheets to support its claim. The Claimant asserted that the Defendant had all details for the pre-termination losses and a considerable amount of information regarding the post-termination losses. The Defendant's position was that the Claimant had still failed to provide the bare minimum of information required, arguing that the spreadsheets were insufficient.

The Claimant on 10 February 2023, issued a draft of the expert report on a "without prejudice save as to costs basis". This was the same expert report on which it would rely in the adjudication in and was provided almost two months before the Defendant would be required to serve its responsive evidence. Following this, the Claimant provided, on a without prejudice basis, revised appendices to the draft expert report; which were the same appendices served with the Referral.

On 16 February 2023, the Defendant stated that it would need until 19 May 2023 to provide a response. On 24 February 2023, after the Claimant had refused to allow an extended

timeframe, the Defendant contended that, "it was impossible for us to commence any meaningful review (or ultimately for an adjudicator to properly consider the position) in the absence of a full and detailed description of the work that was undertaken against each and every work order".

The Claimant's subsequent response to this, was a reinforcement of its offer for the Defendant to attend the Claimant's office to access the systems. This offer was not accepted by the Defendant at any point before the procedure the adjudication.

The Technology and Construction Court (TCC) reviewed the law on the matter and stated amongst other things, that (paragraph 36):

"Notwithstanding the way in which some of the submissions before the Adjudicator seemed to focus on the complexity of the dispute per se ,…rightly does not press a submission before me that the dispute was intrinsically so complicated or heavy that in no circumstances could it have been subjected to adjudication. Such a contention would, in any event, have failed. As pointed out by Akenhead J in HS Works Limited v Enterprise Managed Services Limited [2009] EWHC 729 (TCC), at [56] that, " Parliament provided for 'any' relevant dispute to be referable to adjudication and must have envisaged that there would be simple as well as the immensely detailed and complex disputes which can arise on a construction contract."

At paragraph 37 to 39 of the judgment, the TCC stated:

"37. Similarly, in Amec Group Limited v Thames Water Utilities Limited [2010] EWHC 419 (TCC), Coulson J (as he then was) held:

"60. In my judgment, therefore, the law on this subject can be summarised as follows:

(a) The mere fact that an adjudication is concerned with a large or complex dispute does not of itself make it unsuitable for adjudication: see CIB v. Birse.

(b) What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator had: (i) sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (ii) was satisfied that he could do broad justice between the parties (see CIB v. Birse).

(c) If the adjudicator felt able to reach a decision within the time limit then a court, when considering whether or not that conclusion was outside the rules of natural justice, would consider the basis on which the adjudicator reached that conclusion (HS Properties). In practical terms, that consideration is likely to amount to no more than a scrutiny of the particular allegations as to why the defendant claims that the adjudicator acted in breach of natural justice."

(d) If the allegation is, as here, that the adjudicator failed to have sufficient regard to the material provided by one party, the court will consider that by reference to the nature of the material; the timing of the provision of that material; and the opportunities available to the parties, both before and during the adjudication, to address the subject matter of that material."

38. At [61], the Judge stated in terms that, " size/complexity will not of itself be sufficient to found a complaint based on a breach of natural justice ". In the present case, the Adjudicator correctly kept under review the question of his ability to do broad justice between the parties, notwithstanding the substantial quantity of material he had been presented with. Having determined that he could, this Court will be extremely slow to interfere with that conclusion."

39. Instead, the question in almost all cases where the Adjudicator has considered the position but expressed the clear ability to render a fair decision, will inevitably centre upon the timing of the provision of the material to the responding party, and its ability to fairly put its case, rather than the complexity of the material per se. The TCC considered the presumed intention of Parliament, discussed by Chadwick LJ in Carillion v Devonport Royal Dockyard [2005] EWCA 1358:

> "85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which … may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".
>
> 86. … The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. … The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions…
>
> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or
>
> arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense — as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

Further the TCC stated at paragraph 41 that the legal authorities demonstrate that arguments based upon time constraints impacting the ability to respond fairly have enjoyed little success. For example, in chronological order the TCC stated [emphasis added]:

(1) Edenbooth Limited v Cre8 Developments Limited [2008] EWHC 570 (TCC), in which Coulson J (as he then was) held:

> "17. The other point taken by Mr. Mencer, that is to say the question of the speed with which he was obliged to produce information, is, I am afraid, a complaint often heard on adjudication enforcement applications. It is an inherent feature of adjudication that the Adjudicator is obliged to produce his decision quickly. That means he has to put pressure on the parties to ensure that they provide the necessary information to him just as promptly. Adjudication does not work if the parties take too long to provide information to the Adjudicator. The corollary of that is that parties often feel under pressure to do things more quickly than they would like. However, as I have said, that is simply an inevitable consequence of the adjudication process."

(2) The Dorchester Hotel Limited v Vivid Interiors Limited [2009] EWHC 70, in which the Referral Notice included 37 lever arch files, two expert reports (one of 20 and another of 30 pages) and six witness statements. An extension of the 28-day period was agreed, but the responding party argued that the time available was inadequate and there was a very real risk of a breach of natural justice. Coulson J refused to grant the injunctions sought during an ongoing adjudication. He stated:

> "18. … I take it to be settled law that the rules of natural justice do generally apply to the adjudication process…
>
> 19. But these and other authorities have stressed that there are obvious limits on the application of these rules to the adjudication process. As HHJ Bowsher QC pointed out in Discain , "The adjudicator is working under pressure of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a court or arbitrator." Or, as HHJ Lloyd QC put it in Balfour Beatty Construction Ltd v London Borough of Lambeth [2002] EWHC 597 (TCC), the purpose of adjudication is not to be thwarted "by an overly sensitive concern for procedural niceties".
>
> 20. Accordingly, a Court has to approach an alleged breach of the rules of natural justice in an adjudication with a certain amount of scepticism. The concepts of natural justice which are so familiar to lawyers are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process. …
>
> 23. …the Courts have long accepted that the 1996 Housing Grants (Construction and Regeneration) Act, and the standard forms of building and engineering contracts amended in its wake, permit such claims to be made, and what is more those claims can be made "at any time".'

(3) Bovis Lend Lease Ltd v The Trustees of the London Clinic [2009] EWHC 64, in which one of the arguments raised by the responding party on enforcement was that the nature and volume of new evidence served, and the timetable imposed, did not give it a fair or effective opportunity to respond to the case (which was new), and accordingly the decision was in breach of the rules of natural justice. Akenhead J rejected the argument. It is undoubtedly right, as Mr Neuberger contends, that Akenhead J considered the argument lacked credibility principally because the responding party had failed to raise the point during the adjudication. However, this makes the case at best neutral. The judge certainly does not express the view that, but for the failure to have raised the point, it would have given rise to a successful challenge;

(4) CSK Electrical Contractors Limited v Kingwood Electrical Services Limited [2015] EWHC 667 (TCC), in which Coulson J (as he then was) held that:

> "14. The defendant's third challenge is the suggestion that the adjudicator's timetable was too quick and put too great a strain on their resources.
>
> 15. Again, this point has been taken in a number of the authorities. It has never to my knowledge been upheld. Cases in which the point has been rejected include Bovis Lend Lease Ltd v Trustees of the London Clinic Ltd [2009] EWHC 64 TCC) and Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] EWHC 70 (TCC). The plain fact is that adjudication is a rough and ready process because it has to be carried out within

> a very strict timetable. That often causes particular pressure for the responding party. That is, I am afraid, a fact of adjudication life; it is inherent in the whole process."…"

At paragraph 50 of the judgment, the TCC summarised the legal position from the authorities regarding the claim of a breach of natural justice in relation to an adjudicator's decision as follows:

(1) Adjudication decisions must be enforced even if they contain errors of procedure, fact or law.

(2) An adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material, in that it has led to a material difference in the outcome. However, the Court should examine such defences with a degree of scepticism;

(3) Both complexity and constraint of time to respond are inherent in the process of adjudication, and are no bar in themselves to adjudication enforcement. Whilst it is conceivable that a combination of the two might give rise to a valid challenge, in circumstances where the Adjudicator has given proper consideration at each stage to these issues and concluded that he or she can render a decision which delivers broad justice between the parties, the Court will be extremely reticent to conclude otherwise;

(4) In cases involving significant amounts of data, an adjudicator is entitled to proceed by way of spot checks and/or sampling. The assessment of how this should be carried out is a matter of substantive determination by the adjudicator and an argument that the adjudicator has erred in his or her approach, absent some particular and material related transgression of natural justice, will not give rise to a valid basis to challenge enforcement. It would, even if correct, merely be an error like any other error which will not ordinarily affect enforcement."

Conclusion

The TCC rejected the Defendant's submission that "**whether by reason of the volume of material, constraints of time, and access to material, and whether taken separately or in aggregate, there has been any, or any material, breach of natural justice**" to render the adjudicator's decision unenforceable. The adjudicator's decision was enforced by way of summary judgment in favour of the Claimant in the sums of [emphasis added]:

(1) £6,565,931.94

(2) Interest thereon in the sum of £197,676.51, plus £593.62 daily from the date of the Decision;

(3) £41,259.66 in respect of the Adjudicator's fees, plus interest to be calculated by the parties.

In conclusion, for those involved in adjudication proceedings, please note that this case demonstrates that merely pointing to a large quantity of material, some of which is seen for the first time in an adjudication itself is not of itself sufficient to succeed with a claim for a breach of natural justice. An adjudicator's decision would not be enforceable if it was in breach of natural justice, if the breach was material, causing a material difference in the outcome. However, where adjudication cases involve large amounts of data, an adjudicator was entitled to proceed by way of spot checks and/or sampling. It was not realistic for the Defendant to require the Claimant to provide detailed information on each and every line item, and to use that as a justification to disengage in analysis of the material provided through sampling.

JCT Contracts – Is your Application for Payment on time - 'Days' versus 'Clear Days': High Court Guidance

An important issue which had not come before the courts before in relation to JCT Contracts was decided in Elements (Europe) Ltd v FK Building Ltd [2023] EWHC 726 (TCC). This case provided very useful guidance on the meaning of what constitutes a 'calendar day' pursuant to Clause 4.6.3.1 of the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition, and whether an interim application for payment made by a Sub-Contractor late in the day and outside business hours was valid.

FK Building Limited (the "Contractor") engaged Elements (Europe) Ltd (the "Sub-Contractor") by a Sub-Contract which incorporated the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition, to carry out remediation works to 312 bi-split apartment modules as part of the design and construction of three buildings to comprise of a 156 residential apartment scheme. Following the Sub-Contract, The Contractor and Sub-Contractor entered a Deed of Variation, which varied multiple terms of the Sub-Contract, including increasing the scope of works and the Contract Sum to £7,405,272.78.

A dispute arose between the Contractor and the Sub-Contractor concerning the contractual validity of a payment application due to the time at which the application for payment was received by the Contractor. This is an issue of importance to the construction industry. An adjudicator's decision dated 17 January 2023 awarded the Sub-Contractor the sum of £3,950,190.53 plus interest and costs following a dispute between the parties. The Contractor failed to make payment and contended that the payment application from the Sub-Contractor was contractually invalid because it was received late. The Sub-Contractor sought summary

judgment in the Technology and Construction Court (TCC) in the sum of £3,950,190.52 plus interest and costs.

The Sub-Contract between the Contractor and the Sub-Contractor included the following conditions:

"Clause 4.6…of the Sub-Contract Conditions provides:

4.6.1. *During the period up to the due date for the final payment fixed under Clause 4.22.1 … the monthly due dates for interim payments shall in each case be the date 12 days after the relevant Interim Valuation Date …*

4.6.3. *Where Clause 4.6.2 does not apply, the Subcontractor may make a payment application in respect of an interim payment to the Contractor either:*

4.6.3.1. *so as to be received not later than 4 days prior to the Interim Valuation Date for the relevant payment …"*

Sub-Contract Particulars Item 10 provides that:

"The first Interim Valuation Date is 25th June 2021 and thereafter the same date every fortnight [sic] for a period of two months following which the date shall be the same in each month or the nearest business day in that month."

Clause 4.7.1. provides that:

"Subject to Clause 4.7.4 the final date for payment of any payment shall be 21 days after the due date as fixed in accordance with Clause 4.6.1 …"

The Specification provides:

"The site will be open ***for the Sub-Contractor to carry out the Sub-Contract Works*** *from* ***7.30 a.m. to 6.00 p.m.****Monday to Friday except on any dates stated in item 2.2. On Saturdays the site will be open from 8.00 am to 1.00 pm"* [Emphasis added]

It was agreed between the parties, that the Sub-Contractor issued its Payment Application No. 16 ('the Application') via email on 21 October 2022, timed at 22.07. Payment Application No. 16 by the Sub-Contractor was in the total sum of £3,950,190.53. There is no dispute between parties that the Sub-Contractor's email and its attached payment application No. 16 were received by the Contractor's on the same date it was sent, between 22.07 and 22.08.

The Contractor contended that the Sub-contractor's Payment Application No 16 was submitted late and was therefore contractually invalid due to the time it was received. Further the Contractor proceeded to state that in order to rely upon the lack of a Pay Less Notice, a payee needs to demonstrate that its application for payment was contractually valid. Therefore, the failure to serve a timely Pay Less Notice would not lead to any obligation upon the Contractor to make payment of the sum (invalidly) applied for irrespective of a 'late' Pay Less Notice. Further the Contractor argued that correctly construed, Clause 4.6.3.1 of the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition, means that the Sub-Contractor's application for payment:

"(1) *needs to be received on or before the end of site working hours on 20th October 2022; alternatively*

(2) *needs to be received on or before the end of site working hours on 21st October 2022."*

The Contractor regarding both propositions, emphasised that the word **'received'** is used in Clause 4.6.3.1 of the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition is different to that used in other JCT Forms, and in other parts of the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 the Edition.

The Contractor contrasted the use of the word 'give' in paragraph 4.7.2 when referring to the requirement on the Contractor to 'give a notice' not later than 5 days after the due date which specifies the sum that he considers to be or have been due at the due date. In the view of the Contractor, the use of different language must be considered to have been intentional, therefore Clause 4.6.3.1 is focussing on actual receipt by the Contractor.

In reference to the Contractor's first the argument, relating to 20th October 2022, it is said that this is the result of requiring that the Payment Application to be received no later than 4 days prior to the Interim Valuation Date, which was agreed as 25th October 2022. If some time on 21st sufficed, that would only amount to between three and four days prior to 25th October 2022. According to the Contractor, such a construction would meet 'the reasonable commercial expectations of the parties'.

The Sub-Contractor contended that the Contractor's argument amounts to a contention that Clause 4.6.3 of the JCT Standard Building Sub-Contract SBCSub/C 2016 Edition requires the notice to be served 4 'clear' or 'full' days, and that no such language was used in the Sub-Contract. The Contractor submitted that the rule in English law when interpreting contracts, a day is treated as an indivisible whole and fractions of a day are ignored: In *Lester v Garland* (1808) 15 Ves 248, Sir William Grant MR held:

'Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to anyone, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed.'

The Sub-Contractor referred to ***Cartwright v MacCormack*** **[1963] 1 WLR 18**, to exemplify the application of this principle, in the context of an insurance policy. The Sub-Contractor further relies upon **Lewison on the Interpretation of Contracts 7th Edition at 15-11 to 15.15**. At paragraph 15-11, ***Lewison*** says:

'*There are many different ways of reckoning a day. As a period of time a day is the time occupied by the earth in one revolution on its axis, in which the same terrestrial meridian returns to the sun; a period of 24 hours reckoned from a definite or given point. A solar or astronomical day is reckoned from noon to noon, while the civil day in most civilised countries is reckoned from midnight to midnight. 20 A calendar day is reckoned from midnight to midnight. In its ordinary sense, the word "day" in a contract refers to a calendar day. Thus where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it (midnight).*'

Lewison proceeds to state that the context of a particular contract may show that the word 'day' means a period of 24 hours reckoned from some other time of day. He refers to ***Cartwright v MacCormack*** which considers the meaning of 'working day' and identifies that the House of Lords considered (in *Afovos Shipping Co SA v Pagan* [1983] 1 W.L.R. 195) that once a working day had been identified, subsequently the whole of the day counts as a working day. This argument reflects the general principle stated that the law does not generally deal in fractions of a day.

The Sub-Contractor contended that the effect of said principle, unless stated otherwise, is that a 'day' simply means a 'day' and should be distinguished from 'full' or 'clear' days. The Contractor further makes reference to ***Cubitt Building & Interiors Ltd v. Fleet Glade Ltd [2006] EWHC 3413 (TCC)*** in which HHJ Coulson QC (as he was then) dismissed an argument that ideas found in the civil procedure rules, such as deemed service should be read into construction contracts in the context of construction adjudication. Upon reliance on this authority, the Contractor submitted that the civil procedure practice that "days" mean "clear days" is also inapplicable.

The Sub-Contractor argued that the Sub-Contract provides no restriction on the time of day in which a Payment Application may be made and received pursuant to the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition. Further, it was asserted that the 'fractions of a day' principle as applicable for overriding his second argument that the Specification referring to site opening times is irrelevant and identifies the fact that the provision pertains to the time during which the Sub-Contractor was entitled to carry out its work and relies upon the lack of any cross-reference between Clause 4.6.3.1 of the Sub-Contract and this part of the Specification, if the parties had intended it to be definitive of the times permitted for service of a payment application. A further argument submitted was that the Contractor's proposed construction of the Sub-Contract would lead to uncertainty regarding the definition of the hours within which a payment notice could be validly served and that the construction should be determined by referring to the words of the Sub-contract.

The Sub-Contractor in written submissions, argued that that the payment mechanism was operated by both parties outside of site opening hours. Examples given by the witness evidence include: (i) Payment Application No. 11, sent by the Sub-Contractor at 20:19 on Friday 20 May 2022 (ii) the Contractor's Pay Less Notice No 21 sent at 23:31 on Friday 22 July 2022, and (iii) Payment Application No, 14, sent on behalf of the Sub-Contractor at 20:59

on Sunday 21 August 2022. This the Sub-Contractor argued demonstrated that it was normal for members of the QS team and for senior management to work for extensive hours including evenings and weekends as part of their normal work schedule, and to receive emails at those times.

At paragraph 37 of the judgment, the Court stated:

"There is a long line of established authority that the Court does not deal in fractions of a day. This is made clear in ***Lester v Garland***, cited above. This principle is reflected in the text of *Lewison* as relevant to when, on the proper construction of contract, a contractual obligation is to be performed. Generally, where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it. The principle was also very recently the subject of consideration in the TCC in *Boxxe v Secretary of State for Justice* [2023] EWHC 533 (TCC) in which the Court referred to and applied the 'fraction of the day' principle in the context of whether a Decision Notice served at 4.55pm was to be considered served on the day itself, or the following day:

'In Trow v. Ind Coope (West Midlands) Ltd. [1967] 2 Q.B. 899, referred to by Chadwick LJ in the passage above, writs were issued at 3.05pm on September 10, 1965. They were served on the defendants on September 10, 1966, at 11.59 a.m. and 12.49 respectively. The Rules stated that 'a writ is valid for 12 months beginning with the date of its issue'. The first question related to whether account could be taken of the time of day on which the writs were served. The Court of Appeal unanimously determined that this was not the case. As Lord Denning MR put it,

'When we speak of the date on which anything is done, we mean the date by the calendar, such as: "The date today is May 2, 1967." We do not divide the date up into hours and minutes. We take no account of fractions of a date.'

Thus, the relevant date was simply September 10, 1966. In the present case, therefore, the time that the Decision Notice was received is not relevant. The relevant date is simply 13 December 2022. The key question is whether that date (as a whole) should be included, or excluded from the calculation of time.'

At paragraph 38 the Court stated:

*"**Applying these principles to present case, unless the Sub-contract provided otherwise, a payment application required to be made so as to be received by FK no later than 21st October 2022, could be made so as to be received at any time on 21st October 2022, up to 23.59.59, because the law does not count in fractions of a day**."* [Emphasis added]

At paragraph 39, the Court stated:

It is of course open to parties – as they often do – to require within a contract that particular documents or notices need to be provided within defined time periods (whether loosely (e.g. 'within business hours') or specifically (e.g. 'between 9am and 5pm')). Just as the Sub-contract was not specific that there needed to be 4 'clear' days, neither did it stipulate that the application had to be received by a particular time period on the relevant day. [Emphasis added]

Conclusion

To summarise:

- The Court refused to accept the Contractor's argument that "*the part of the Specification setting out when the Site would be open for the Sub-Contractor to carry out the works can be read as importing a restriction upon the words '4 days' in clause 4.6.3.1 of the Sub-Contract. Not only is there no wording within the Sub-contract to suggest it can be, it is obviously irrelevant when tested against other reference to 'days' within the Sub-Contract more generally. For example, the final date for payment in clause 4.7.1 is '14 days' after the due date. This plainly does not mean 'days' calculated by reference to when the site is open: if so, it would be a period equating to 15.5 calendar days (the site being shut on Saturday afternoons and a Sunday).* ***Put simply, the site opening times within the Specification have nothing to do with the proper construction of the word 'days' within the payment and notice provisions required for compliance with the HCGRA****."* [Emphasis added]

- The Court held that the Sub-Contractor's Payment Application No. 16 was valid despite the time it was received by Contractor (between 22:07 and 22:08).

- The Sub-Contract was not specific that there needed to be 4 'clear' days, neither did it stipulate that the Payment Application had to be received by a particular time period on the relevant day.

- Payment Application No. 16 by the Sub-Contractor was made to be received on 21st October 2022, which was not later than 4 days prior to the Interim Valuation date and was therefore validly served. There was no error by the adjudicator in this respect, and the adjudicator's decision was enforced by the Court. The Sub-Contractor's Payment Application was required to be made to be received by the Contractor no later than 21st October 2022, therefore it could be made so as to be received at any time on 21st October 2022, up to 23.59, because the law does not count in fractions of a day.

- It is open to parties to a construction contract to require that particular documents or notices need to be provided within defined time periods ('within business hours') or specifically (e.g. 'between 9am and 5pm').

- Finally, it should be noted that the parties agreed to a settlement prior to the judgment being handed down.

Payment and Construction Contracts: Is My Late Application for Payment Valid? Court of Appeal guidance

In **A & V Building Solutions Ltd v J & B Hopkins Ltd [2023] EWCA Civ 54,** an appeal from the Technology and Construction Court (High Court) in relation to a payment dispute and the interpretation of payment provisions in a construction contract, provides some useful guidance. Charles Edwards, Barrister and Head of Chambers acted for the successful Sub-Contractor, A & V Building Solutions Ltd ("AVB" or "Sub-Contractor") in the Court of Appeal. J & B Hopkins Ltd, the Respondent in the Court of Appeal proceedings is referred to as JBH.

The appeal by the AVB before the Court of Appeal involved multiple grounds of appeal. However, the key issue at hand for the Sub-Contractor was whether its interim application for payment 14 which was submitted one day late on a Monday, was valid according to the Sub-Contract. An Adjudicator decided that the late payment application by AVB was valid. In Part 8 proceedings in the Technology and Construction Court ("TCC" or "High Court"), the Judge in the TCC held amongst other things that AVB's interim application for payment 14 was not valid. The TCC judgment on this issue was based on the requirement stated in the Sub-Contract, which specified that the AVB's application for payment should have been submitted on a Sunday. However, the Court of Appeal disagreed with the TCC Judgment on this point, allowing AVB's appeal and overturning the judgment of the Technology and Construction Court (High Court). The Court of Appeal held that AVB's interim application for payment 14 was valid despite being submitted one day late, based on the provisions of the Sub-Contract.

The Moulsecoomb University Project in Sussex involved JBH as the main mechanical and electrical contractor. JBH engaged AVB by a written Sub-Contract dated 18 December 2019, to carry out certain mechanical and electrical engineering works on the project. The

Sub-Contract sum was £368,000. The Sub-Contract contained various provisions, including one pertaining to the timing of interim applications. The Sub-Contract provided amongst other things that:

"…9.1. The Sub-Contractor shall be entitled to payment by instalments.

9.2. It is a ***condition precedent to payment that the Sub-Contractor shall make monthly applications ("Interim Application") for payment to the Contractor on the dates specified in Appendix 6****…".*

On Monday 22 March 2021, AVB submitted it's interim application number 14 to JBH, one day later than the required submission date of 21 March 2021, which happened to fall on a Sunday. The application showed a gross value of the works in the sum of £601,000 and a net amount due to AVB in the sum of £211,773.60.

On 1 April 2021, JBH responded to AVB's interim application 14 by email which stated amongst other things that:

"Please see attached our initial summary of your application number 14 dated 21/3/21 and issued 22/3/21. We note that you have issued two applications for the period, the first being application 13, dated and issued 15/3/21 are we to assume number 14 supersedes the aforementioned application 13?...

…A full and formal sub-contract payment or payless notice should be issued in due course and in accordance with the dates set out within appendix 6 of the Sub-contract."

Further, on 16 April 2021, JBH sent AVB a "sub-contractors payment certification". According to JBH's valuation, AVB had been overpaid in the sum of £68,946.25. Subsequently, between April and November 2021, the parties engaged in

discussions and exchanged correspondence concerning AVB's claim based on interim application for payment 14.

On 17 November 2021, AVB commenced adjudication proceedings against JBH. The adjudicator found in favour of AVB and declared that interim application for payment 14 was valid despite being submitted one day late and that JBH should pay AVB the sum of £138,010.86.

The adjudicator's decision in AVB's favour was overturned by the Technology and Construction Court (TCC) and the Judge in the Technology and Construction Court (TCC) found that AVB's interim application for payment 14 was not valid as it could only be made on the specific date set out in Appendix 6 of the Sub-Contract. The TCC's reasoning for its judgment included:

"*26. First, the use of the words "condition precedent" in clause 9.2. Those words are followed by a reference saying that the Sub-Contractor "shall" make monthly applications and that those applications should be made on the date specified in the Appendix.*

27. Next at the date of the contract 21st March 2021 was going to be a Sunday. It was always going to be a Sunday. It was known to all concerned or capable of being known by all concerned that it would be a Sunday.

28. Next, the dates in the second column in Appendix 6, the dates when the applications were to be made, are not all the 21st day of the relevant month. They are all there or thereabouts but for example in cycle 16 the date is 18th February and in other cycles, it is the 19th of the month, in others 20th and in others the 21st…

33. ***Mr Edwards did say that the consequence of the interpretation that the Payment Application has to be on 21st March would lead to an unfair result. He says that as a consequence and applying normal principles the court should hesitate before adopting an interpretation which comes to an unfair result in the absence of clear words. However, although the consequence of an interpretation requiring the notice***

to be on the Sunday is an unusual one it is not one in my judgment which leads to an unfair result such as to cause the court to say clear words are needed before that conclusion can be reached." [Emphasis added – extract from TCC Judgment]

Further, paragraph 36 of the approved judgment from the TCC which was appealed stated as follows:

"...

36. The Defendant says that the dealings in 2020 and the response to the service of the Application Notice are relevant. ***Mr Edwards put the matter thus. He says that the Defendant's case was that the Payment Application was valid by reference to the contract as properly interpreted and that such interpretation was supported by the fact of the way in which the Claimant treated the application and the way in which the Claimant acted in September 2020.*** *However, other than as a matter of forensic advocacy, the post-contract dealings of the parties to a written contract cannot be relevant to the interpretation of that written contract. Such interpretation is to be an exercise undertaken by reference to the wording of the contract and the circumstances as they existed at the time of the contract."*

The Technology and Construction Court (TCC) disagreed. However, the Court of Appeal disagreed with the TCC on the interpretation of the Sub-Contact and the payment provisions and found that the application for payment was valid. Further, the Court of Appeal noted at paragraph 25 of the Court of Appeal judgement that AVB's secondary submission was rejected by the Judge in the TCC at paragraphs [40] and [41]*: "…that there had been a variation or a waiver of the date of 21 March 2021, either by reference to a similar event in 2020, when JBH had without objection made an interim payment in respect of an application notice due on a Sunday but sent on the following Monday; or by reference to the parties' contemporaneous treatment of application 14. The judge did not expressly address estoppel…".*

Further, paragraphs 15 and 16 of the Court of Appeal judgment stated as follows:

"…

15. Throughout this period, JBH apparently treated application 14 as having been validly made: the dispute was on the detail. On 12 October 2021, a dispute having arisen in respect of application 14, AVB's consultants wrote indicating that, if the sum due was not paid, they would commence adjudication. In their reply dated 19 October 2021, JBH's solicitors asserted, for the first time, that application 14 was not served in

accordance with the provisions of the Sub-Contract. The letter did not explain how or why that was the case. At no time prior to the commencement of the first adjudication did JBH expressly take the point that application 14 was invalid because it was issued one day late. [Emphasis added].

16. ***On 17 November 2021, AVB commenced adjudication proceedings seeking a net payment of £211,773.60 plus VAT, interest and fees, based on application 14. JBH's submission that application 14 was provided one day late was first expressed in their solicitors' letter dated 26 November 2021, after the adjudication had commenced***." [Emphasis added].

Was Application 14 A Valid Interim Application?

Yes. The Court of Appeal disagreed with the Technology and Construction Court (TCC) judgment on this point and its interpretation of the Sub-Contact. The Court of Appeal overturned the TCC's judgment, allowing AVB's appeal. The Court of Appeal held that AVB's Interim Application for Payment 14 was a valid Interim Application for Payment. The Court of Appeal agreed that there was indeed flexibility within the payment provisions of the Sub-Contract within Appendix 6 and where a contract contains general terms which conflict with specific or bespoke terms, usually the specific or bespoke terms would outweigh the general terms.

With regard to the correct approach to contractual interpretation and law on this issue, the Court of Appeal, stated at paragraphs [45] and [46] of the their judgment that: *The correct approach to contractual interpretation is set out in the trilogy of Supreme Court cases of Rainy Sky SA v Kookmin Bank [2011] UK SC50; Arnold v Britton [2015] UK SC36; and Wood v Capita Insurance Services [2017] UK SC24. In particular, it has been emphasised that what is sometimes referred to as commercial common sense should not be invoked to undervalue the importance of the language of the provisions being construed [45]. There are two canons of construction, as summarised in Chapter 7 of The Interpretation of Contracts (7th edition) by Sir Kim Lewison, which are potentially relevant to the dispute between the parties. The first is that, when interpreting a contract, all parts of the contract must be given effect where possible, and no part of it should be treated as inoperative or surplus: see, for example, Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526. The second principle is that, where a contract contains general provisions and specific provisions which potentially contradict each other, the specific provisions will be given greater weight: see, for example, Woodford Land Limited v Persimmon Homes Limited [2011] EWHC 984 (Ch), in which this principle was described as "a principle of common sense" [46].*

The Court of Appeal, further stated at paragraphs [49], [50] and [58] that:

If all the dates in Appendix 6 were rigidly fixed, then the interim payments would only be due on those specified dates, not (as clause 9.4 provided) "calculated from the date when the first payment was due" [49]. More significantly, there are the two paragraphs after the table in Appendix 6, set out at paragraph 7 above. On any view, those paragraphs are plainly designed to allow for flexibility in the interim valuation/payment timetable. **The first of those paragraphs expressly talks about payments becoming due "beyond the dates set out in the schedule"**. It allows for (different) due dates continuing to occur "at the same intervals" set out in the table. **That seems to me to be contrary to the general suggestion that the dates for valuation and payment were inflexibly set in stone as per the table in Appendix 6** [50]**…it is important to remember the second canon of construction noted in paragraph 46 above, in the event of a clash or an inconsistency between different types of contract terms, specific or bespoke terms will usually outweigh the general. Here, the condition precedent provision in clause 9.2 was a part of the general provisions within JBH's standard terms. Appendix 6, on the other hand, was a bespoke agreement between the parties relating to this particular Sub-Contract. To that extent, therefore, if there is a clash between clause 9.2 and the second paragraph of Appendix 6, the second paragraph - as a specific provision rather than a general one - must prevail…"** [58]. [Emphasis added].

Variation/Waiver/Estoppel

Further, although it was strictly unnecessary for the Court of Appeal to reach a concluded view on Ground 4 of the appeal, the Court of Appeal stated amongst other things that:

"69…I consider that the necessary ingredients of a simple estoppel would appear to be made out here. JBH said in their email of 1 April 2021 that they would deal with application 14 as a valid application; that they would assume that it had replaced valuation 13. What is more, they then proceeded to do just that. They considered the detail of application 14 and responded to that detail with their own valuation in the email of 1 April and their Payment Notice of 16 April 2021. These documents assumed throughout the validity of application 14. Neither document suggested that application 14 was invalid, and did not even seek to reserve the position in respect of validity. In this way, I consider that JBH unequivocally affirmed the validity of application 14."

Conclusion

The key points for Contractors and Sub-Contractors to note from the Court of Appeal judgment include:

1. If an application for payment is submitted late by a Contractor or Sub-Contractor, it does not follow in every instance that the application for payment is invalid.

2. Ensure that payment mechanisms within your construction contract are properly drafted to ensure that there are no conflicting terms.

3. Where a contract contains general terms which conflict with specific or bespoke terms, usually the specific or bespoke terms would outweigh the general terms.

4. When interpreting a contract, all parts of the contract must be given effect where possible, and no part of it should be treated as inoperative or surplus.

5. The treatment of an application for payment may give rise to an estoppel.

6. If you disagree with validity of an interim application for payment, raise this as soon as possible or reserve your position in relation to it.

JCT Contracts 2024 Edition

The Joints Contracts Tribunal (JCT) held its annual Construction Industry Parliamentary Reception 2023 at the House of Commons on 16th June 2023. An early insight was provided by the JCT Chair into the new edition of JCT Contracts 2024 and the main changes to expect. Charles Edwards, Barrister and Head of Chambers and a member of the JCT Council (ICES Representative) attended the event.

It was announced by the JCT that the main updates and changes to expect in the JCT 2024 Editions, include (extract below JCT's website):

"…

- ***Modernising and streamlining*** *– including adoption of gender neutral language, and increased flexibility around the use of electronic notices.*

- ***New for JCT 2024*** *– the introduction of a new contract family, JCT Target Cost Contract (TCC), comprising main contract, sub-contract, and guide.*

- ***Legislative changes*** *– major updates in relation to the Building Safety Act, Termination accounting and payment provisions reflecting the Construction Act, new insolvency grounds reflecting the Corporate Insolvency and Governance Act 2020.*
- ***Future proofing*** *– including changes to reflect the objectives of the Construction Playbook, and the incorporation of previously optional supplemental provisions relating to Collaborative Working, and Sustainable Development and Environmental Considerations, into the main document."*

Amongst the announcements by JCT was that a new form of contract JCT contract will be launched in 2024, the JCT Target Cost Contract, sub-contract and guide.

NEC4 Updates

The New Engineering Contract 4 (NEC4) was published in 2017 and there has been numerous updates since to the suite of contracts. The 2023 amendments include the following:

1. Adjudication – amendments have been made to Dispute resolution Option W2 has been updated to clarify that the Adjudicator decides the procedure and timetable for the adjudication, in alignment with the requirements of the Housing Grants, Construction and Regeneration Act (1996).

2. Secondary Option X29 (Climate Change) although issued prior to 2023, has now been incorporated into the ECC in 2023. According to the NEC, this was designed to help "*NEC users in their drive towards achieving net zero greenhouse gas emissions and other related climate change and biodiversity targets...."* and with the overall aim "*to help parties reduce the impact of the works, service or supply on climate change*."

3. Secondary Option X22 (Early Contractor involvement) has been amended and provides increased flexibility.

4. Working from home and other locations outside of the Working Areas - amendments have been made to the Schedule of Cost Components (SCC) and the Short Schedule of Cost Components (SSCC) to address this issue.

5. Using the supplier's design – the NEC have clarified and extended the ability of the Client to use a suppliers design to include documents prepared for design.

FIDIC Update

<u>Dispute Avoidance - Focusing on Dispute Boards</u>

On 27th November 2023, FIDIC published a new practice note "Dispute Avoidance - focusing on dispute boards" on the crucial/relevant subject of dispute avoidance in order to assist FIDIC users and to benefit projects. The note was launched during the Official FIDIC International Contract Users' Conference at a meeting of FIDIC's Dispute Avoidance Panel and emphasises the importance of the dispute avoidance function in ensuring project efficiency and success. Avoiding disputes in construction is fundamental in reducing costs and maintaining optimal relationships between contractors and clients. This FIDIC practice note raises awareness of the dispute avoidance function for adjudicators and FIDIC contract users and provides advice on how to adopt best practice. To quote, FIDIC CEO Dr Nelson Ogunshakin OBE in relation

to the launch of the new practice note: "*Avoiding disputes as early and as quickly as possible is in the nest interests of all parties to construction projects and FIDIC strongly recommends that all project holders take on board and act on the content of the new practice note*…".

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