

Construction Law Update

“No Crystallised Dispute” Jurisdictional Challenges

In the case of *MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited*, the Technology and Construction Court (the “**TCC**”) considered the operation of a “no crystallised dispute” challenge to the Adjudicator’s jurisdiction in the context of an extension of time (“**EOT**”) claim.

Background

By way of a sub-contract, MW High Tech Projects UK Limited (“**MW**”) engaged Balfour Beatty Kilpatrick Limited (“**BBK**”) to carry out mechanical and electrical services in relation to the construction of a new laboratory building at Dansom Lane, Hull (the “**Sub-Contract**”). The Sub-Contract was in the form of JCT Design and Build Sub-Contract 2011 with bespoke amendments.

As a result of delays occurring to the works, in August 2019 BBK referred to adjudication its claim for an EOT. On 10 October 2019, the Adjudicator awarded BBK the full EOT sought and ordered MW to pay the Adjudicator’s fees (the “**Decision**”).

This case concerned MW’s Part 8 claim seeking a declaration that the Adjudicator did not have jurisdiction to resolve BBK’s claim referred in August 2019, meaning that the Decision was of no legal effect.

The parties’ respective positions

MW contended that the Decision was invalid by virtue of the Adjudicator lacking jurisdiction. Namely, BBK had served a novel delay report (“**the Report**”) on MW eight days before commencing the adjudication. MW’s case was that the Report contained a new relevant event amounting to a considerable proportion of the EOT claimed and also a new critical delay analysis.

Under the Sub-Contract, MW was entitled to up to sixteen weeks to assess an EOT claim. On that basis, MW contended that no dispute could crystallise until

such time (or reasonable time) had elapsed for MW to consider the EOT and either accept or reject it; eight days was insufficient and, accordingly, no dispute had crystallised when BBK referred its claim to adjudication.

On the other hand, BBK’s case was that the Adjudicator had jurisdiction and the Decision was therefore valid. BBK had given MW notice of delay(s) and claimed an EOT by five separate letters from March 2018 to February 2019. MW failed to address the alleged delays and EOT sought and did not make any response within sixteen weeks, as stipulated under the Sub-Contract. As such, MW’s failure to respond within sixteen weeks gave rise to a crystallised dispute prior to reference to adjudication.

Further, in July 2019, BBK had provided MW with the Report by way of a letter and sought a response within seven days; MW did not respond. BBK contended that the service of additional evidence in support of the EOT did not affect the dispute at that time nor did it amount to a new claim.

The TCC’s decision

The TCC reiterated the robust approach adopted in respect of adjudication enforcement, citing the following:

“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.”

The TCC firstly accepted BBK’s submission that the relevant clauses of the Sub-Contract were such that absolute precision and certainty was not required in the Contractor’s assessment nor in the Sub-Contractor’s notice and particulars.

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The key issue concerned clause 2.17.3 of the Sub-Contract, which stated as follows:

“The Sub-Contractor shall forthwith notify the Contractor of any material change in the estimated delay or any other particulars and supply such further information as the Contractor may at any time reasonably require.”

Counsel for BBK submitted that *any* notification of a change under clause 2.17.3 would not give MW a fresh period within which to make a decision on the EOT claim. However, the TCC stated this put the case too high. The TCC accepted there may be cases where the notification of a material change could be so different to the original notified claim that it amounted to a new notice, displacing the original. It was, therefore, a matter of fact and degree whether in any given case, the information provided under clause 2.17.3 supplements a notified claim or gives rise to a new claim.

The TCC held that if the additional notification did not change the fundamental nature and basis of the claim, the Contractor would remain under an obligation to respond within the timeframe set out in the Sub-Contract. However, if the additional information/notification, objectively assessed, gave rise to a new claim, the Contractor would be entitled to a fresh sixteen-week period to consider such a new claim before there could be any dispute.

Applying such an analysis, the TCC held that the Report did not amount to a fresh notification and it was not materially different to the delay claim advanced in BBK’s earlier notices. The Report constituted expert evidence to support BBK’s previous claim(s) for an EOT, in respect of which there was a crystallised dispute.

The TCC also noted that, in cases where there was no express acceptance or rejection of an EOT claim, the point at which a dispute could be inferred was heavily dependent upon the facts of each case. In this case, the TCC held that MW’s silence in response to BBK’s delay

notices amounted to an inference that the delay claim set out in the notices was not admitted.

The TCC, therefore, concluded that the Adjudicator had jurisdiction to determine the dispute and the Decision was valid; thereby rejecting MW’s challenge. The TCC also found that the Adjudicator’s fees were payable by MW.

Analysis

This case reaffirms the TCC’s robust approach to adjudication enforcement and the principle that courts are unlikely to interfere with adjudicators’ decisions save in instances where an adjudicator’s jurisdiction or observance of the rules of natural justice are in doubt.

This case also demonstrates that whether the submission of additional evidence, such as a substantial expert report, in support of an EOT claim, amounts to a new notification is largely dependent upon the facts of the case.

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