

Construction Law Update

Conclusivity and time bar clauses: Scottish Court of Session guidance

In an important recent decision, *D McLaughlin & Sons Limited -v- East Ayrshire Council*, the Scottish Court of Session (the “CSOH”) has considered final certificate conclusivity and time bar provisions and their application to interim payment disputes.

Background

D McLaughlin & Sons Limited (“DMS”) was employed by East Ayrshire Council (the “Council”) to build an extension to a school under the terms of an amended JCT/SBCC Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) 2011 (the “Contract”).

In August 2017, DMS issued an interim payment notice as the Council had failed to issue an interim certificate (the “Notice”). No pay less notice was issued by the Council, but DMS did not seek adjudication at that time.

In July 2019, after completion of works, the Council issued a final certificate valuing the works at c.£3.3m (the “Certificate”). In September 2019, DMS issued court proceedings challenging the Certificate. DMS’ valuation was c.£3.7m gross.

In March 2020, DMS also commenced an adjudication for payment of the sum in the Notice. The adjudicator found in DMS’ favour, awarding c.£500k together with interest on the sum claimed and further interest for any period between the date of the award and the making of payment (the “Decision”). DMS successfully enforced the Decision, and the Council was obliged to pay.

The effect of this was that DMS had been paid over £3.9m gross i.e. more than it was seeking in the court proceedings. The Council therefore sought declarations that the adjudicator was bound by the Certificate, the Notice was invalid, and effectively sought reversal of the Decision. The declarations were not decided at the enforcement hearing; instead, these issues came before the CSOH in a separate hearing.

Issues

The CSOH determined the following issues:

- (i) the effect of the Certificate;
- (ii) the validity of the Notice; and
- (iii) whether, if the Council succeeded in reversing the Decision, it was entitled to repayment of interest from the date of the Decision until the date payment was given.

Effect of the Certificate

The Contract stated that if adjudication, arbitration or proceedings were commenced within 60 days from the Certificate, the Certificate took effect as conclusive evidence save only in respect of matters to which the proceedings related (the “Exception”).

As the court action commenced within 60 days from the Certificate, DMS argued the Exception applied equally to the later adjudication.

For its part, the Council argued that, as the adjudication proceedings had been commenced more than 60 days from the Certificate, there was no Exception and the Certificate *was* therefore conclusive evidence of sums due in the adjudication.

In a previous decision of the English Courts, *Trustees of Marc Gilbard Settlement Trust -v- OD Developments and Projects Ltd* Coulson J (as he then was) rejected an argument similar to that advanced by DMS, holding that a final certificate would be conclusive evidence in a later adjudication if that adjudication had not been commenced within the specified period. This was so even if prior proceedings covering the same or similar issues had been commenced within that period.

The CSOH agreed with Coulson J and held that, in any form of proceedings commenced after the specified period, a final certificate must be conclusive evidence on a proper construction of contract terms. It was only

Construction Law Update

in the proceedings commenced within 60 days of the Certificate that the Exception would apply. This was the case even if the subsequent proceedings concerned the same subject matter.

There was, however, a significant twist in that the CSOH nevertheless found that the conclusivity provisions were intended to apply only to final account proceedings, rather than proceedings concerning *interim* payments. As such, the Certificate would still not be conclusive in the later adjudication (concerning interim payment) even though those proceedings commenced more than 60 days from the Certificate.

Validity of the Notice

Whilst the parties agreed that the first relevant due date was 4 weeks after commencement of works and thereafter the same date in each following month, they disagreed about the date when works commenced. This led to differing views on the validity of the Notice.

DMS argued that the Notice qualified as an interim payment notice under the Contract, entitling it to payment even if the wrong payment due date was referred to. The Council argued the Notice was invalid as it did not state the sum considered due at the relevant due date; rather, it stated the sum considered due at a date other than the relevant due date (i.e. 1 day prior to the relevant due date).

This question as to the validity of the Notice had been determined in the Decision. The Contract stated that if an adjudication decision were published after a final certificate had been issued, a dissatisfied party could seek a final determination of that dispute or difference by arbitration or legal proceedings commenced within 28 days of the adjudication decision.

The CSOH held that, as the Council did not commence arbitration or legal proceedings within 28 days of the Decision, its counterclaim as to the validity of the Notice failed entirely. Expressing its views on submissions, the CSOH stated that if the Notice did not refer to the relevant due date (no matter how close the

date referred to was to the relevant due date), the Notice would not have been valid under the Contract.

Was the Council entitled to repayment of interest?

Given its previous findings, the CSOH did not have to determine this issue. Nonetheless, the CSOH stated:

- (i) the payer must have a directly enforceable right to recover any overpayment to which the adjudicator's decision has led to, once there has been final determination of the dispute;
- (ii) recovery of payment of adjudicators' fees and expenses is different to recoverability of interest payable from the date of an award. The latter is not ancillary, rather it is "*part and parcel of the award*"; and
- (iii) it would not be right to allow a party who received payment to which it was not entitled to retain part of that payment i.e. interest arising from the date of an adjudication award.

Conclusion

The Council's counterclaim failed and, consequently, it could not, by that means, recover what was said to have been overpaid to DMS. It would have to await the outcome of the main court proceedings.

Analysis

On one level, this case confirms that the interpretation of conclusivity provisions previously set out by the English courts in *Marc Gilbard* now applies in Scotland. But while this highlights the often persuasive nature of decisions handed down in these adjacent jurisdictions, they are not finally binding. Accordingly, whether the English courts agree with the decision reached by the CSOH on the novel point which arose regarding conclusivity provisions in the context of interim payment disputes remains to be seen. Several commentators have already expressed some doubt around the legal basis for the decision.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

© Hawkswell Kilvington Limited 2022.