

Construction Law Update

Life after death? The uncertain effect of an Adjudicator's Decision on subsequent contract procedures

It is often said that an adjudicator's decision is of 'temporary finality'. That is to say, it is contractually binding upon the parties unless and until their underlying dispute is finally determined by way of arbitration or litigation. But quite what this means in terms of the decision's relevance for and impact upon ongoing contractual processes such as final accounting or any subsequent adjudications, can be less easy to discern. In the recent case of *Essential Living (Greenwich) Limited -v- Elements (Europe) Limited* the Technology and Construction Court (TCC) was asked to grapple with this question.

The Adjudication Proceedings

Essential Living (Greenwich) Limited ("ELG") engaged Elements (Europe) Limited ("EEL") pursuant to the terms of a contract incorporating the terms of a JCT Construction Management Trade Contract 2011, as amended (the "Contract").

ELG later requested that an adjudicator determine the true value of works claimed by EEL within its interim application for payment (the "IAfP") and the subject of a corresponding assessment made by the construction manager (the "CM"). More particularly, ELG sought declarations in respect of (1) the value of measured Works performed, (2) the value of variations and (3) the amount it was entitled to in respect of remedying defects and liquidated damages.

The adjudicator found in ELG's favour, and it was awarded c.£1.8m (the "Adjudicator's Decision"). However, following completion of the Works, EEL submitted documents to the CM for the purpose of calculating the Final Trade Contract Sum ("FTCS"), requesting an adjustment to the completion period and increased claims for variation, full extension of time and additional prolongation and no deduction of liquidated damages, or other damages.

Claim for Declaratory Relief

As a result, ELG brought Part 8 proceedings seeking declaratory relief arising out of the Adjudicator's Decision, namely that matters assessed and decided by the Adjudicator's Decision were binding for the purpose of calculating the FTCS, fixing completion and any subsequent adjudication.

In response, EEL maintained that the Adjudicator's Decision was limited to the IAfP, and had no relevance for or effect on the CM's determination of the FTCS pursuant to what it said were the separate and distinct contractual processes to be carried out following practical completion.

The Issues for the Court

The Court was therefore required to determine the extent to which the Adjudicator's Decision was binding on the subsequent contractual processes, including:

- (1) The Adjudicator's Decision on claims for extensions of time, liquidated and delay related damages
- (2) The Adjudicator's Decision on the evaluation of the FTCS including variations, loss and/or expense; and
- (3) The impact of the Adjudicator's Decision on any subsequent adjudication.

Applicable Legal Principles

In considering the issues, the Court referred firstly to paragraph 23(2) of the statutory Scheme for Construction Contracts, which provides the decision of an adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, or by agreement (*Aspect Contracts (Asbestos) Limited v Higgins Construction plc [2015]*). The Court went on to state this does not affect the underlying rights / obligations of the parties under their contract or displace the agreed procedures. The consequence of the binding

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effect of an adjudication decision is that a subsequent adjudicator has no jurisdiction to determine matters which are the same or substantially the same as those decided in the earlier adjudication. (*Quietfield Ltd v Vascroft Construction Ltd [2007]* & *Carillion Construction Ltd v Smith [2011]*).

Completion Period

On the issue as to whether or not the Adjudicator's Decision had an impact on extensions of time and liquidated and delay-related damages, ELG submitted EEL was effectively seeking to re-open the delay issue relying on the same events and causes of delay. In contrast, EEL contended that the Adjudicator's Decision had limited scope and the contractual procedure following completion mandating the CM to determine such completion period as was fair and reasonable, could produce a different result to an earlier assessment.

The Court emphasised the importance of analysing the contractual and factual matrix to consider its scope and impact. From this it was clear that EEL was required to give notice of actual or likely delay during the Works. Following completion, the CM was then obliged to consider any notice of delay, and if in his opinion completion was likely to have been delayed, the CM was obliged to make such adjustment as was fair and reasonable. It therefore followed that the Adjudicator's Decision was not binding on the CM's final determination of the completion period, or any liability on EEL's part in respect of liquidated damages or delay charges.

Final Contract Sum

Again, as with the completion period, the Adjudicator's Decision determined the interim valuation. EEL contended that the Contract had separate contractual mechanisms to determine the FTCS and that the cause of action in respect of interim valuation was separate and distinct from the final valuation, even if the two sums happen to be the same. The Adjudicator's Decision did not purport to determine the FTCS.

The Court held; it did not follow that the Adjudicator's Decision could not bind the CM in respect of specific matters already determined by the adjudicator. Unlike the Completion Period, the provisions of the Contract did not require the CM to remeasure the works to determine the FTCS. It was a matter for the CM carrying out its obligations to consider the arguments and evidence of each disputed element to determine whether it was agreed under the Contract or the Adjudicator's Decision and whether it was binding or a fresh basis of claim. It was not a matter the court could resolve by general declaration.

Subsequent Adjudications

ELG sought a further declaration that EEL was not entitled to re-adjudicate on any of the matters and claims previously decided by the Adjudicator. This of course was well established, however the real issue in the case was whether any dispute that might be referred to a further adjudication would, as a matter of fact, be the same, or substantially the same dispute as that decided by the Adjudicator's Decision.

The difficulty for the Court was that there was no further adjudication, no notice of adjudication or otherwise any material to analyse. The Adjudicator's Decision had decided a number of discrete issues as to the parties' contractual entitlement, some giving rise to binding decisions that could not be re-opened; and others that could be reviewed under the Contract and, if disputed, could therefore be referred to a subsequent adjudicator. The Court held it was a matter of fact and degree as to whether any matters which EEL might seek to refer to a subsequent adjudication were indeed the same, or substantially the same. As a consequence, absent a notice of adjudication it would not be appropriate for the court to speculate or provide a declaration based on a hypothetical dispute.

Decision

In summary, the TCC found that: (1) the parties were bound by the Adjudicator's Decision until final determination. They could not seek a further decision on a dispute/difference already subject to the

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Adjudicator's Decision; (2) The Adjudicator's Decision was not binding for the purpose of the CM's final contractual determination of the Completion Period and associated matters; and (3) The Adjudicator's Decision was not binding for the purposes of determining the FTCS but was binding in respect of variations assessed by the adjudicator (unless and until the Decision was overturned, modified or altered or a fresh basis of claim permits the variation claim to be opened up and reviewed under the Contract). Finally, (4) it was a matter of fact and degree as to whether the Decision was binding on other discrete issues and as to whether matters EEL might seek to refer to subsequent adjudication were indeed the same, or substantially the same as those previously decided.

Analysis The precise scope and extent to which an earlier adjudicator's decision will be binding upon ongoing contractual processes will invariably be a matter of fact and degree, and will entail close consideration of the contractual terms applicable to each procedure. One cannot assume that a successful interim adjudication decision will translate readily to the final accounting process under the contract.

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