



Lidl joy: Court rejects food retailer's Part 8 Claims

In *Lidl Great Britain Limited v Closed Circuit Cooling Limited t/a 3CL* [2023], HHJ Stephen Davies enforced an adjudicator's decision in favour of a contractor and rejected a series of Part 8 declarations sought by the employer.

Background

Lidl Great Britain Limited ("**Lidl**") and Closed Circuit Cooling Limited t/a 3CL ("**3CL**") entered into a framework agreement which enabled the parties to enter into a series of individual work orders for refrigeration and air-conditioning works across Lidl's premises. The case concerned the first order issued under the framework.

A series of payment disputes arose in respect of 3CL's application for payment 19 ("**AfP19**"), in which 3CL sought payment of c.£780,000. Lidl argued that AfP19 was invalid because it failed to comply with one or more requirements of the contract, which included: identification of milestones achieved and the amounts claimed against each; the provision of supporting evidence; and service by email (together, the "**Requirements**"). 3CL's position was that it had complied with the contract, and even if it had not, none of the points raised by Lidl amounted to conditions precedent to AfP19 being valid. 3CL also sought to argue that Lidl was estopped by convention from alleging 3CL had failed to comply with the contract ("**Issue 1**").

Separately, there was also a dispute as to the validity of Lidl's response to AfP19 when it issued a purported notice ("**Pay-7**") ("**Issue 2**"). 3CL also argued that provisions of the contract dealing with the final date for payment failed to comply with the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "**Act**") because payment of the same was stated to be conditional upon delivery

of a contract-compliant VAT invoice (which on Lidl's case 3CL did not do) ("**Issue 3**").

In April 2023, 3CL referred the dispute over its entitlement to payment under AfP19 to adjudication and by a decision dated 1 June 2023, the adjudicator rejected all of Lidl's submissions. The adjudicator found that AfP19 was valid, Pay-7 was not a valid notice and that the final date for payment could not be conditional upon delivery of a VAT invoice. Payment was ordered together with interest, in 3CL's favour (the "**Decision**").

Lidl failed to pay in accordance with the Decision and went on to issue a Part 8 claim seeking declarations in respect of the underlying Issues. In response, 3CL issued a Part 7 claim and a summary judgment application seeking enforcement of the Decision. This case concerns the outcome those competing claims, which with the consent of both parties, were heard together.

The correct procedure to adopt when dealing with competing Part 7 and Part 8 claims

In considering the correct approach when dealing with competing part 8 proceedings which would, if successful, affect the enforceability of an adjudicator's award, the judge provided some useful guidance:

- The court should be guided by the factors identified in paragraph 9.4.5 of the TCC Guide 2022 and paragraph 28 of the Court of Appeal decision in *A & V Building Solutions Ltd v J & B Hopkins Ltd* [2023].
- The starting point is to first consider whether there are any genuine substantive defences to summary enforcement of a decision (i.e. lack of jurisdiction or breach of the rules of natural justice). The court must then consider whether it is appropriate to deal with any other claims for declaratory relief at

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the hearing whilst holding firmly in mind “*the need to produce a judgment within a timetable which does not prejudice the Part 7 claimant’s reasonable expectation of speedy justice in adjudication enforcement cases*”.

In the present case, Lidl sought to argue that the rules of natural justice had been breached because the adjudicator had made his Decision by reference to a clause of the contract (clause 7.4.2) that had not been expressly raised by the parties. Lidl sought complained that it had not been given opportunity to address the point. The judge rejected this and cited the following:

- The adjudicator made his decision on the basis of Pay-7 which the reasonable recipient would have understood to be a pay less notice (and not a payment notice);
- 3CL had specifically raised the point in its referral that Pay-7 wrongly deducted and withheld an amount for liquidated damages, such that the same was clearly an issue raised in the adjudication, which Lidl simply did not engage with in its response. Lidl had belatedly appreciated the significance of this clause but had failed to identify the same in their evidence or submissions;
- It would be taking the requirements of natural justice “*way too far in the context of the adjudication procedure*” to say that an adjudicator cannot refer to a specific clause because the same had not been the subject of express reference by either party;
- Lidl failed to show that the point which it was allegedly deprived of the opportunity to engage with was properly arguable; and
- Given there was no breach of natural justice, it would be unjust to refuse summary enforcement of the Decision.

Issue 1 – the validity of AfP19

Turning to the Issues raised within the Part 8 Claims, the judge found that compliance with the Requirements was not a condition precedent to the validity of AfP19/payment of that application. The contract did not seek to restrict the amounts due as interim payments in the way claimed by Lidl and clear wording to this effect would have been required had this been the intention of the parties.

The judge also observed that had 3CL needed to rely on it, it would have been successful in its claim that Lidl was estopped by convention from alleging breach.

Issue 2 – the validity of Pay-7

The adjudicator had already decided in his Decision that Pay-7 was not a valid payment notice in respect of AfP19. This decision was reached on the basis that a reasonable recipient would have understood Pay-7 to be a pay less notice (and not a payment notice) because as matter of content and substance: (a) this is what Pay-7 said it was; and (b) it included a deduction for liquidated damages when under the terms of the contract, including and specifically clause 7.4.2, that deduction ought to be the subject of a payless notice and not a payment notice.

Issue 3 – VAT invoice as a payment trigger

The judge found that owing to lack of certainty, the payment provisions of the contract failed to comply with section 110(1)(b) of the Act which requires every construction contract to “*provide for a final date for payment in relation to any sum which becomes due*”.

In doing so, the judge followed *Rochford Construction Ltd v Kilhan Construction Ltd* [2020], in which Cockerill J held that a due date, but importantly, not a final date for payment, could be fixed by reference to an invoice or notice.

In accordance with section 110(3) of the Act, the relevant provisions of the Scheme for Construction

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Contracts (the “**Scheme**”) applied to the extent necessary to remedy non-compliance with the Act.

The judge also rejected Lidl’s argument that submittal of a VAT invoice compliant with the terms of the payment schedule contained in the contract was a condition precedent to the validity of AfP19 - Lidl could not rely on the absence of a VAT invoice as a means of withholding payment. The judge also reasoned that had the parties intended otherwise, “*far clearer and more explicit*” language would be required to that effect in the parties’ contract.

Having declined to grant the declarations sought by Lidl, and in the absence of any substantive defence to enforcement, the court gave judgment in favour of 3CL.

Analysis

This case provides useful guidance on how competing Part 7 and 8 claims should be dealt with in adjudication. The case also confirms that the final date for payment under a construction contract cannot be made wholly contingent on submission of a VAT invoice; and provides some useful authority on the issue of estoppel by convention and the validity of payment notices.

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