



Within reason: TCC content to enforce succinct Decision

In *Bexhill Construction Ltd v Kingsmead Homes Ltd* [2023], the TCC in Leeds rejected the Defendant's suggestion that an adjudicator had breached the rules of natural justice by not considering all defences raised, and upheld the Decision notwithstanding only brief reasons had been provided.

Background

Kingsmead Homes Ltd ("**Kingsmead**") engaged Bexhill Construction Ltd ("**Bexhill**") as its sub-contractor for labour only bricklaying services ("**the Works**") at a project in Warrington, for the sum of £174,128.50 ("**the Sub-Contract**").

On 16 May 2022, Bexhill issued its interim application for payment number 8 in the sum of just under £50k ("**AFP 8**"). Kingsmead asserted that its email sent to Bexhill on 23 May 2022 amounted to a pay less notice for AFP 8 ("**PLN**"). Kingsmead maintained its email also made clear that the Sub-Contract was terminated as of 16 May 2022.

On 18 January 2023, Bexhill referred the dispute to adjudication, contending that Kingsmead had failed to serve a valid PLN as it was served too early and did not state the sum it considered to be due nor the basis on which that sum had been calculated. By a decision dated 15 February 2023 the Adjudicator, Mr Jon. E. Mizrahi ("**the Adjudicator**"), awarded Bexhill the £50k applied for in AFP8 ("**the Decision**"). Although neither party asked the Adjudicator to provide reasons for his Decision, he did so.

After receipt of the Decision, Kingsmead emailed the Adjudicator asserting that the Decision did not "*address the content of Kingsmead's Rejoinder*" in which a defence was raised that AFP 8 had not

been issued in accordance with the Sub-Contract and as a result was not a notification in accordance with section 110B(4)(b) of the Housing Grants, Construction and Regeneration Act 1996, thus, no notified sum was required to be paid to Bexhill by Kingsmead ("**the Defence**").

On 16 February 2023, the Adjudicator responded to Kingsmead's email stating "*I confirm that all submissions were reviewed during the Adjudication. Those that have not been expressly referred to in my Decision, did not impact my Decision*".

On 15 March 2023, following Kingsmead's failure to comply with the Decision, Bexhill applied for summary judgment to enforce the Decision. On 21 April 2023, Kingsmead served its defence asserting that the Decision was unenforceable for breach of natural justice by the Adjudicator as he had not considered the Defence raised in its Rejoinder. Moreover, Kingsmead sought a stay of execution, claiming there was a probable risk that Bexhill would not be able to repay the judgment sum due to insolvency ("**the Stay**").

Held

The judge, Her Honour Judge Kelly, granted summary judgment to enforce the Decision and dismissed Kingsmead's application for a Stay for the following reasons: -

Once a defence has been raised, it is the adjudicator's job to consider any defence properly put forward by the defending party (*Cantillon Limited v Urvasco* [2008]). In the present case, the Judge determined that Kingsmead did not have a real prospect of successfully arguing that the Adjudicator did not consider all the defences raised.

The court held that a breach can be material if there is a failure to consider and address a substantive defence put forward by the responding party. It will not be a material breach if the adjudicator simply

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



fails to address some particular aspect of the evidence or elements of one party's submissions.

There is a distinction to be drawn between a case where an adjudicator deliberately decides not to consider a defence or a legitimate counterclaim and a case where there is an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide. The former may make the decision unenforceable whereas an inadvertent failure usually will not.

It is not necessary for the court to investigate the facts to decide if the Adjudicator would have reached a different decision had he considered that argument and evidence. All that is necessary is that there would be a real, as opposed to fanciful, possibility that the Adjudicator could have reached a different decision.

In this instance, the court found that although the Adjudicator had chosen to provide some reasons for his Decision, even when none were requested, that did not impose an obligation for him to provide reasons and a discussion on every point raised. The Adjudicator answered the question posed to him, reached certain conclusions on the legal points raised, and gave reasons for those decisions which were comprehensible. That would suffice even if the Decision itself were wrong.

The Stay

The judge found that in Kingsmead's defence there was no mention of a stay of execution, instead it was sought in the witness statement of Mr. Beer. Thus, the court found the Stay had not been sufficiently pleaded.

Further, in considering the documentation provided, namely, a report containing limited detail, which set out that Bexhill had a 3.2% possibility of becoming insolvent, the court found there was no evidence

which established a probable inability by Bexhill to repay any sums owed to Kingsmead.

Analysis

To avoid any doubt as to whether an adjudicator has considered all submissions put to them, you should always ask for an adjudicator to submit the reasons for their decision since uncertainty can lead to subsequent enforcement challenges – merited or otherwise.

In this instance, the claim was issued on 15 March 2023 and heard on 17 May 2023; however, the judgment was not handed down until 3 October 2023. The value of the Decision was £50k, however, both parties' costs taken together likely totalled more than this. Despite the court's strong support for adjudication as a relatively speed form of dispute resolution, enforcement proceedings can take time and the resulting delay can cause serious cashflow problems and even insolvency for some companies.

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

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



**HAWKSWELL
KILVINGTON**

Specialist Construction Solicitors

Construction Law Update

© Hawkswell Kilvington Limited 2023

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk

Registered Office: 2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB. Registered in England and Wales. Company No. 5582371. Regulated by the Solicitors Regulation Authority (SRA No.464387).
A list of directors' names is available for inspection at the registered office. We use the term partner to refer to a director of the company, or an employee or consultant with equivalent standing and qualifications.