Payback time: TCC upholds adjudicator's decision entitling employer to recoup interim overpayment

In *Bellway Homes Limited v Surgo Construction Ltd* [2024] EWHC 269 the Technology and Construction Court (TCC) was asked to determine issues arising in relation to the appointment of a panel adjudicator; and his decision entitling the employer to repayment of sums overpaid on a previous interim payment cycle.

This is the second dispute between these two parties decided by the TCC in recent months; the first judgment was the subject of an earlier bulletin here.

Background

Bellway Homes Limited ("**Bellway**") engaged Surgo Construction Ltd ("**Surgo**") under an amended JCT Intermediate Building Contract with Contractor's Design, 2016 Edition dated 9 October 2019 (the "**Contract**").

The relevant amendments in relation to adjudicator appointment were as follows:

- Both the Contract Particulars and Clause 9.2.1 required that an adjudicator be chosen from the Bellway Panel of Adjudicators current at the date of the Contract.
- Clause 9.2.2 did not *expressly* require that the chosen adjudicator be appointed "not later than 7 days" from the date of the Notice of Adjudication.

And in relation to interim payment:

- Clause 4.9 contained standard provisions for interim payments. The clause did not expressly prohibit or permit the certificate being in a negative amount.
- Clause 4.9 also entitled Bellway to recover overpayments made *"at any time"* and "*all interim payments made to the contractor are payments on account only of sums due under the Contract".*

The Adjudications

In August 2022, Surgo referred a dispute over the notified sum in relation to payment cycle 29 to adjudication ("the **First Adjudication**"). Surgo was successful and no objection was raised by Bellway. At this stage Bellway had paid Surgo a gross sum of c.£11.3m.

In February 2023, the contract administrator issued payment certificate 36 ("**Certificate 36**") in a negative sum of c.£3.4m. Surgo did not accept this, arguing that to the contrary, it was owed a further £1.423m. Bellway referred its claim for overpayment to adjudication on a notified sum basis and alternatively on a true value basis ("the **Second Adjudication**)", and Mr Jonathan Cope was subsequently appointed as adjudicator ("the **Adjudicator**").

Surgo challenged the Adjudicator's jurisdiction on the basis that clause 9.2.2 contravened the Housing Grants, Construction and Regeneration Act 1996 ("**HGCRA**") and that the statutory Scheme for Construction Contracts (England and Wales) Regulations 1998 (the "**Scheme**") ought therefore to apply unamended. The Adjudicator agreed with Surgo and subsequently resigned. However, in so doing he expressed a view that the panel provision in 9.2.1 was not itself contrary to HGCRA, such that he might still have been validly chosen under that sub- clause and appointed pursuant to the Scheme.

For completeness, there was also a third, abortive adjudication.

On 13 March 2023 Bellway issued a yet further notice of adjudication (the "**Fourth Adjudication**"). On that occasion, Notice was given under the Scheme but Bellway again sought to appoint an adjudicator from the panel. Surgo objected but acting in line with his expressed view on resigning from the Second Adjudication, the Adjudicator continued and proceeded to make a true valuation decision in Bellway's favour ("the **Decision**").

The Claims

Upon Bellway commencing the Fourth Adjudication, Surgo had immediately issued a Part 8 claim seeking declarations challenging Bellway's entitlement to be paid sums by Surgo on an interim basis pursuant to a true value determination; and confirming that to the extent there had been overpayment to Surgo during the course of the works, Bellway was not entitled to be repaid until the issuing of the final certificate, subject to a final reconciliation in accordance with Clause 4.21 of the Contract.

For its part, Bellway brought a Part 7 claim seeking to enforce the Decision.

The court thus had 4 key issues to decide:

1) Did clause 9.2.1 of the contract fall foul of the HGCRA?

2) If it did, did the equivalent paragraph within the Contract Particulars nevertheless apply, and if so, did it also fall foul of the HGCRA?

3) If clause 9.2.1 were valid, did the Adjudicator – appointed pursuant to the Scheme – have jurisdiction to determine the dispute?

4) In the event he did, the question arising under the Part 8 Claim was whether the Adjudicator had been entitled, as a matter of substantive law, to order Surgo to repay Bellway what in his assessment was the difference between the true value of the works under interim payment cycle 36 and the amount which Bellway had been obliged to pay to Surgo in respect of the notified sum under interim 29, following the decision in the First Adjudication?

Held

In relation to issue (1), clause 9.2.1 did not contravene the HGCRA:

- Section 108(2)(b) of the HGCRA requires that the timetable has the object of securing appointment and referral within 7 days of the notice. As long as that objective was secured, it did not automatically contravene the HGCRA if a period in excess of 7 days is not *explicitly* prohibited.
- The requirement for an adjudicator to be from Bellway's panel did not contravene the HGCRA. There was no basis to suggest that by the mere fact of being on Bellway's panel the adjudicator was not "*ostensibly impartial*". No one would consider that an adjudicator would be "*inclined to depart from their well-known duty of impartiality*".

In light if this, issue (2) fell away – though it is worth noting that the judge observed the relevant paragraph within the Contract Particulars would not have survived independently of contract clause 9.2.1, had it been struck down.

As to issue (3), the judge found that on a proper analysis, it made no material difference in this case whether the referral was under the contractual provisions, as it should have been, or under the Scheme and the contract particulars, as it was made.

Bellway was thus entitled to have the Fourth Decision enforced, and as such the court was required to grapple with the question arising in the Part 8 Claim.

Here, the judge held that the payment mechanism within the contract (as amended) envisaged that a negative amount might be due to the contractor in an interim payment cycle. Further, the words "*at any time*" included in clause 4.9, meant the employer was not limited to recovering an overpayment at the final account stage only.

In reaching this view the judge considered a number of authorities and construction law textbooks and referred to the “correction principle” (being that overpayments would normally be dealt with by deductions in subsequent payment cycles). He concluded the correction principle could extend to an adjudicator ordering repayments of an interim overpayment "*as the dispositive remedy flowing from the adjudicator's re-evaluation".*

Analysis

The decision confirms that bespoke adjudication clauses can be acceptable to the court and are not necessarily contrary to the HGCRA; and that where an objective is achieved there is no need for the clause in question to *explicitly* require it. It further illustrates the court’s robust approach to addressing suggestions of adjudicator impartiality.

Bespoke amendments to interim payment provisions might also prove acceptable, and contractors should take careful note of clauses entitling their employer to recoup overpayments without waiting for the final account stage.