Savoye and Savoye Ltd v Spicers Ltd
[2014] EWHC 4195 (TCC); TCC; Akenhead J

Spicers Ltd (Spicers), a distributor of office supplies and equipment, appointed Savoye and Savoye Ltd (together Savoye) to design and supply a conveyor system at its factory (the Agreement).

The dispute resolution clause included:

‘In the event that no settlement is reached...and if the Agreement is a “construction contract” as defined in Section 104 of the [HGCRA] either party may refer any dispute...arising...under the Contract for adjudication ...’.

After Savoye completed installation, disputes arose regarding alleged outstanding sums and purported quality and performance failures.

Savoye issued a notice of adjudication regarding non-payment. Spicers objected on grounds that the adjudicator lacked jurisdiction, claiming that the Agreement did not form a ‘construction contract’. The definition of ‘construction contract’ in s 104 of the HGCRA refers to ‘construction operations’. Spicers argued that the conveyor system was not covered by ‘construction operations’ for the purposes of the HGCRA so the right to adjudicate could not be invoked.

Decision
Akenhead J found in favour of Savoye and enforced the adjudicator's decision.

In considering whether the Agreement formed a ‘construction contract’ under the HGCRA, the TCC focussed on the definition of ‘construction operations’ in s 105(a) to (c). These subsections all require that the operations relate to buildings, structures or works ‘forming part of the land’.

Akenhead J considered case law on the concept of ‘fixtures’ in property law but stated:

‘...whilst the law relating to fixtures casts useful light on the test [of whether something is “forming part of the land”], it is not some sort of pre-condition that the test or threshold...can only be “passed” if the item of work etc is a fixture as understood in the law of real property ... [I]f Parliament had intended to incorporate the law relating to fixtures, it could and would have done so ...’

Akenhead J noted that the fact that machinery is more readily removable will not necessarily mean that it does not form part of the land. Similarly, even if something is installed in the building, it will not necessarily form part of the land (eg a washing machine). Nevertheless, the fixing of an object and the ease of removability are pointers.

In finding that the conveyor system did form part of the land for the purposes of the HGCRA, Akenhead J stated ‘[w]hether something forms part of land is ultimately a question of fact and this involves fact and
degree’ and his reasoning included that the system was bolted to the body of the building and was ‘intended’ to be ‘relatively permanent’.

**Significance**
This case provides guidance for parties considering the definition of ‘construction operations’ under s 105 of the **HGCRA**, particularly in relation to the meaning of the words ‘forming ... part of the land’ under the **HGCRA** and suggests that the scope of the **HGCRA** will be interpreted widely. Parties will need to be aware of the potentially wide-reaching application of the **HGCRA** which, if applicable, will necessitate a right for either party to refer a dispute to adjudication and the need for the parties to comply with the **HGCRA** payment provisions, failing which the payee will have certain payment rights, such as the right to suspend.

**ISG Construction Ltd v Seevic College**
[2014] EWHC 4007 (TCC); TCC; Edwards-Stuart J

ISG Construction Ltd (ISG) was appointed as Design & Build Contractor on the terms of the JCT Design and Build Contract 2011 (the Contract) by Seevic College (Seevic).

The payment terms of the Contract do not appear to have been amended and were **Housing Grants, Construction and Regeneration Act 1996** (**HGCRA**) compliant. The TCC summarised them as follows:

‘if the employer either does not agree with the sum claimed by the contractor in an interim application, or in any event does not intend to pay it, it must serve either a payment notice or a pay less notice, or both.’

The Contract allowed for only two situations where the contractor was entitled to payment; through interim applications or following issue of the final statement.

ISG submitted its interim payment application (No 13) in the sum of just over £1 million. As no payment was made and Seevic College failed to serve either a payment notice or pay less notice in time, ISG commenced adjudication in respect of this sum (Adjudication 1). In addition to the above, four days prior to the adjudicator’s decision, Seevic served a notice of adjudication for determination of the correct value of the works as at the date of application No 13 (Adjudication 2).

The adjudicator found in favour of ISG regarding Adjudication 1; Seevic did not issue a payment notice or pay less notice in accordance with the Contract. However, the same adjudicator, deciding upon Adjudication 2, valued the works at only £315,450.47; a stark disparity to the near £1 million awarded in Adjudication 1.

ISG sought summary judgment for enforcement of the decision in Adjudication 1 and a declaration that the decision in Adjudication 2 was invalid for want of jurisdiction; the matters being ‘the same or substantially the same’ as those already decided under Adjudication 1.

**Decision**
Edwards-Stuart J found in favour of ISG.

Edwards-Stuart J agreed with His Honour Judge Lloyd’s conclusion in *Watkin Jones & Son Ltd v Lidl UK GmbH* [2002] EWCH 183 (TCC):

‘if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application’.

On this basis, the court held that the first adjudicator decided the value of the work for the purposes of the interim application and therefore the dispute in Adjudication 2 was redundant.

Edwards-Stuart J commented:

‘[t]he statutory regime would be completely undermined if an employer, having failed to issue the necessary payment or pay less notice, could refer to adjudication the question of the value of the contractor’s work at the time of the interim application ...’.

**Significance**
This case shows the benefit of reacting quickly to any failure by an employer to serve a pay less notice in time as this could entitle the contractor or consultant to adjucdate in relation to the employer’s failure to do so without the adjudicator considering any allegations the employer may have regarding the sum claimed in the payment notice. This case also highlights the need for employers to adhere strictly with the payment terms and time limits of the **HGCRA**. This case shows that issuing a subsequent adjudication for valuation of the works is unlikely to save an employer from its failure to comply with the payment terms under the **HGCRA**. CL