Reports from the courts

Our regular round up of the cases of most interest to construction comes from Andrew Croft and Ben Spannuth of Beale & Company Solicitors LLP, focussing on a decision that serves as a reminder that where new evidence becomes available or where some part of the claim has been left undecided in an earlier adjudication, it may be possible to adjudicate again in relation to the same issue; and another that provides some clarification on liquidated damages.

April 2019 Hitachi Zosen Inova AG v John Sisk & Son Ltd
[2019] EWHC 495 (TCC); TCC; Stuart-Smith J

Hitachi Zosen Inova AG (Hitachi) was employed to specify, design, engineer, construct, commission and test a power plant in Yorkshire. Hitachi engaged John Sisk & Son Ltd (Sisk) to provide design and construction services pursuant to a contract dated 29 March 2012 (the Contract).

On 16 October 2015, Sisk issued its Application for Payment No 6 (Application No 6) which included a valuation for Event 1176 (‘Acceleration Works to the Boiler Hall construction’) in the sum of £1,092,497.45.

On 9 November 2015, Hitachi submitted a payment notice rejecting the claim for payment for Event 1176 and asserting that Sisk had been overpaid £2,720,683.52.

Sisk subsequently referred some of the items included in Application No 6 for adjudication, including Event 1176, seeking a declaration as to the correct valuation of each of the items in dispute and an order that Hitachi pay Sisk the sum of £3,947,187.42 plus VAT. This was the second adjudication between the parties.

The adjudicator concluded in Sisk’s favour that Event 1176 was a variation and therefore required a valuation. However, the adjudicator considered that there was insufficient evidence to value it such that the sum allowed for Event 1176 was £nil.

Following a mediation and 5 further adjudications between the parties, the dispute was still ongoing.

On 3 November 2017, Sisk made a further application for payment for Event 1176 in the revised sum of £999,595.59. Hitachi rejected the application on 30 November 2017 (asserting that it had no contractual merit and referring to the adjudicator’s decision in the second adjudication) and provided a payment notice.

On 20 June 2018, Sisk commenced an eighth adjudication seeking: (i) a declaration that Event 1176 was a variation that required valuation; and (ii) an order that Hitachi pay Sisk the revised sum of £994,572.19 plus VAT. Hitachi asserted that the adjudicator did not have jurisdiction on the basis:

‘... the claim […] is the same or substantially the same as that advanced in the second Adjudication, namely a claim for additional payment in respect of Event 1176.’

The adjudicator considered that he did not have jurisdiction in respect of the first issue, having decided in the second adjudication that Event 1176 was a variation that required valuation. However, the adjudicator concluded that he was able to adjudicate on the value of Event 1176 as he had been unable to do so previously. The adjudicator ordered Hitachi to pay Sisk the sum of £825,703.17 plus VAT in respect of Event 1176.

Payment was not forthcoming from Hitachi so Sisk commenced enforcement proceedings.

Decision
Stuart-Smith J held that the adjudicator had jurisdiction to evaluate Event 1176 and the orders made by the adjudicator in the eighth adjudication fell to be enforced.

Referring to Quietfield Ltd v Vascroft Construction Ltd [2007] BLR 67 and Harding v Paice [2015] EWCA Civ 1231, Stuart-Smith J found that, since the decision in the second adjudication did not determine the valuation of Event 1176, Sisk was entitled to bring the eighth adjudication having found evidence to enable Event 1176 to now be properly valued. Stuart-Smith J concluded that the respective adjudications did not decide the same or substantially the same question as the eighth adjudication. The adjudicator therefore had jurisdiction to determine the value of Event 1176.
Comment
The decision emphasises that the starting point for determining whether two disputes are the same or substantially the same requires consideration of the decision in the earlier adjudication and the referral in the later adjudication.

Where the disputes concern the same issues, they are likely to be deemed the same or substantially the same. However, this case is a reminder that, where new evidence becomes available or where some part of the claim has been left undecided in the earlier adjudication, it may be possible to adjudicate again in relation to the same issue.

Triple Point Technology Inc v PTT Public Co Ltd [2019] EWCA Civ 230; CA; Sir Rupert Jackson

Triple Point Technology Inc (TPT) entered into a contract with PTT Public Company Ltd (PTT), a company undertaking commodities trading, in early-2013 for TPT to provide PTT with a new software system (the Contract).

Article 5.3 of the Contract provided:

‘[TPT] shall be liable to pay the penalty at the rate of 0.1% […] of undelivered work per day of delay up to the date PTT accepts such work.’

Article 12.3 of the Contract provided:

‘…[t]he total liability of [TPT] to PTT under the Contract shall be limited to the Contract Price received by [TPT].’

Article 18 set out various milestones to be achieved by TPT in exchange for payment. This was supplemented by various documents which were either exhibited to or subject to the terms and conditions of the Contract and provided dates by which payments were to be made (Order Forms A, B, and C).

TPT achieved completion of Stages 1 and 2 of Phase 1 on 19 March 2014 – 149 days late. TPT submitted an invoice for $1,038,000 in respect of this work which was paid by PTT.

Relying on the dates for payment stated in Order Forms A, B, and C, TPT asked PTT to pay further invoices for other work which was incomplete. PTT refused to do so, relying on art 18 and noting that TPT had not achieved any of the milestones (save for Stages 1 and 2 of Phase 1). On 27 May 2014, TPT suspended work and left site.

PTT maintained that TPT had wrongfully suspended work. On 15 February 2015, PTT terminated the Contract.

On 25 February 2015, TPT commenced proceedings to recover the outstanding sums claimed.

The TCC dismissed TPT’s claim, finding that art 18 prevailed over Order Forms A, B, and C and noting TPT’s negligent failure to plan, programme, or manage the project. TPT was therefore not entitled to suspend work and was in repudiatory breach of contract such that PTT was awarded $4,497,278.40 in respect of its costs of procuring an alternative system (but capped at $1,038,000 pursuant to art 12.3). PTT was also awarded liquidated damages of $3,459,278.40 pursuant to art 5.3, but such damages were held not to be subject to the cap.

On 25 October 2017, TPT appealed on grounds that liquidated damages for delay under art 5 were irrecoverable in respect of work which PTT never accepted and any liquidated damages recoverable were subject to the cap under art 12.3.

Decision
The Court of Appeal allowed TPT’s appeal.

The Court of Appeal held that, whilst PTT was entitled to liquidated damages in respect of TPT’s delay in completing Stages 1 and 2 of Phase 1, liquidated damages were not recoverable in respect of incomplete work. It considered that the phrase ‘up to the date PTT accepts such work’ in art 5.3 meant that liquidated damages had no application in circumstances where work was incomplete. PTT was however ‘entitled to recover damages for breach of Articles 5 and 12 of [the Contract], assessed on ordinary principles’.

The Court of Appeal found in favour of TPT in respect of the operation of the cap under art 12.3, concluding that it imposed an overall cap on TPT’s total liability.

Comment
Whilst the decision turns on its facts, it clarifies the law on liquidated damages following GPP Big Field v Solar EPC [2018] EWHC 2866 (Comm).

Liquidated damages following termination may not be recoverable in circumstances where they are triggered by completion or acceptance.

This case is a reminder of the importance of clear drafting as the courts will seek to give effect to the precise wording of the contract and the operation of limits of liability. CL