C Spencer Limited v MW High Tech Projects UK Limited
[2019] EWHC 2547 (TCC); O'Farrell J

In 2015, MW High Tech Projects UK Limited (MW) was engaged by Energy Works (Hull) Ltd as main contractor to design and construct a power plant in Hull. C Spencer Limited (CSL), a firm of engineers, was subcontracted by MW to design and construct the civil, structural and architectural works pursuant to a sub-contract dated 20 November 2015 (the Sub-Contract).

The Sub-Contract included both 'construction operations' pursuant to the Housing Grants, Construction and Regeneration Act 1998 (the Act) and 'non-construction operations' pursuant to s105(2) of the Act, being the 'assembly of plant and erection of steelwork to support or access plant and machinery, on a site where the primary activity is ... power generation'. The Sub-Contract provided for periodic interim payments, but made no distinction between 'construction operations' and 'non-construction operations'. The payment mechanism in the Sub-Contract was compliant with the Act.

The dispute resolution provisions in the Sub-Contract included the right to refer disputes to adjudication, but stated clearly that those provisions applied 'only to the extent (if any) required by [the Act]'.

In 2018, a dispute arose between MW and CSL as regards an interim payment application. Neither the payment application submitted by CSL nor the payment notice issued by MW distinguished between the sums due for 'construction operations' and 'non-construction operations'. CSL gave notice of its intention to refer the dispute to adjudication. MW challenged the adjudicator's jurisdiction, arguing that the contractual adjudication provision was limited to disputes concerning 'construction operations'. MW’s position was that the adjudicator did not have jurisdiction to consider the dispute given CSL's failure to distinguish between 'construction operations' and 'non-construction operations'. CSL withdrew its claim.

In February 2019, CSL issued a payment application which clearly distinguished between the amounts payable for 'construction operations' and 'non-construction operations'. MW served a payment notice indicating a negative sum as being due to CSL. MW's payment notice did not allocate the sums due between 'construction operations' and 'non-construction operations'. CSL argued that MW’s payment notice was invalid as it failed to identify the proportion of the sum assessed that was due in respect of 'construction operations' and the basis on which that sum had been calculated. CSL brought a Part 8 claim against MW, seeking payment of £2,683,617.09 plus VAT as the notified sum due in the absence of any valid payment notice. MW contended that the payment provisions in the Sub-Contract were Act-compliant such that it was appropriate for both 'construction operations' and 'non-construction operations' to be dealt with under the same payment regime.

Decision
O'Farrell J dismissed CSL's claim.

O'Farrell J held that the payment scheme in the Sub-Contract was valid and applied to both 'construction operations' and 'non-construction operations'. MW’s payment notice issued under the terms of the Sub-Contract was therefore valid.

O'Farrell explained that, whilst parties cannot contract out of the statutory payment regime set out in the Act, they may agree a contractual payment scheme that is Act-compliant. Where the parties have contractually agreed an Act-compliant payment scheme, so that only one payment system is in operation, there is no requirement to distinguish between 'construction operations'
and ‘non-construction operations’ in any payment application or payment notice. It was therefore held that the payment notice issued by MW in response to CSL’s payment application was valid.

Comment
The decision confirms the importance of expressly including an Act-compliant payment mechanism and an express right to suspend in the event of non-payment in every ‘hybrid’ contract. In the absence of such provisions, there is potential for confusion and dispute as regards the operation of two separate systems for ‘construction operations’ and ‘non-construction operations’.

Furthermore, the right to refer disputes to adjudication under the Act is confined to disputes in respect of ‘construction operations’. A right to adjudicate should therefore be expressly included in any ‘hybrid’ contract which applies to all disputes so as to avoid potential difficulties regarding the adjudication of disputes concerning both ‘construction operations’ and ‘non-construction operations’.

**Flexidig Ltd v A Coupland (Surfacing) Ltd**
[2019] EWHC 2578 (TCC); Simon Lofthouse QC

In March 2017, Flexidig Ltd (Flexidig), a firm of civil engineers, entered into a sub-contract for the carrying out of civil engineering works with the main contractor, M&M Contractors Europe Limited (M&M), in connection with the installation of fibre optic cables in Louth, Lincolnshire (the Sub-Contract).

Under the terms of the Sub-Contract, in the event that Flexidig failed to make good any defects during the progress of the work and the defects liability period, M&M could engage a third party sub-contractor to undertake such work, or could carry out the work itself, and recover the associated costs from Flexidig.

Works commenced in January 2019. A dispute arose in February 2019 between M&M and Flexidig in relation to the standard of the works undertaken by Flexidig. A ‘stop notice’ was issued by M&M on 15 February 2019. However, Flexidig was subsequently allowed back on site to correct the alleged defects. M&M remained unhappy with the remedial works and issued a further ‘stop notice’, but again allowed Flexidig back on site to undertake remedial works. Still concerned with the standard of the works undertaken by Flexidig, M&M engaged a replacement sub-contractor, A Coupland (Surfacing) Ltd (Coupland), to complete the required remedial works.

Coupland was aware of the dispute between Flexidig and M&M and Flexidig’s position that M&M was in breach of contract (as Flexidig had the right to perform the works under the Sub-Contract). However, M&M assured Coupland that there was no such breach of contract.

Flexidig applied for an injunction against Coupland to restrain Coupland from carrying out the rectification works. It argued that: (1) M&M had engaged Coupland in breach of contract; and (2) Coupland was committing the tort of inducing a breach of contract.

**Decision**
Mr Simon Lofthouse QC dismissed Flexidig’s application for injunctive relief.

It was held that the Sub-Contract did not expressly provide that M&M could not engage a third-party sub-contractor to remedy defects (although M&M would first have to ask Flexidig to remedy the defects if it subsequently wished to claim from Flexidig the costs of engaging a replacement sub-contractor). Therefore, there was no breach of contract and no inducing a breach of contract. In any event, Coupland had not acted with ‘reckless indifference’ as to whether M&M would be in breach and did not have the requisite knowledge or intent required to prove inducing a breach of contract.

Mr Simon Lofthouse QC declined to order the injunction sought by Flexidig, concluding that, had there been a breach, damages would have been a better remedy in any event.

Comment
This decision is a reminder that contracting with a party and giving it the means or opportunity to breach a pre-existing contract is insufficient to constitute inducing a breach of contract. Mere ‘facilitating’ is not enough.

Furthermore, replacement contractors should not act with ‘reckless indifference’ in relation to pre-existing disputes and should consider making provision for reimbursement by the employer for any liability and costs in the event that they become involved in disputes between the employer and the original contactor. Similarly, employers should have regard to any potential breaches of contract when awarding work to replacement contractors. **CL**