Reports from the courts

Our regular review of the court decisions of most relevance to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who look at a decisions showing that the courts will not enforce adjudication decisions where manifest injustice can be demonstrated; and another highlighting the need for clear drafting to permit the omission of works from a contractor.

JRT Developments Ltd v TW Dixon (Developments) Ltd

HT-2020-BHM-000010; HHJ Watson

JRT Developments Ltd (JRT), a company owned and controlled by Mr Jonathan Woodcock, a quantity surveyor, and TW Dixon Ltd (TWD), a company formed for the purposes of building 14 houses on a site in Shropshire (the Project) entered into a JCT Minor Works Contract with Design 2011 Edition (the Contract) and a so-called 'Commercial Agreement' (the Agreement) both dated 22 June 2016.

Article 2 of the Contract provided: 'the Employer will pay the Contractor [...] the VAT-exclusive sum of £1,191,752 ("the contract sum")'. The Agreement confirmed that JRT was to manage the Project and provided that:

> The development will be constructed on a cost plus basis [...] The Properties will be delivered at cost plus the business overheads of JRT. Agreement of profit share against the sale of the properties is to be split against a 50:50 ratio of gross profit minus the plot value and the associated build and sale costs.

On 13 June 2019, JRT terminated the Contract. The parties engaged in informal dialogue in relation to the resolution of outstanding payments allegedly in the sum of £952,578.97.

On 19 September 2019, JRT issued a Disputed Payment Notice under the terms of the Contract. TWD failed to understand the significant of the Disputed Payment Notice and did not serve a pay less notice.

On 14 November 2019, JRT referred the dispute to adjudication. The adjudicator determined that JRT's Disputed Payment Notice was valid and that TWD owed JRT the amount demanded as a result of having failed to serve a pay less notice (the Decision).

On 10 March 2020, JRT issued proceedings and sought summary judgment to enforce the Decision.

TWD sought a stay of enforcement on the basis of 'special circumstances', namely: (a) the probable inability of JRT to repay the judgment sum at the end of the substantive trial; and (b) the risk of manifest injustice if no stay was granted given TWD's inability to pay and the circumstances of the case.

Decision

HHJ Watson granted the stay, having regard to the 'exceptional circumstances' of the case which 'do appear to me to be relevant to the fairness of enforcing the judgment sum'. HHJ Watson considered HHJ Coulson's judgment in the case of ***Wimbledon Construction Company 2000 Ltd v Vago [2005] EWHC 1086 (TCC)*** and was satisfied that:

(i) it was highly probable that JRT would be unable to repay the judgment sum at the end of the substantive trial;
(ii) JRT's financial position was substantially different to when the Contract was entered into; and
(iii) this was not either wholly or in significant part due to TWD's failure to pay the sums awarded in the adjudication.

HHJ Watson also considered the case of ***Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)***, which established the principle of staying adjudication enforcement in situations of manifest injustice. HHJ Watson concluded that it would be manifestly unjust to TWD if the judgment was not stayed on the basis that TWD would be forced to pay a potentially overinflated sum, following which it would be forced into liquidation and unable to pursue its claim for a declaration that the Disputed Payment Notice was not a valid payment notice.

Comment

This decision demonstrates that, whilst adjudication

awards will generally be enforced, the TCC will make exceptions in rare cases where manifest injustice can be demonstrated and where parties are seeking to take advantage of the adjudication process where doing so is clearly unfair. This will very much depend on the specific facts.

In the current economic climate, where the construction industry is likely to see increased insolvencies, this decision serves as another useful reminder of the limitations of 'smash and grab' adjudications.

Van Oord UK Ltd v Dragados UK Ltd
[2020] CSOH 87; Lord Tyre

Dragados UK Ltd (Dragados) was employed by Aberdeen Harbour Board as the main contractor for the design, management and construction of the Aberdeen Harbour Expansion Project (the Project). Pursuant to a subcontract dated 16 March 2018 based on the NEC3 Engineering and Construction Subcontract with bespoke amendments (the Subcontract), Dragados subcontracted certain works, including soft dredging works, to Van Oord UK Ltd (Van Oord).

Clause 14.3 of the Subcontract stated that:

> [Dragados] may give an instruction to [Van Oord] which changes the Subcontract Works Information or a Key Date. [Dragados] may, in the event that a corresponding instruction is issued by the Project Manager under clause 14.3 of the Main Contract only, also give an instruction to omit (a) any Provisional Sum and/or (b) any other work, even if it is intended that such work will be executed by Others.

Van Oord commenced works in May 2018. During 2018 and 2019, Dragados issued various instructions to Van Oord to omit certain areas of soft dredging from its works, which were transferred to two other subcontractors.

Dragados' omissions of works meant: (a) Van Oord was no longer obliged or entitled to carry out the works and be paid for them; and (b) under the terms of the Subcontract, each omission of works constituted a compensation event such that the sum payable was calculated by reference to Defined Cost. This resulted in a reduction of the total amount payable to Van Oord for the works that it still had to carry out under the contract.

Van Oord sought to rely on the case of *Abbey Developments Ltd v PP Brickwork Ltd [2003]*

EWHC 1987 (Technology) (in which it was held that: (i) a contract for the execution of work gives a contractor the right to complete the work for which it was contracted; and (ii) the question of whether works could be omitted depended upon the proper interpretation of the contract). Van Oord argued that Dragados was in breach of contract in transferring work to other subcontractors and sought declarations that: (i) Dragados was not entitled to reduce the sum payable to it for work done consequent on the disputed instructions; and (ii) that it was entitled to payment of a sum calculated on the basis of the unreduced bill rate. Dragados maintained that the circumstances of the present case were distinguishable from those in *Abbey Developments v PB Brickwork Ltd.*

Decision
Lord Tyre refused to grant the declarations sought by Van Oord.

Lord Tyre considered *Abbey Developments Ltd v PP Brickwork Ltd.* However, on the basis that clause 14.3 of the Subcontract expressly provided for a particular situation in which Dragados was entitled to omit work, it was held that raised an inference that in other circumstances Dragados was not so entitled. Dragados was therefore in breach of contract.

However, Lord Tyre found that Van Oord's remedy was provided by the compensation event mechanism, notwithstanding the fact that this ultimately resulted in a reduction of the total amount payable to Van Oord for the works that it still had to undertake pursuant to the Subcontract. Lord Tyre noted that there was nothing unusual about a compensation event consisting of a breach of contract. In terms of the use of Defined Cost, Lord Tyre explained that this 'is intended to provide an objective method of giving effect to change, including […] as a consequence of a breach of contract, in a way that does not leave the contractor either better or worse off'.

Comment
This case highlights the need for clear drafting in order to permit the omission of works from a contractor – express provision in the contract will be required. Likewise, contractors should carefully review contracts and beware possible unintended consequences arising from exclusion of work clauses and to factor in the risk of works being omitted when pricing services. **CL**