

Reports from the courts

Our regular round up of the court cases of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who examine a case highlighting the importance of ensuring that payment provisions are carefully followed; and an Outer House of the Court of Session judgment from Scotland that reinforces the difficulty of challenging an adjudicator's decision.

Elements (Europe) Limited v FK Building Limited [2023] EWHC 726 (TCC); Constable J

FK Building Limited (FK) appointed Elements (Europe) Limited (Elements) as subcontractor to undertake remediation works to 312 bi-split apartment modules as part of the design and construction of three buildings in Salford pursuant to a sub-contract incorporating the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition with bespoke amendments (the Sub-Contract).

Clause 4.6.3 of the Sub-Contract provided that "[Elements] may make a payment application in respect of an interim payment to [FK] either: [...] so as to be received not later than 4 days prior to the Interim Valuation Date for the relevant payment". Sub-Contract Particulars Item 10 provided that Interim Valuation Dates were the 25th of each month.

Further, the Specification provided: "The site will be open for [Elements] to carry out the Sub-Contract Works from 7.30 a.m. to 6.00 p.m. Monday to Friday".

On 21 October 2022 at 22:07, Elements issued Payment Application No. 16 (the Application) to FK seeking payment of £3,950,190.53. A dispute arose as to whether the Application was validly served.

On 5 December 2022, Elements referred the dispute to adjudication. The adjudicator found in Elements' favour (the Award) and, subsequently, Elements sought summary judgment in the sum of £3,950,190.52 plus interest and costs in the TCC. FK commenced Part 8 proceedings seeking a final determination. The court ordered both sets of proceedings to be listed together.

FK contended that clause 4.6.3.1 meant that the Application should have been received before the end of site working hours on 21 October 2022. FK emphasised the inclusion of the word "received", which was said to contrast to other JCT Forms which focus on the requirement on the contractor to "give a notice" within a specified timeframe. FK

argued that "the use of different language must be considered to have been intentional, and meaning must be given to the fact that 4.6.3.1 is focusing on actual receipt by FK".

Elements relied upon the rule in English law that, when interpreting contracts, "a day is treated as an indivisible whole and fractions of a day are ignored" and that "unless provided for explicitly otherwise, 'day' simply means 'day' and should be distinguished from 'full' or 'clear' days". Elements further noted that the Sub-Contract imposes no restriction on the time of day in which a Payment Application must be made and contended that FK's construction would lead to uncertainty regarding the hours within which a Payment Application could be validly served.

Decision

Constable J held that the Application was valid and the Award was therefore enforceable – the Application "was made so as to be received on 21st October 2022, which was not later than 4 days prior to the Interim Valuation date, and was therefore validly made".

Constable J rejected FK's argument that the contractual site working hours could be interpreted as imposing a restriction on the words "4 days" in clause 4.6.3.1, as no wording in the Sub-Contract supported this and this interpretation did not correspond with the wider meaning of "day" throughout the Sub-Contract.

Constable J considered FK's emphasis on the receipt of the Application as irrelevant, noting that there were no words within the Sub-Contract which meant that the timing of receipt in the late evening would not constitute same-day service for the purpose of determining the validity of the Application. Constable J observed effectiveness should not be "dependent upon an unexpressed restriction relating to working hours which will necessarily be subjective to the parties, and differ from party to party and contract to contract".

Comment

This judgment is a reminder to ensure that: (i) payment provisions are carefully followed; and (ii) contracts include careful and consistent drafting, as a restriction on one aspect of a contract might not apply in a wider, implied context elsewhere. Parties should ensure that any timed restrictions on deadlines, e.g. before the end of working hours, are clearly stated within the contract to the court interpreting the contract in a commercial context.

Atalian Servest AMK Limited v BW (Electrical Contractors) Limited

[2023] CSOH 14; Lord Sandison

In 2020, Atalian Servest AMK Limited (AMK) were subcontracted to undertake construction works at Lord's Cricket Ground. AMK in turn engaged BW (Electrical Contractors) Limited (BW) as sub-subcontractor in respect of various electrical works (the Sub-Sub-Contract).

Clause 33 of Schedule 3 of the Sub-Sub-Contract provided:

33.3 Within 28 days of the receipt of the Final Account, AMK shall state the amount which it considers to be due to the Subcontractor ('the Final Account Statement').

33.4 The Final Account Statement shall be final and binding on the Subcontractor unless the parties agree to any modification of it or, where the Subcontractor disagrees with the AMK Final Account Statement, unless the Subcontractor has commenced adjudication or court proceedings within 20 working days of the date of the AMK Final Account Statement.

On 11 February 2022, AMK notified BW that Practical Completion of the sub-sub-contract works had been achieved on 17 September 2021. On 8 April 2022, BW submitted its Final Account to AMK in the sum of £3,099,350.60 (excluding VAT) and three days later issued its Final Application for Payment. On 6 May 2022, AMK issued its Final Account Statement stating that the sum owed to BW was £1,039,438.14.

BW disputed AMK's Final Account Statement. On 26 May 2022, BW commenced adjudication proceedings seeking a decision that the value of the Final Account was £3,099,350.60. However, the adjudicator resigned "on the basis that the amount of material presented to him was not capable of being

properly considered within the time made available to him".

On 27 May 2022, BW commenced proceedings in the Scottish Outer House seeking a declaration that the Final Account be valued in the sum of £3,099,350.60 and that it was entitled to payment from AMK of £1,897,117.74.

On 8 September 2022, BW commenced further adjudication proceedings. The adjudicator decided that the sum due in respect of the Final Account was £2,526,570 (excluding VAT) and the net sum due to be paid by AMK to BW was £1,401,821 (excluding VAT) and that AMK's Final Account Statement had not been validly issued and was not binding on the parties (the Decision).

BW sought enforcement of the Decision. AMK maintained that the Decision should be set aside on the basis that the second adjudication was commenced over 20 working days after the Final Account Statement such that the Final Account Statement was binding.

Decision

Lord Sandison found in BW's favour concluding that the issue of a single set of court or adjudication proceedings within the 20-working days period sufficed to prevent the Final Account Statement from becoming binding. Lord Sandison noted that, "upon the first being done, the Final Account Statement lost the capacity to become final and binding on" BW.

The Court highlighted that, as the parties had not used a standard form sub-contract, the wording of clause 33 did not convey the same "extreme degree of intended finality which has been ascribed to the JCT/SBC standard form". Instead, it was necessary to consider the contractual wording itself.

The Court also noted that clause 33.4 intended that "the Final Account Statement is never to become binding on AMK, but only on BW", which evidenced the parameters of the parties' relative intention in terms of finality.

Comment

Whilst decisions of the Scottish courts are not binding on the English courts, this judgment reinforces the difficulty of challenging an adjudicator's decision. It is also a reminder that parties must take care when amending standard form contracts and drafting bespoke contracts – the courts will be more likely to consider the strict contractual wording as opposed to implying commercial intent when considering the parties' intention. **CL**