Reports from the courts

Our regular round up of the court decisions of most interest to construction comes from **Andrew Croft**, **Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who examine a a case where a judge said the manner of an attack on an adjudicator was "wholly inappropriate"; and a judgment emphasising that Part 8 proceedings are a means of obtaining declaratory relief.

Essential Living (Greenwich) Limited v Conneely Facades Limited

[2024] EWHC 2629 (TCC); Mr Williamson KC

Essential Living (Greenwich) Limited (Essential) engaged Conneely Facades Limited (Conneely) by a trade contract dated 14 June 2017 to undertake the design, construction, coordination and commissioning of façade works at a development at Greenwich Creekside.

On 2 February 2024, Essential issued a notice of intention to refer a dispute to adjudication. This related to a claim for declarations to the effect that the cladding system, designed and installed by Conneely, was defective. The notice included a claim to recover costs of c.£1m.

Following service of the Referral on 9 February 2024, on 16 February 2024, Conneely sought disclosure of a previous adjudication decision of Dr Mastrandrea dated 22 July 2019 and the associated expert reports in that adjudication. The adjudication in question was between Essential and another trade contractor. Conneely submitted that the materials sought supported their case that: (i) the defects complained of in the present adjudication were occasioned by breaches of contract by other parties and not workmanship failures on the part of Conneely; and (ii) Essential was seeking double recovery.

On 20 February 2024, the adjudicator rejected Conneely's application on the basis that the previous adjudicator's decision predated the first appearance of the defect: "I am not persuaded that any payments made to Essential pursuant to that Decision would have concerned the defects at issue in this Adjudication. The suggestion of double recovery is fanciful, thus provides no basis for disclosing Mr Mastrandrea's Decision" (the First Decision).

On 22 March 2024, Conneely submitted a more focused request for disclosure, which Dr Mastrandrea accepted. However, on 5 April 2024, having reviewed Essential's disclosure, Conneely abandoned the double recovery argument.

On 19 April 2024, Dr Mastrandrea found in Essential's favour. On 14 May 2024, Conneely paid Dr Mastrandrea's fees without reserving its position.

Essential applied for summary judgment against Conneely. Conneely resisted enforcement arguing that the First Decision was arrived at in breach of the requirements of natural justice, namely that Dr Mastrandrea "made a determination about the strength of [Conneely's] case" which raised a "real possibility" that he was biased. Essential argued that Conneely waived any natural justice objection because it paid Dr Mastrandrea's fees without reserving its position.

Decision

Mr Williamson KC held that Essential was entitled to summary judgment.

Mr Williamson KC found that the First Decision was not a breach of the rules of natural justice, let alone a serious breach. Dr Mastrandrea was entitled to describe Conneely's position as "fanciful" based on the merits of the disclosure application. Mr Williamson KC considered that Dr Mastrandrea had "proceeded carefully and fairly throughout, giving Conneely every chance to put its case forward". On that basis, Mr Williamson KC did not agree that "the fair-minded and informed observer would conclude that there was a real possibility that the decision-maker was biased".

Mr Williamson KC agreed with Essential that Conneely's payment of Dr Mastrandrea's fees without reservation amounted to a waiver of the natural justice objection.

Lastly, Mr Williamson KC considered that indemnity costs were appropriate in

circumstances where Conneely had raised "unmeritorious points" and the manner of its attack against Dr Mastrandrea was "wholly inappropriate".

Comment

Whilst the courts do not wish to discourage payment of adjudicators' fees, losing parties should note that payment without reservation can amount to a waiver of a natural justice objection, which can preclude future challenges on these grounds.

This judgment is also a reminder that jurisdictional challenges must be undertaken with caution as there is a risk that the courts may impose cost consequences where such challenges are deemed inappropriate.

Workman Properties Limited v Adi Building and Refurbishment Limited

[2024] EWHC 2627 (TCC); HHJ Davies

On 6 January 2022, Workman Properties Limited (WPL) and Adi Building and Refurbishment Limited (Adi) entered into a JCT Design and Build Contract 2016 with bespoke amendments (the Contract) for the refurbishment of Cotteswold Dairy in Gloucestershire (the Works).

Paragraph 1.4 of the Employer's Requirements (the ERs) provided:

> The Contractor will [...] be fully responsible for the complete design, construction, completion, commissioning and defects rectification of the works.
> Significant design has been developed to date which has been taken to end of RIBA Stage 4 [...] in order to deliver what the Employer is requiring within their controlled budget.

Paragraph 1.5 of the ERs provided:

> It is the Contractor's specific responsibility to liaise closely with the Employer and his team to fully understand their requirements and to review the current design development in order to ensure those requirements are met.

On 22 May 2023, Adi raised a formal complaint with WPL that the tender design contained in the Employer's Requirements had not been developed up to RIBA Stage 4, which amounted to a breach of paragraph 1.4 of the ERs for which Adi was entitled to claim damages and/or additional time/ costs.

On 4 August 2023, Adi issued a notice of adjudication seeking various declarations in respect of the Contract and the Works.

On 23 September 2023, the adjudicator found that the design was not completed to RIBA Stage 4 and that WPL had provided a contractual warranty that the design had been completed to that stage such that ADI was entitled to damages for breach of contract.

On 1 May 2024, Adi commenced a second adjudication which challenged the gross valuation of a payment certificate together with claims for extensions of time and loss and expense. The total claim was c.£8.5m.

On 19 August 2024, the adjudicator decided that Adi was entitled to additional payment of c.£3m as the changes that partly flowed from the failure to complete the design to RIBA Stage 4 had been valued at £1 million less than allowed.

WPL issued a Part 8 claim seeking a declaration as to who was contractually responsible for completing the design of the Works to RIBA Stage 4, maintaining that Adi was responsible.

Decision

HHJ Davies declared that given the wording of the Contract it was Adi who was contractually obliged to complete all necessary works to complete the design of the Works.

In reaching the decision, HHJ Davies considered that the Part 8 claim was "entirely appropriate, and not remotely unfair" to Adi to grant the limited declarations sought, particularly as it determined the very issue which Adi referred to adjudication and would assist the parties with their ongoing disputes under the Contract. HHJ Davies observed that Adi had failed "to identify in any clear terms any particular facts included within its witness evidence [...] were relevant to the issue of contractual interpretation".

Comment

This judgment emphasises that Part 8 proceedings are a means of obtaining declaratory relief; where a party disputes the suitability of Part 8, it must raise its objection at an early stage. It is also a reminder that parties should ensure that their contract terms are clear and consistent to avoid disputes arising at a later stage. **CL**