



Technical

Quarterly Case Law Update (Article 71)

Date: 15 February 2022

Introduction

This Article considers 3 recent Decisions from the English Courts. The issues within these cases centre around:

1. An Abandoned Right to Liquidated Damages.
2. A Payment Notice Must Identify the Sum "*Genuinely Considered*" Due and Severability of an Adjudicator's Decision.
3. Reputational Damage.

An Abandoned Right to Liquidated Damages

In the case of *Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2972 (TCC), Mansion Place Limited (*the Employer*) was a Property Developer who engaged Fox Industrial Services Limited (*the Contractor*) for the refurbishment and extension of Student Accommodation.

Delays occurred on the Project which the Contractor claimed were, to a limited extent, the result of the COVID-19 pandemic and the national lockdown imposed and, to a greater extent, due to the Employer's failure to give timely possession of the site. The Employer believed the delays were due to a failure in progressing the Works, caused by insufficient labour and resources.

On 14 October 2020, a telephone conversation took place between a Director of the Employer and the Managing Director of the Contractor. During the conversation, the Employer agreed to forego any entitlement to Liquidated Damages and, in return, the Contractor agreed to forego any right to claim payment for Loss and Expense as a result of the delay in the Works.

On 22 October 2020, the Contractor submitted an Interim Payment Application whereby the Employer's Agent issued a subsequent Certificate. However, on 13 November 2020, the Employer served a Pay Less Notice and a number of Notices of Intention to Deduct Liquidated Damages.

The Contractor claimed that the agreement on 14 October 2020 prevented the Employer serving the Pay Less Notice and from seeking to deduct Liquidated Damages. The Employer stated that there was no such agreement. It did not accept that any agreement was made during the conversation and alternatively insisted, that to the extent reference was made to it foregoing its right to claim Liquidated Damages, this was a waiver which it was entitled to and did revoke.

The issue went to Adjudication. The Adjudicator decided that the conversation on 14 October 2020 had resulted in a binding agreement, to which the Employer had abandoned its right to claim or deduct Liquidated Damages. As a result, the £367,103.44 sum identified in the Employer's Agent's Certificate was due plus interest.

Proceedings commenced, to which the Employer sought a Declaration that there was no such agreement on 14 October 2020.

Contemporaneous records were reviewed in order for the Court to arrive at a decision, some of which included oral evidence and internal correspondence from the Contractor. The Court found that the Contractor honestly believed the conversation on 14 October 2020 formed a binding agreement, and it was not a case of misinterpretation of what was said coupled with wishful thinking on the Contractor's part.

The Court held that the Contractor was entitled to a Declaration that there was an agreement, whereby the Employer had agreed to abandon its entitlement to Liquidated Damages in exchange for the Contractor's abandonment of any right to a Loss and Expense claim.

Conclusion

This case shows how an oral agreement during an informal conversation, in this particular case a telephone conversation, bound the Parties to the said agreement. Whilst the conversation itself was not recorded, the Contractor's subsequent correspondence was sufficient to show it genuinely believed a binding agreement had been made. It demonstrates the importance of thoroughly contemplating a decision prior to agreeing it with another party. Had it not been for the oral agreement, the Employer would have been entitled to a substantial sum in Liquidated Damages. The Contractor too, may have easily found itself in a similar position had it wished to pursue a Loss and/or Expense claim, only to find the conversation prevented it from doing so.

A Payment Notice Must Identify the Sum "Genuinely Considered" Due and Severability of An Adjudicator's Decision

In the case of *Downs Road Development LLP v Laxmanbhai Construction (UK) Limited* [2021] EWHC 2441 (TCC) a dispute arose as to the operation of the payment regime for the Works.

Laxmanbhai Construction (UK) Limited ("*the Contractor*") submitted an Interim Application for Payment 34 on 26 February 2021, identifying a sum of £1,888,660.70 was due. The Employer's Agent issued Payment Notice 34 on 3 March 2021, identifying that a net amount of £0.97 was due. A subsequent Payment Notice, 34a, was issued on 9 March 2021 by the Employer's Agent indicating that a revised sum of £657,218.50 was indeed due. Downs Road Development LLP ("*the Employer*") paid the sum of £657,218.50 on 26 March 2021.

The Contractor referred the matter to Adjudication, seeking determination of "*the correct sum*" due under Interim Application for Payment 34. In its Adjudication Response, the Employer advanced a cross-claim identifying that the Contractor had failed to build a capping beam in accordance with the Contract Documents, causing a loss which it estimated to be £149,692.30.

The Adjudicator determined a sum due in Interim Application for Payment 34 that differed to both that which the Contractor or the Employer put forward. In his Decision, the Adjudicator addressed the capping beam contra-charge issue, believing it to be outside of his jurisdiction as the dispute related to the proper valuation of Interim Application for Payment 34. The Adjudicator stated that, whilst the Employer might have been able to bring a future claim for breach of contract in respect of the capping beam issue, the Employer's Agent made no mention of the matter in its evaluation and certification and it was therefore not part of the dispute.

The Contractor threatened to suspend works on 24 June 2021 if payment was not made, pursuant to the Adjudicator's decision. The Employer subsequently commenced Part 8 Claim Proceedings on 28 June 2021. These Part 8 Proceedings challenged the enforceability of the Decision, on the footing that the Adjudicator had failed to address a line of defence asserted by the Employer [the capping beam issue], and that such action of the Adjudicator constituted a breach of natural justice. The Employer also argued that the Decision was binding as to the

proper figure for the gross value of Interim Application for Payment 34, save for the deduction of the capping beam contra-charge. The Employer proposed that the Adjudicator's subsidiary decision on the sum due be severed, as this matter was untouched by any breach of natural justice which might have occurred when the Adjudicator did not consider the capping beam set-off.

The Contractor sought a Declaration in defence of the Part 8 Proceedings as to the invalidity of the Employer's Payment Notices contending that the Decision was enforceable, notwithstanding the Adjudication Decision, it was entitled to payment of the sum set out in the Interim Application for Payment.

In relation to whether Payment Notice 34 was valid, the Courts held that the Payment Notice was invalid as it did not accurately state the sum which the Employer "*genuinely considered*" to be or have been due, as required under Section 110A (2)(a) of the Housing Grants, Construction and Regeneration Act 1996 ("*the Act*"). The sum of £0.97 was not thought to be a realistic assessment of what the Employer believed was due. In order to allow it more time in assessing Payment Notices, it had adopted a method in previous payment cycles of sending initial Payment Notices of £1.00 or £0.97, as a holding measure to grant it more time. These were later followed by an accurate assessment of what was due. The Court found this course of action inappropriate. The Court also held that Payment Notice 34 did not set out the basis to which the sum was calculated, a requirement under the Act.

In respect of there being a breach of natural justice, the Court held that a breach had occurred rendering the Adjudicator's Decision unenforceable. It was considered that, as the Adjudicator had to determine the correct sum due under Interim Application for Payment 34, he did indeed have jurisdiction to review the Employer's cross-claim as this was a material issue which required consideration in arriving at the correct sum. The deliberate failure to address this material issue that was within the Adjudicator's jurisdiction therefore constituted a breach of the rules of natural justice.

With regard to the severance of the Adjudicator's Decision the Court held that, if an Adjudicator's Decision comprised a series of independent decisions, it is feasible that part of the decision could be severed. However, in this case, the Court held that the Adjudication concerned a single issue. The stages of the Adjudicator's reasoning were seen as part of a process, leading to the single conclusion and not a series of separate decisions. The Adjudicator set out his reasoning in addressing the sum due in Interim Application for Payment 34. Severing the Adjudicator's Decision in this case "*would turn a single decision with an accompanying explanation of reasoning into a series of separate decisions*". The Adjudicator's Decision could therefore not be severed.

Conclusion

This case highlights the significance of setting out the basis to which a Payment Notice is calculated. It showed that a Payment Notice is supposed to identify the sum "*genuinely considered*" due. The Court considered that just issuing a Payment Notices to the value of £1.00 or £0.97, in order for a party to satisfy its obligations in providing a Notice, was inappropriate and the basis to which a sum is calculated needed to be provided.

The case shows another example of the importance in providing Payment Notices within the time required under a Contract. The Contractor had sufficient grounds to adjudicate on a "*smash and grab*" basis due to the late issuing of Payment Notice 34a. There is a good chance it may have been successful in recovering the full sums it had claimed in its Application for Payment also, as the £0.97 sum identified in Payment Notice 34 did not provide a basis to which that sum was

calculated. In this particular case, the Contractor opted not to pursue a “*smash and grab*” Adjudication and chose to pursue what the Adjudicator believed was the “*correct sum*”.

The severance issue shows some of the difficulties in severing an Adjudicator’s Decision, especially when a claim of a breach in natural justice has been put forward. The sum awarded by the Adjudicator was not too unfavourable to the Employer and it tried to sever this positive decision from the breach of natural justice. This would have enabled it to then contra-charge the capping beam costs against this sum, leaving it in a more favourable position than Payment Notice 34a had put it in.

Reputational Damage

The case of *BDW Trading Limited v URS Corporation Limited & Anor* [2021] EWHC 2796 (TCC) required the Court to ascertain the scope of the Defendant’s Structural Designer duties. The Court considered several Preliminary Issues in a professional negligence claim relating to structural defects in buildings.

BDW Trading Limited (“*the Claimant*”) was the developer of a number of high-rise buildings, some of which had been constructed in 2005. A number of structural defects were discovered in 2019. The Claimant was no longer the building owner, however, it had undertaken investigatory and remedial works (at significant cost) whilst also insisting it had incurred losses from reputational damage due to negligent design by URS Corporation Limited & Anor (“*the Defendant*”).

As the Claimant was no longer the building owner, the Defendant argued that a full limitation defence from claims by the current owner could have been made by the Claimant. The Claimant assumed a voluntary loss by remedying the defects, in order to avoid damage to its reputation. Effectively, as any claim by the current owner was outside the period of limitation, the Claimant had failed to mitigate its losses and the remedial works were to protect its reputation and not because it was liable to the new owner.

The Preliminary Issues considered by the Court were as follows:

- a) Did the scope of the Defendant’s duties extend to the alleged losses?
- b) Were the Claimant’s alleged losses recoverable, in principle, as a matter of Law in Tort?
- c) In particular as to (b):
 - (i) Were the losses in contemplation of the Parties at the time of entering into the appointments?
 - (ii) Were the losses too remote?
 - (iii) Did the Claimant cause its own losses
 - (iv) Did the Claimant’s actions break the chain of causation?
 - (v) Did the Claimant fail to mitigate its losses?

In making its decision on the Preliminary Issues, the Court contemplated 6 questions identified by the Supreme Court in the case *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20:

1. Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence?
2. What are the risks of harm to the Claimant against which the Law imposes on the Defendant a duty to take care?
3. Did the Defendant breach his or her duty by his or her act or omission?
4. Is the loss for which the Claimant seeks damages a consequence of the Defendant’s act or omission?

5. Is there sufficient nexus between a particular element of the harm for which the Claimant seeks damages and the subject matter of the Defendant's duty of care as analysed at stage 2 above?
6. Is a particular element of the harm, for which the Claimant seeks damage, irrecoverable because it is too remote or because there is a different effective cause in relation to it or because the Claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid?

Due to the timeframes involved, much of the case revolved around the Defendant's limitation period for bringing an action. However, in relation to a Designer's duty of care extending to avoiding or preventing damage to reputational damage, it was considered whether the actual nature of the damage suffered is relevant, to the existence and extent of any duty, to avoid or prevent it.

The Court considered that a Designer generally is not under a duty to avoid or prevent reputational damage. It was held that losses for reputational damage are not recoverable from a Designer. A loss of this kind was considered to be, not only too remote, but a head of loss which a Designer does not owe a duty of care. However, the Court did consider that conventional damages resulting from losses incurred by the Claimant, for investigatory and remedial works, were not considered too remote.

Conclusion

Reputations may be damaged due to a negligent design undertaken by others. However, quantifying the potential full extent of losses of this nature may be problematic. A Company's standing and reputation could increase greatly in the future, compared to its current position, meaning the extent of any potential losses would be unknown whilst an appointment is under consideration. Not knowing the extent of future potential claims would have a negative effect on a Designer's ability to obtain Professional Indemnity Cover.

Whilst the case considered reputational damages were not recoverable, it did reaffirm that conventional damages resulting from losses incurred by the Claimant were not considered too remote, enabling claims of this nature to continue.