

How far does an interim valuation adjudication bind determination of the final account?

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I was lucky enough to be asked to give a recent case law update lecture for the Adjudication Society. At the end one of the delegates asked a very sensible question, namely to what extent do matters decided by an adjudicator concerning an interim valuation bind later valuations. It's an issue that I've been asked about before, and it's also one of those that can promote polarising debate, with some extreme positions taken.

Although there have been plenty of TCC judgments dealing with the question of what constitutes the "*same or substantially the same dispute*", I cannot recall one that deals directly with the question of the extent to which an adjudicator's decision concerning an interim valuation will bind the subsequent determination of the final account. That is until Mrs Justice O'Farrell handed-down her judgment in *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd*, which is the case I want to talk about this week.

Essential Living (Greenwich) Limited v Elements (Europe) Ltd

The parties' dispute arose out of a contract entered into in December 2016 for a project for a mixed use development at Greenwich Creekside London. The defendant (Elements) was engaged by the claimant (Essential) to design, supply, manufacture and install modular units for the project. The contract incorporated the *JCT Management Trade Contract, 2011 Edition* and was for a contract sum of £25.7 million.

Essential made a *Part 8 application* arising out of an adjudicator's decision dated 22 July 2019, which valued Elements' work up to its March 2019 application for payment. The sums valued by the adjudicator included amounts for *variations, remedying defects and liquidated damages for delay*. He concluded that Elements should pay Essential £1.8 million.

Practical completion was certified in May 2019 and, in October 2019, Elements submitted to the Construction Manager its documents for the final account process. There was then a delay until 2021, when a dispute arose over the binding nature of the July 2019 adjudicator's decision.

In October 2021, Essential issued its Part 8 application, seeking declarations including that:

- It was entitled to the sums the adjudicator awarded by way of liquidated damages and clause

8.7A damages and can retain those sums, unless and until the adjudicator's decision is overturned, modified or altered by the court.

- Elements was not entitled to any *extensions of time* beyond those already assessed and awarded by the adjudicator, unless and until those are overturned, modified or altered by the court.
- Nothing in clause 2.27.5.1, clause 4.6 or any other provision of the Trade Contract allows the construction manager to review, reopen, modify or alter the extensions of time, liquidated damages, clause 8.7A damages and valuations assessed and decided by the adjudicator.
- Unless and until the court overturns, modifies or alters the adjudicator's decision, Elements was not entitled to claim any;
 - *loss and/or expense* for extended on-site preliminaries;
 - loss and/or expense for factory production disruption costs;
 - loss and/or expense for preliminaries thickening based on alleged delay events that were considered and rejected by the adjudicator;
 - sums that differ from the values and/or basis already decided in respect of the variations the adjudicator considered and assessed; and
 - balconies testing costs and/or any associated overheads and profit.
- Elements is not entitled to re-adjudicate on any of the matters and claims the adjudicator decided and any subsequent adjudicator is bound by the adjudicator's decision on such matters and claims and/or lacks the requisite jurisdiction to reopen or determine such matters and claims.

Elements disagreed, and also argued these issues were unsuitable for a Part 8 application.

O'Farrell J's judgment

O'Farrell J summarised all of this rather succinctly (in my opinion). The court was being asked to decide the binding effect of the adjudicator's decision and its impact on subsequent contractual processes, including dispute resolution, in particular, the impact on:

- Claims for extensions of time, liquidated damages and delay damages.
- Evaluation of the Final Trade Contract Sum, including variations and loss and/or expense.
- Any subsequent adjudication.

In her characteristic detailed and thorough manner, she looked at the applicable legal principles (*paragraphs 49 to 56*), before considering in turn the issues she identified in summary form (*paragraphs 57 to 83*). Before setting out the judge's findings, it is worth setting out clause 2.27.5 which sets out the provisions for the construction manager's final review of the extensions of time:

"After the expiry of the Completion Period for the Works ... if this occurs before the date of practical completion, the Construction Manager may, and not later than the expiry of 12 weeks after the date of practical completion shall, by notice to the Trade Contractor ...

.1 fix a Completion Period for the works ... later than that previously fixed if in his opinion that is fair and reasonable having regard to any Relevant Events, whether on reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Trade Contractor under clause 2.26.1; or

.2 ... fix a Completion Period shorter than that previously fixed if in his opinion that is fair and reasonable having regard to any instructions for Relevant Omissions issued after the last occasion on which a new Completion Period was fixed for the Works ...; or

.3 confirm the Completion Period previously fixed."

O'Farrell J concluded that:

- The parties were bound by the adjudicator's decision on any dispute or difference determined therein until it is finally determined by the court or by subsequent settlement.
- The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision.
- The adjudicator's decision is not binding on the parties for the purpose of the Construction Manager's final determination of the Completion Period under clause 2.27.5, from which would flow any liability on the part of Elements for liquidated damages and finance charges.
- The adjudicator's decision is not binding on the parties for the purpose of determining the Final Trade Contract Sum.
- The adjudicator's decision is binding in respect of variations considered and assessed by the adjudicator, unless and until it is overturned, modified or altered by the court, or unless either party identifies a fresh basis of claim that permits such variation claim to be opened up and reviewed under the terms of the contract.
- It is a matter of fact and degree, requiring careful analysis of the evidence and argument on each disputed item, as to whether the adjudicator's decision is binding on any other discrete issue referred to and determined by the adjudicator, unless and until it is overturned, modified or altered by the court.
- It is a matter of fact and degree as to whether any matters that Elements might seek to refer to a subsequent adjudication are the same, or substantially the same, as the matters determined by the adjudicator's decision; absent any notice of adjudication before the court, it is not possible for this issue to be determined.

Judgment is essential reading

In my view, this case is essential reading for all users of adjudication because, while O'Farrell J's findings are not entirely surprising, they do provide clarity on the extent to which an adjudicator's decision concerning an interim valuation will bind the subsequent determination of the final account, both under the relevant contract and in future adjudication proceedings. This is the case regardless of the fact that the dispute arose under a JCT Construction Management Trade Contract, 2011 Edition, because other JCT forms such as the *Standard Building Contract, 2016 Edition* (SBC) contain similar contractual provisions.

With regard to the extension of time claim, it would appear to follow from O'Farrell J's findings that an adjudicator's decision concerning extension of time claims, which are pursued under clause 2.27.1 of the JCT Trade Contract (clause 2.28 of the SBC) during the course of a project, and which are subject to notice requirements and so on), will not normally bind the determination of a fair and reasonable extension of time under clause 2.27.5 of the Trade Contract (clause 2.28.5 of the SBC), which the Construction Manager (or Contract Administrator under the SBC) is required to determine within 12 weeks of the date of practical completion regardless of whether the Relevant Event has been notified.

I can absolutely understand why O'Farrell J made the findings she did, as there are clear and distinct contractual processes by which extensions of time can be granted under JCT contracts.

However, I can foresee the potential for issues in the future. For example, in the following scenario, the contractor appears to get a second bite of the cherry:

- A contractor submits a six-month extension of time claim for ten compensable events.
- The Contract Administrator rejects the claims under clause 2.28.1 of the SBC as the events were not Relevant Events and/or the delays were not critical.
- The dispute is referred to adjudication and the adjudicator agrees with the Contract Administrator and rejects the claim.
- The Contract Administrator then reaches the same conclusion during the clause 2.28.5 review of a fair and reasonable extension of time.
- The contractor refers the same six-month claim for the 10 compensable events to another

adjudication, asking another adjudicator to decide the same claim, but under a different sub-clause of the contract.

I also anticipate a reluctance on the part of contractors to refer extension of time disputes to adjudication until after the 12-week review has been undertaken (or should have been undertaken):

- Would a contractor really want to go to the expense of running an extension of time claim in an adjudication, with all the associated unrecoverable costs of lawyers and experts, if it could simply be ignored during the subsequent 12 week review and possible adjudication?
- Will that mean that contractors have to bear liquidated damages for longer, and/or be discouraged from claiming related (although not directly dependent) prolongation costs?

Perhaps that is something the JCT needs to address, as the same issues do not arise under other standard forms, such as NEC4.

O'Farrell J's distinction of the determination of the final account from the extension of time provisions also clearly accords with the contract and the fact that there is no means by which the Construction Manager (or Contract Administrator under the SBC) can reconsider or revalue variations that have been accepted and valued in accordance with the contractual procedure. The judge made it clear that variations that were agreed, or disputed and determined in the adjudication, would be "binding, pending any final resolution by litigation or settlement".

But what, I hear you ask, is the situation with loss and expense ascertained under the contract? After all, loss and expense is arguably no different to variations in that, once it has been ascertained and a decision made by an adjudicator as to its value, there is no means by which the Construction Manager (or Contract Administrator under the SBC) can reconsider or revalue it. Would it not also be binding in the determination of the final account and then any later adjudication?

The judge did not specifically refer to loss and expense, but she did make it clear that it is a matter of fact and degree as to whether each claim now advanced was decided in the adjudication, and that the Construction Manager (or Contract Administrator) would have to determine:

"... whether it is agreed under the Contract, determined in the Adjudication Decision and binding, or whether there is a fresh basis of the claim that requires or permits him to make a fresh assessment."

The judge also made it clear that a similar analysis would be required when it came to deciding whether discrete issues decided in the previous adjudication would be binding in future adjudications.

And finally

So the answer to the question posed in the title of this blog is, as is so often the case in law, "it depends". However, a key issue will be whether the contract in question permits or requires the contract administrator (or equivalent) to reconsider time or money claims, and, if it does, parties with an interim valuation adjudication might find that it is of limited relevance on the determination of the final account.



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