

## **Adjudication: Crystallisation and Severance**

The recent case of *Working Environments Ltd v Greencoat Construction Ltd* [2012] concerned two interesting issues of adjudication enforcement: the crystallisation of disputes and the severability of parts of an adjudicator's decision.

The background to this case was an extensive office fit out in Shaftesbury Avenue, London. The Defendant was the main contractor and the Claimant was engaged under a sub-contract to install mechanical services.

On 24 November 2011, the Claimant submitted an interim application claiming £488,153.45. On 2 December 2011, the Defendant issued a Payment Certificate and Notice of Withholding Payment. It claimed only £16,686.36 was due to the sub-contractor. The Defendant enclosed breakdowns of the sums certified. A number of items were listed, including "Liquidated Damages tbc".

Under the sub-contract, payment was due by 14 January 2012.

On 8 December 2012, a claims consultant for the Claimant wrote to the Defendant to say that the work had been undervalued and the sums set-off were incorrect. There was therefore a dispute between the parties on value and set-off and a notice of adjudication would follow.

The Claimant issued its notice of adjudication on 14 December 2011. An adjudicator was appointed but the Defendant argued that he had no jurisdiction, on the basis that no or no material dispute had crystallised, as the date for payment of 14 January 2012 had not yet accrued. The adjudicator rejected the jurisdictional challenge and proceeded with the adjudication.

On 5 January 2012, the Defendant issued a Withholding Notice that listed twelve items. The first nine items had been raised previously. The tenth item, liquidated damages, was stated to be £120,000 and the final two items were new.

The adjudicator sought confirmation from the parties on the extent of his jurisdiction and the Defendant declined to agree to extend his jurisdiction to consider the Withholding Notice. The adjudicator issued his decision, in which he addressed all twelve items of the Withholding Notice, on the basis that the scope of the adjudication included the intended set-off of these items from the monies otherwise due on 14 January 2012. He rejected all but two of the items for lack of substantiation.

The Claimant issued proceedings to enforce the decision. The Defendant maintained the same challenge as before to the jurisdiction of the adjudicator. Furthermore, the adjudicator had no jurisdiction to deal with any of the twelve items in the Withholding Notice or at the very least no jurisdiction to deal with items ten to twelve because they were not part of any crystallised dispute.

Akenhead J held that the Claimant had confirmed that it did not accept the Defendant's assessment on 8 December 2011. It was clear at that point that there was a crystallised dispute. The certificate certified what was due for payment some weeks later but there was a dispute as to whether the certified value was correct.

The ambit of the dispute included the first nine items in the Withholding Notice. The Defendant could not withdraw these nine items from the adjudicator, as they were clearly part of the crystallised dispute referred to adjudication.

In respect of the tenth item, the liquidated damages, this was something the Defendant had earlier identified as a cross claim to be set off against what would otherwise be payable and was also part of the crystallised dispute, albeit the quantum had not previously been identified.

The eleventh and twelfth items, however, were not within the jurisdiction of the adjudicator. These two items were not part of the crystallised dispute, as they had not been mentioned before they appeared in the Withholding Notice of 5 January 2012. The adjudicator therefore had no right to adjudicate upon these two items.

The judge went on to consider if it was possible to sever the decision, to remove the parts dealing with items where the adjudicator lacked jurisdiction. The judge approached this by treating items eleven and twelve as two further disputes. In effect, the adjudicator had dealt with more than one dispute. Guided by the comments of the court in *Cantillon v Urvasco*

[2008], the successful jurisdictional challenge to the parts of the decision on the further disputes did not undermine the validity and enforceability of the bulk of the decision that dealt with the crystallised dispute.

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