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Willmott Dixon Construction Ltd v Robert West Consulting Ltd [2016] EWHC 3291 (TCC)

Willmott Dixon Construction (**Willmott**) was appointed as the contractor in relation to a project at 5 and 7, Mossbury Road (**the Property**). Willmott appointed Robert West Consulting (**Robert West**) to carry out the underpinning of a party wall shared between the Property and 9, Mossbury Road (**the Neighbouring Property**).

The contractor alleged that due to Robert West's defective design, damage was caused to the party wall and Willmott subsequently suffered loss and damage. Robert West made allegations that Toureen, Willmott's independent sub-contractor, were liable for the damage via contributory negligence for works they had carried out in and around the party wall.

Once proceedings in the High Court began, Willmott issued a request for further information to Robert West. Robert West provided initial responses in December 2015. A year later, Robert West sought to amend the responses given in 2015 to add a new allegation that purported to make Willmott vicariously liable for Toureen's work. Willmott refuted the application to amend the responses.

For the amendment to be accepted, it had to be demonstrated that the argument proposed had a real prospect of success. In considering this, the two issues for the High Court dealing with this preliminary issue were:

1. Did Willmott owe a non-delegable duty of care in respect of the underpinning works carried out by Toureen?

2. If so, could Robert West rely on that duty under its allegations of contributory negligence?

The general rule is that a main contractor is not liable for the negligence of its independent sub-contractor. There are some narrow exceptions to this general rule which have been considered in various case law. In this case, Robert West sought to rely upon the exception in cases where the sub-contractor is entrusted with work which involves the withdrawal of support from neighbouring properties.

The Judge referred to Lord Sumption's judgment in *Woodland v Essex County Council* where he stated "*The expression 'non-delegable duty' has become the conventional way of describing those cases in which the ordinary principle [of vicarious liability] is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others.*"

In relation to the first issue, the Judge confirmed the position that a contractor cannot be vicariously liable for its independent sub-contractor. He acknowledged that a non-delegable duty of support exists between owners of neighbouring land but he could *"see no reason to extend this non-delegable duty to main contractors who have engaged independent sub-contractors…such a duty would mean that, provided only that the works in question can be shown to be connected with the removal of support to neighbouring land, main contractors would be potentially liable 'for procuring the careful performance of work delegated to independent sub-contractors'..."*. The Judge was not persuaded that any authority existed to impose such a wide ranging obligation.

Moving on to the second issue, the Judge went on to confirm that the alleged non-delegable duty of care was no relevance to Robert West's allegations of contributory negligence. In any event, the duty of care is owed to the occupier of the property and not Robert West. The Judge would not extend liability for the contractor to third parties due to the actions of its sub-contractor as to do so would be a *"major extension of the law"*. Subsequently, it was held that the proposal to amend the responses was refused as the amendments had no realistic prospect of success.

Spartafield Ltd v Penten Group Ltd [2016] EWHC 2295 (TCC)

In 2013, Spartafield Ltd (**Spartafield**) selected Penten Group Ltd (**Penten**) to carry out demolition and building works in relation to a property in London. The intended form of building contract was identified in the tender as

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Trowers & Hamlins

Trowers & Hamlins LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

the JCT Intermediate Building Contract with Contractor's Design (**the JCT ICD**).

A value engineering exercise was required to reduce the proposed contract sum. To avoid impacting on the works programme, the parties agreed to enter into a letter of intent.

Initially, the parties proposed a Letter of Intent (**LoI**) with limited scope (design and pre-construction activities only) and with a financial cap of £15,355. However, discussions continued and by the time the parties signed the LoI in July 2013, it authorised works up to the sum of £1,000,000 (almost the entire Contract Sum).

Works began on 9 September 2013 and the parties began to discuss concluding the JCT ICD. In December 2013, the evidence suggested that there were only "minor comments" outstanding on the JCT.

By 1 April 2014 and at the time of the 10th site meeting, the parties had still not entered into the JCT ICD. By May 2014, the only outstanding matter under the contract documents was the procurement of collateral warranties. The contract sum had been agreed as £1,150,000. At the 13th site meeting in late May 2014, hard copy sets of the JCT ICD were provided to Penten for execution. Penten agreed to review the documents to ensure that they reflected the terms that were understood to have been agreed.

However, by this point in the programme, issues were beginning to arise with the works and it appears that Penten's director was advised by his QS to withhold signing the JCT ICD until issues concerning delay costs were resolved.

Despite a number of discussions between the parties regarding the execution of the JCT ICD, by 9 March 2015 the JCT ICD was still not executed by Penten. Penten wrote to Spartafield informing them that its costs incurred had exceed the value authorised under the Letter of Intent. Penten subsequently wound down its work, relying on the Letter of Intent. Spartafield resisted Penten's actions on the grounds that it was only obliged to pay for works certified under the JCT ICD and that cessation of work was unlawful under the JCT ICD.

In October 2015, the parties entered the first of four adjudications (which were subsequently criticised as "serial adjudication"). Following two adjudications ordering payment under the Letter of Intent in Penten's favour, Spartafield began Part 8 proceedings in the High Court for the adjudicators' decisions to be set aside and confirmation that the parties were working from the JCT ICD despite the lack of formal execution.

The Court drew a distinction between the clauses that were critical to agreeing a form of contract and those that did not act as a precondition to a formal agreement. The Judge stated that even though the Letter of Intent *"was not the easiest of documents to construe"* he did not *"consider that it imposes a condition that the contemplated replacement contract must be the subject of formal execution."*

The Judge went on to state that he was *"quite satisfied that it is perfectly possible to contract on the basis of a JCT standard form despite it not being executed in the matter contemplated in the Articles, at least where there is no additional requirement for execution under seal."*

The Court therefore concluded that the works were governed by the JCT ICD, and this had superseded the LoI; despite the fact the JCT ICD had not been formally executed by both parties.

Source: Fotolia.

Bouygues (UK) Ltd v Febrey Structures LTD [2016] EWHC 133

In 2015, Bouygues sub-contracted works to Febrey Structures (**Febrey**) in relation to a project at the University of Bath. The sub-contract included a list of dates in Appendix 10 which stipulated when Febrey was to issue its payment application.

Works began by the 23 March 2015 and Febrey submitted its first payment application on this date in accordance with Appendix 10. Payment applications continued and there were no material disputes until November 2015 following Febrey's payment application dated 23 October 2015 for £144,582.06.

Appendix 10 stated that:

1. The Payment Application was due on 23 October;
2. Valuation date was 2 November;
3. Due Date for Payment was 16 November;
4. Payment Notice was due on 23 November;

5. Pay Less Notice was due on 20 November; and

6. The Final Date for Payment was 23 November.

In preceding months, the due date for Payment Notices was recorded as the 20th of the relevant month.

Bouygues failed to serve any notices due on or before 20 November 2015 but instead served a Payment Notice on 23 November 2015 which stated that Febrey was entitled to -£2,041.27. Febrey advanced that Bouygues had failed to comply with its Payment Application and was entitled to payment.

When Bouygues failed to pay the sums requested under Febrey's Payment Notice, Febrey began adjudication proceedings on the basis that Bouygues' Payment Notice did not comply with the Housing Grants, Construction and Regeneration Act 1996 (**the Act**) as the deadline for service was more than five days after the due date. Therefore, Bouygues had served its notice out of time under the Act.

The adjudicator found in Febrey's favour and Bouygues sought a declaration regarding the payment provisions.

The Court identified that, as the due date for the Payment Notice was more than five days after the Due Date for Payment, and the Pay Less Notice deadline was before the Payment Notice deadline, Appendix 10 did not comply with the Act.

The Act provides that where payment provisions are non-compliant; the relevant provisions are replaced by the equivalent dates from the Scheme for Construction Contracts. However, applying the scheme dates did not produce a workable solution. Bouygues therefore suggested two alternative methods of reaching compliance. The first was to simply change the Final Date for Payment, the Pay Less Notice and Payment deadlines. The second was to follow *Manor Asset Limited v Demolition Services [2016] EWHC 222* (**Manor Asset**) and allow the Pay Less Notice to be served anytime up until the Final Date for Payment.

The Court rejected both of these suggestions and said the reference to 23 November 2015 was 'an obvious error' which should have read 20 November 2015 in line with the other months. The Court refused to follow Manor Asset and imply terms into the sub-contract as *"to do so would be contrary to what I have construed as the express provisions of the Contract."*

Bouygues' Payment Notice was deemed to be served out of time and was therefore invalid.

ZVI Construction Co LLC v University of Notre Dame (USA) in England [2016] EWHC 1924 (TCC)

TJAC Waterloo LLC (**TJAC**) had entered into a Development Agreement with the University of Notre Dame (**UND**) for the sale and purchase of property at Conway Hall in London.

A condition of the Development Agreement was that works would be carried out to the property. It was agreed that a company named ZVI Construction Co LLC (**ZVI**) would carry out the required works and ZVI was also made a party to the Development Agreement between TJAC and UND. Additionally, a duty of care agreement was put in place between ZVI and UND.

The issue central to this case concerned the operation of a dispute resolution clause which referred any disputes arising between the parties in relation to their rights, duties and obligations under the Development Agreement to expert determination (clause 17.1). In addition, the Development Agreement contained a further clause that any dispute or difference between the parties in relation to the meaning or construction of the Development Agreement would be referred to arbitration.

The building works required pursuant to the Development Agreement were carried out by ZVI between November 2010 and August 2011. The sale of the property was then completed in late 2011. In 2014, UND brought a claim against ZVI and TJAC that the work carried out by ZVI was defective. The claim presented by UND referred to numerous breaches of the Development Agreement in respect of the defective works and referred the matter to expert determination pursuant to clause 17.1 of the Development Agreement. ZVI responded to the allegations in respect of the defective works and the alleged breaches of the Development Agreement. An expert was subsequently appointed and the formal determination process began. ZVI actively participated in the expert determination process and at no point during this procedure made any contention that the expert did not have jurisdiction to determine the dispute against ZVI; nor did ZVI argue that it did not in fact owe any duties to UND under the Development Agreement.

The expert determination held that TJAC/ZVI were liable to UND for many of the defects. The sum that was estimated as recoverable in damages by UND was in the region of US$9m. Due to concerns held by UND as to the ability of TJAC and ZVI to pay the US$9m in compensation, they obtained a freezing order from a court in the US in relation to the assets of ZVI and TJAC.


Source: Fotolia

Following this, ZVI raised a number of arguments for the first time. ZVI argued that, firstly, they were merely a "nominal" party to the Development Agreement. Consequently, they argued that any claim that UND wished to make against ZVI should have been brought under the duty of care agreement that had been entered into separately to the Development Agreement. (Incidentally, the duty of care agreement referred any disputes to the English courts.) Secondly, ZVI sought to argue that the expert that had been appointed pursuant to the expert determination procedure in the Development Agreement did not have jurisdiction to decide the defects dispute as against ZVI. They argued that the expert only had jurisdiction to determine matters between UCD and TJAC. ZVI sought an injunction prevent UND from enforcing the independent expert's determination.

The UK court held that it was clear from the facts that ZVI had participated fully in the expert determination process, without reservation. They had therefore submitted to the expert's jurisdiction. In particular, the Court noted that "*not only did ZVI not advance any reservation* [to the expert determination process], *it took an active part in the procedure from about the middle of December 2014 to June 2015*". Therefore the Court went on to state that "*having impliedly agreed to submit the dispute as to whether there were defects for which ZVI were responsible under the Development Agreement, ZVI is now bound by clause 17.1.1 which renders the expert's determination final and binding on it. There is nothing unfair or illogical about this. ZVI had every opportunity to argue these points but for whatever reason it either chose not to deploy those arguments or did not consider them*".

Consequently, given that ZVI was found to have submitted to the expert determination process, the court was not required to go on to consider whether the expert did in fact have jurisdiction to decide the defects dispute as between UND and ZVI.

Balfour Beatty Regional Construction Ltd v Grove Developments Limited [2016] EWCA Civ 990

On 11 July 2013, Balfour Beatty Regional Construction Ltd (**Balfour Beatty**) and Grove Developments Ltd (**Grove**) entered into a JCT D&B Contract with bespoke amendments including amendments to the payment provisions by agreeing a schedule of periodic payment dates (the **Contract**). The project was to design and construct a hotel and serviced apartments adjoining the O2 Complex at Greenwich for the Contract Sum of £121 million (the **Works**). The Date of Completion was 22 July 2015.

The parties opted for a stage payment arrangement in the form of an agreed Schedule of 23 valuation and payment dates covering the period from September 2013 to July 2015.

The project ran into delay. On 21 August 2015, Balfour Beatty issued an interim application for payment 24 (IA 24) for the value of £23 million plus VAT. Up to 21 August 2015, the two parties had been corresponding regarding the timing of any future applications for payment (after IA 23); the timing of the date for final payment; and, Grove's Payment and Pay Less Notices. Grove served Balfour Beatty with a Pay Less Notice in response to Balfour Beatty's IA 24 on 15 September 2015.

Balfour Beatty argued that it had a contractual right to make IA 24, or any subsequent application, and to be paid in respect thereof. It also argued that Grove's Pay Less Notice issued on 15 September 2015 was issued late.

Grove argued that Balfour Beatty had no contractual right to issue IA 24, so the payment notice regime was irrelevant.

The High Court held that Balfour Beatty had no contractual right to make or be paid in respect of IA 24 or any subsequent application (as covered in our July 2016 update). It followed that if the parties entered into an agreement about the amounts of the payments and the intervals at which, or circumstances in which, they became due, the mere fact that the Contract did not provide for interim payments covering all of the work under the contract, was no reason to import the provisions of the Scheme (s109-110 of Housing Grants, Construction and Regeneration Act 1996 which implies the Scheme of Construction Contracts 1998) to supplement their agreement so as to generate interim payments covering the work that the agreement did not cover.

Balfour Beatty appealed to the Court of Appeal.

Despite one dissenting judgment, the Court of Appeal has upheld the decision of the High Court. The

evidence put before the Court was not sufficient to identify a subsequent agreement between the parties relating to interim payments after IA 23. Contractors should therefore continue to ensure payment schedules allow for interim payments to continue beyond a prescribed set of dates if the contractual completion date is delayed.

Kilker Projects Limited v Rob Purton (trading as Richwood Interiors) [2016] WLR(D) 548

Kilker Projects (**Kilker**) instructed Rob Purton (**Purton**) to carry out joinery works at the Dorchester Hotel, London. As the form of the contract was an oral construction contract, the Scheme for Construction Contracts 1998 (**the Scheme**) applied.

A dispute arose as to the value of the final account and this dispute was subsequently referred to adjudication by Purton. Purton submitted that as Kilker had failed to serve a valid payment notice and/or pay less notice, the amount applied for should be paid. The adjudicator agreed with Purton and decided that as no payment or pay less notice had been served, Kilker was to pay Purton's final account in full. Kilker duly paid the full amount.

Unhappy with the decision, Kilker commenced a second adjudication in which it sought a declaration from the second adjudicator as to the "true value" of the final account. Kilker also sought a declaration for repayment of any sums that had been over-paid to Purton. The adjudicator decided that Purton had to repay £55,676.84 to Kilker plus the adjudicator's fees and expenses.

Purton did not pay the amount due pursuant to the second adjudicator's decision. Purton resisted payment on the grounds that the second adjudicator lacked jurisdiction to decide the true value of the final account. Purton relied on the case of *ISG Construction Ltd v Seevic College [2014] EWHC 4006 (TCC)* (**ISG**) and argued that the first adjudicator had already decided the value of the final account in the first adjudication and therefore the second adjudicator did not have jurisdiction to decide the value of the account again. Purton said that based on the decision in ISG, Kilker was deemed to have agreed the value in account when it failed to serve the required notices.

Kilker issued adjudication enforcement proceedings in the Technology and Construction Court. Kilker relied on the judgment in *Harding v Paice [2015] EWCA Civ 1231* and argued that whilst it is true that the paying party has to pay up following a failure to serve the correct notices, after making that payment, it is entitled to refer a dispute to adjudication concerning the merits of the valuation itself.

Ms Finola O'Farrell QC (**O'Farrell**) rejected Purton's submissions and distinguished the application of ISG; ISG related to jurisdiction where the parties had referred a dispute relating to interim accounts to adjudication. O'Farrell distinguished between interim and final accounts on the basis that when dealing with interim accounts, "*any errors can be corrected in subsequent interim or final accounts."* However, when the issue relates the value of a final account, "*either party is entitled to have the ultimate value of the contract sum determined in a subsequent adjudication."* Thus, a party who fails to serve the required notices in time and is ordered to pay a final account can refer the true value of that final account to adjudication in an attempt to seek repayment.

O'Farrell also recognised the structure the Scheme provided for processing interim payments; but rejected submissions that the Scheme had an impact on the whole contract sum agreed between the parties from the outset.

The Court subsequently enforced the second adjudicator's decision against Purton.

Lulu Construction Ltd v Mulalley & Co Ltd [2016] EWHC 1852 (TCC)

In an adjudication decision dated 12 August 2015, Mulalley & Co (**Mulalley**) were ordered to pay the claimant, Lulu Construction (**Lulu**) £240,324.77 within seven days.

On 24 August 2015, Mulalley paid £182,863.80. Lulu sought enforcement proceedings against a sum of £57,460.97 which comprised of accrued interest and sums described as 'debt recovery cost' (**the Costs**). These were the costs of the adjudication.

Mulalley resisted payment of the Costs on the grounds that the adjudicator lacked jurisdiction to make the declaration for those funds as "*it was not part of the dispute referred to him."* Lulu's case was that it was entitled to the Costs under s1 and s5A of the Late Payment of Commercial Debts (Interest) Act 1998.

The Judge, Mr Jonathan Acton-Davis QC, upheld Lulu's claim as it was "*hardly surprising that the claim for debt recovery costs was not referred to in the Notice of Adjudication"* as it was Mulalley, the paying party, who brought the adjudication for a declaration regarding the value of Lulu's claim under the contract.

Applying the judgment of Akenhead J in *Allied P&L Limited and Paradigm Housing Group Limited,* the Judge held that the costs of running the adjudication *"are clearly connected with and ancillary to the referred dispute and must properly be considered part of it"* and that the adjudicator did in fact have jurisdiction to decide

on the Costs element of the dispute. Mulalley was therefore ordered to pay the amount pleaded to Lulu.

Howmet Ltd v Economy Devices Ltd [2016] EWCA Civ 847

In 2005, Economy Devices Limited (**EDL**) supplied Howmet with thermolevels which were to be used in tanks in the Howmet factories. The tanks contained chemicals and were heated to very high temperatures and therefore constituted a fire risk. The purpose of the thermolevels was to monitor the temperature of the liquid in the tanks and to automatically switch off the heater if the water fell to below a certain level.

Within two years of the thermolevels being installed, two incidents occurred where the thermolevel had failed to turn the heater in the tank off. On both occasions a fire had broken out but had caused no damage to the factory.

In 2007, Howmet purchased a 'float switch' which would act as an alternative to the thermolevel and would turn off the heather in the tank if the temperature increased. Before the float switch could be installed, a third fire broke out and caused twenty million pounds of damage to Howmet's factory.

Howmet sued EDL in negligence and/or for breach of duty. Howmet submitted that only those employees towards the bottom of the hierarchy knew of the fault and that Howmet as an entity could not be associated with that knowledge as it had not been communicated to senior staff.

The High Court held that while EDL had breached its duty of care, as the employees knew of the faulty thermolevel, had stopped relying on the thermolevel and were exercising extra vigilance, EDL could not be held as causing the loss incurred. The Court disagreed with Howmet's submission regarding its knowledge. The Judge commented that even if his decision on causation was incorrect, Howmet would be 75% liable in contributory negligence for the loss caused in any event.

Howmet subsequently appealed to the Court of Appeal which upheld the High Court's decision. The Court stated that EDL did not owe Howmet a continuing duty of care and "*if one person in the corporate hierarchy becomes aware of a dangerous situation...the company cannot rely upon ignorance of its more senior managers*."

The claim in negligence failed because either EDL owed no continuing duty to Howmet by the date of the 2007 fire or alternatively, any breach of duty by EDL in respect of the thermolevel was not causative of Howmet's loss.

While the Court dismissed Howmet's appeal, the Court had alternative views on the comments made by the High Court in relation to contributory negligence. While Jackson LJ and Sir Robert Akenhead adopted the view that a failure to manage a defect appropriately would break the chain of causation for the claimant, Arden LJ agreed with the High Court that a failure to rectify a defect would in fact be a failure to mitigate loss and lead to the 'innocent party' being apportioned with liability under the Contributory Negligence Act 1945.

Amey Wye Valley Ltd v The County of Herefordshire District Council (Rev 1) [2016] EWHC 2368 (TCC)

In 2003, The County of Herefordshire District Council (**Herefordshire**) entered into a ten-year Service Delivery Agreement (**the SDA**) with Jarvis Services Ltd (**Jarvis**) for the repair and maintenance of the highways in Herefordshire. Amey Wye Valley Ltd (**Amey**) later took control of Jarvis in 2007.

The SDA incorporated Option A of the Engineering and Construction Contract (2nd edition 1995) and stated at Paragraph 4.3 of Schedule 6 "until such time as the Parties agree a mechanism to adjust prices in line with actual cost fluctuation via open book accounting, the proportions used to calculate the Price Adjustment Factor are…"

In 2005, the parties fell into dispute regarding price adjustments to reflect inflation under the SDA. This was resolved by a joint statement between the parties which included a 'VOP3' to state how inflation would apply.

The parties fell into dispute regarding how the VOP3 should apply and Amey began adjudication proceedings. The first adjudicator (**Mr Entwistle**) was asked to decide what the VOP3 meant but was not asked to provide the financial consequences of his decision. Neither party served a Notice of Dissatisfaction against Mr Entwistle's decision. Amey, however, then referred the issue to a second adjudicator (**Mr Molloy**) to decide the financial consequences of the first adjudicator's decision.

Source: Fotolia

Mr Molloy decided that Amey were to repay Herefordshire £9,500.632.43. When Amey failed to pay, Herefordshire sought enforcement proceedings in the Technology and Construction Court. Amey concurrently sought a declaration to strike out Herefordshire's reliance on Mr Molloy's decision on the basis that Mr Molloy had no jurisdiction as he did not follow the decision of Mr Entwistle.

The parties both acknowledged that Mr Molloy had made an error in calculating the sums from Amey to Herefordshire. However, the Judge was reluctant to criticise Mr Molloy's mistake as *"errors of fine detail are part of the process effectively accepted by Parliament as a consequence of the process of adjudication. The 'right' answer is secondary to the parties having a rapid answer."*

The Judge rejected Amey's submission regarding Mr Molloy's jurisdiction and confirmed that Mr Molloy had jurisdiction to interpret Mr Entwistle's decision and consider the "*terms, scope and extent of the dispute previously referred and the…earlier decision."* This was on the basis that Mr Molloy was not asked to decide the same dispute as Mr Entwistle. Mr Entwistle looked at principles whilst Mr Molloy looked at the financial consequences. The Judge refused to sever the calculation Mr Molloy used, or consider how he came to the final figure, and went on to enforce Mr Molloy's decision against Amey as it was not within the Court's power to amend errors of fact.

Paice & Anor v Harding (t/a MJ Harding Contractors) [2016] EWHC B22 (TCC)

In 2013, Harding was instructed to carry out works on two residential properties under a JCT Intermediate Building Contract 2011 (**the Contract**). Less than six months after Harding started on site, the relationship between Paice and Harding broke down and the parties both attempted to terminate the contract. The Contract contained an adjudication agreement.

Following three successful adjudications brought by Harding in relation to payment of its account, Paice sought a declaration from the fourth adjudicator regarding the value of the works completed upon a termination account. Unhappy with the fact that the fourth adjudication had commenced, Harding sought an injunction to prevent the fourth adjudication from continuing. The High Court and the Court of Appeal declined to grant the injunction.

Mr Sliwinski acted as the fourth adjudicator and ordered Harding to repay £325,484.00 and the adjudicator's fees of £15,487.50. When Harding failed to pay, Paice began enforcement proceedings in the High Court. The proceedings were decided in Harding's favour on the grounds that there was evidence of bias from the adjudicator. Harding subsequently issued a formal complaint with the Royal Institute of Chartered Surveyors (**RICS**), Mr Sliwinski's professional body. Mr Sliwinski was subjected to a disciplinary hearing and the matter was disposed of by way of a confidential consent order.

In order to obtain repayment of the sums paid under the first three adjudications, Paice commenced a fifth adjudication seeking a decision on the true value of the account. Paice sought a declaration from the fifth adjudicator regarding the value of the works completed. Mr Linnett acted as the fifth adjudicator and ordered Harding to repay £296,006.44 to Paice.

Harding failed to pay the sums due and Paice issued enforcement proceedings which were resisted by Harding on the grounds that Mr Linnet's decision was a) delivered out of time and b) bias as Mr Linnet had provided a character reference for Mr Sliwinski, the fourth adjudicator, in the RICS investigation.

The High Court confirmed that the test for apparent bias is "*whether an informed and fair minded observer, with knowledge of all the relevant circumstances, would conclude that there was a real possibility that the tribunal was biased."* Applying this test to the current circumstances, the Court held that *"Mr Linnett's view of Mr Sliwinski could not reasonably be considered to impact on the exercise he was required to undertake in the adjudication."*

The Court disagreed with the submission that Mr Linnet's decision was delivered out of time. While Harding had made some reservations about the Mr Linnet's jurisdiction to act as adjudicator, Harding had not stated the position regarding extensions of time if Mr Linnet was found to have jurisdiction. As the Court held Mr Linnett did have jurisdiction, his decision was communicated within the agreed period and the submissions regarding time limits failed. The Court subsequently ordered Harding to pay the sums declared under Mr Linnet's adjudication.

For more information please contact

Victoria Ball
Senior Associate
t +44 (0)121 214 8837
e vball@trowers.com

Tanya Chadha
Associate
t +44 (0)121 214 8849
e tchadha@trowers.com