

A SURPRISING CONCLUSION? THE IMPACT OF THE NOTICE OF COMPLETION OF MAKING GOOD IN THE DUE DATE OF FINAL ACCOUNTS WHEN NO DEFECTS HAVE BEEN NOTIFIED UNDER JCT CONTRACTS

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"A Notice of Completion of Making Good, under a modified JCT 2011 Design and Build Contract, was not necessary when an employer had not instructed the contractor to make good any defect during the defects liability period, with direct implications for the date on which the final account became conclusive."

In a significant and surprising recent decision, the English Technology & Construction Court (TCC) has concluded that a Notice of Completion of Making Good, under a modified JCT 2011 Design and Build Contract, was not necessary when an employer had not instructed the contractor to make good any defect during the defects liability period, with direct implications for the date on which the final account became conclusive. As a rare example of a case where an adjudicator was found to have breached the rules of natural justice, the decision in *CC Construction Ltd v Mincione*¹ is also a warning for adjudicators on the importance of considering carefully all defences raised by the parties.

BACKGROUND

Mr Raffaele Mincione (the "Employer") engaged CC Construction Ltd (the "Contractor") to design and build the shell and core of a new house in Knightsbridge pursuant to the terms of a modified JCT 2011 Design and Build

Contract (the "Contract").

The Contractor sent the Employer its "Final Statement" (the final account) on 5 October 2020 but there was some suggestion that it was not received, so it was sent again on 1 December 2020 and received by the Employer on 4 December 2020. The Final Statement showed a balance of nearly £480,000 owed to the Contractor. However, in a letter of 18 December 2020, the Employer disputed the content of the Final Statement and contended that the Contractor had failed to take into account liquidated delay damages in excess of £340,000.

On 13 January 2021, the Employer went on to issue a Notice of Completion of Making Good (a certificate confirming that all defects had been remedied) in the standard JCT form, notwithstanding the fact that he had not delivered a schedule of defects, nor issued instructions for rectification works, during the defects liability period which had expired on 15 November 2020. On 10 February 2021, the Employer further served a payment notice asserting an overpayment of £250,000 (the "Payment Notice").

A dispute arose as to the due date for final payment, the finality of the Final Statement and whether the Payment Notice was served too late. Clause 4.12.5 of the Contract provided that the due date for final payment would be one month after the last of the following:

1. the end of the Rectification Period in respect of the Works ...;
2. the date stated in the Notice of Completion of Making Good under clause 2.36² ...; or
3. the date of submission to the other Party of the Final Statement or, if issued first, the Employers Final Statement....

Pursuant to clause 4.12.6, the sums set out in the Final Statement would become conclusive on the due date, "subject to clause 1.8.2" (which concerned the effect of adjudication or arbitration proceedings), unless notice disputing the Final Statement had been given prior to the due date.

The Employer contended that the due date was 13 February 2021 (i.e. one month after the Notice of Completion of Making Good) and that its letter of 18 December 2020 and Payment Notice prevented the Final Statement from becoming conclusive. The Contractor, on the other hand, contended that the due date was 4 January 2021 (i.e. one month after the Employer received the Final Statement and before the Employer's Payment Notice) because, in the absence of any notification of defects, there was no contractual basis for the Notice of Completion of Making Good, and that the letter of 18 December 2020 was not effective in preventing the Final

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Statement from becoming conclusive.

The matter was referred to adjudication on 16 February 2021 and, in due course, an award was made in the Contractor's favour. While the Employer had argued that it was entitled to set off the liquidated damages claim by way of a legal set-off, the adjudicator found that liquidated damages was not part of the dispute he had been asked to decide and so it could not "be raised in set off in these circumstances".

The Employer commenced Part 8 proceedings before the TCC seeking declarations as to the due date and the finality of the Final Statement, and the Contractor commenced a Part 7 claim to enforce the adjudicator's decision.

DECISION

Due date

Rejecting arguments that a special rule of interpretation applied to standard form contracts, such as the JCT contract used in this case, HH Judge Eyre QC applied normal principles of construction and agreed with the adjudicator that the Notice of Completion of Making Good was not a notice for the purposes of clause 4.12.5.2 because it was not issued pursuant to clause 2.36.

The Employer had not provided a schedule of defects, nor issued instructions to remedy any defect, and the judge therefore considered that clause 4.12.5.2 could not come into operation as there was no scope to issue a Notice of Completion of Making Good under clause 2.36. As a consequence, the 13 January 2021 Notice of Completion of Making Good was irrelevant for the purposes of determining the due date.

Although HH Judge Eyre QC recognised that the due date would appear to be 4 January 2021, he declined to make any declaration as this was not sought by the Contractor.

Finality of the Final Statement

However, HH Judge Eyre QC concluded that the letter of 18 December 2020 was effective and operated for the purposes of clause 4.12.6 to prevent the Final Statement from becoming conclusive.

The Contractor had argued that the 18 December 2020 letter was ineffective either because (i) it was not a dispute to the Final Statement dated 1 December 2020, as it referred to the original Final Statement sent on 5 October 2020; or (ii) given the reference to clause 1.8.2 in clause 4.12.6, the Employer had to give notice of dispute **and** commence proceedings before the due date, which had not been done.

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HH Judge Eyre QC considered how the 18 December 2020 letter would have been understood in the particular circumstances by a reasonable recipient aware of the surrounding facts and took the view that a reasonable recipient would have been in no doubt that the Employer was disputing the Final Statement which had been re-sent on 1 December 2020. Therefore, the letter operated as an effective notice of dispute for the purposes of clause 4.12.6.

The judge also rejected the argument that clause 4.12.6 provided for a two-step process in order to prevent the Final Statement becoming conclusive. On the contrary, it provided an alternative for the Employer, who could either issue a notice of dispute or initiate proceedings before the due date to prevent it becoming conclusive.

Rules of natural justice

Finally, after confirming that the adjudicator had jurisdiction over the finality of the Final Statement (as it was clear from the parties' exchanges that there was a dispute in advance of the adjudication as to whether or not the Final Statement had become conclusive), HH Judge Eyre QC addressed the Employer's argument that the adjudicator had breached the rules of natural justice in his treatment of the former's liquidated damages argument.

Following the principles set out in *Pilon Ltd v Breyer Group Plc*³ and considering *Global Switch Estates Ltd v Sudlows Ltd*⁴, HH Judge Eyre QC concluded that "where there is a claim for payment a defence of set-off can be raised and will necessarily be part of the dispute which an adjudicator addressing such a claim has to determine". In this case, the judge stressed that the Contractor sought payment of the sum due by reason of the Final Statement, and not merely a declaration as to valuation, so the Employer was therefore entitled to rely on all available defences, including a set-off claim.

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However, the adjudicator's words that the liquidated damages claim was "not part of the dispute I have been asked to decide" and "therefore [it] cannot be raised in these circumstances" showed he was clearly declining to consider such a claim as a potential set-off. As a consequence, HH Judge Eyre QC concluded that the adjudicator failed to address a defence which was before him and within his jurisdiction, so this was therefore a rare occasion on which the adjudicator had breached the rules of natural justice.

Interestingly, HH Judge Eyre QC took a provisional view that the fact that the adjudicator failed to consider the Employer's liquidated damages claim did not taint or affect his decision as to amounts in excess of those of liquidated damages and therefore the decision could be enforced to the extent of the balance.

KEY TAKEAWAYS

The decision that the Notice of Completion of Making Good was irrelevant to the calculation of the due date in this case will come as a surprise to many parties contracting under the JCT form, where it has generally been considered good practice to issue such a notice, even when no relevant defects have been identified. This decision means that employers should now be aware that in these circumstances a Notice of Completion of Making Good may be irrelevant and must exercise extreme care so as not to miss the relevant deadline to dispute final accounts and prevent them becoming conclusive.

However, employers will be reassured by the common sense approach taken by the judge to the construction of the notice of dispute and the confirmation that it is not necessary to both serve a notice of dispute and commence proceedings challenging contractors' final accounts to prevent finality of the final account. Nevertheless, employers should take care to ensure that if they intend to dispute a final account then they should always include in the notice the relevant contract provisions in order to make clear their intention.

Finally, the decision that there had been a material breach of the rules of natural justice in this case should serve as a warning to adjudicators of the danger in deliberately disregarding a party's defence, particularly in cases where a set-off defence is raised in payment claims.

Notwithstanding this, it is worth noting the judge's provisional position to preserve part of the adjudicator's decision, allowing enforcement of the amount not impacted by the liquidated damages. This follows a trend towards severing (and enforcing) the "core" part of the adjudication award as per the TCC decision in *Willow Corp SARL v MTD Contractors Ltd*⁵.

[1] [2021] EWHC 2502 (TCC)

[2] Clause 2.36 provided that when certain defects identified by the Employer had been made good, then the Employer "shall issue" the Notice of Completion of Making Good

[3] [2010] EWHC 837 (TCC)

[4] [2020] EWHC 3314 (TCC)

[5] [2019] EWHC 1591 (TCC)

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