FENWICK ELLIOTT

The construction & energy law specialists

*Dispatch* highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

**Issue 272 - February 2023**

# Dispatch

## Adjudication: valuation dates, estoppel

### A & V Building Solutions Ltd v J & B Hopkins Ltd

[2023] EWCA Civ 54

JBH were the main M&E contractors on a university project in Sussex, and engaged AVB to carry out certain M&E works at the site. Clause 9 of JHB's standard form included as follows:

*"9.2. It is a condition precedent to payment that the Sub-Contractor shall make monthly applications ('Interim Application') for payment to the Contractor on the dates specified in Appendix 6. Such applications for payment must specify the sum that the Sub-Contractor considers to be due to him and the basis on which that sum has been calculated ...*
*9.3. The payments shall be in accordance with Appendix 6.*
*9.4. Interim payments shall be due at regular intervals calculated from the date when the first payment was due. The final date for payment shall be in accordance with Appendix 6."*

Coulson LJ said that it was clear that each of the dates by which A&V were to issue their application were mechanically calculated, in that they were always 10 days before the valuation dates, which were, in turn, always the last day of each month. Appendix 6 went on to provide as follows:

*"In the event that Interim Payments become due beyond the dates set out in the schedule above then the Due Dates shall continue to occur at the same intervals as set out above and dates for submission of applications, valuations, Payment Notices, Pay Less Notices and Final Date for Payment shall occur at the same time from the Due Date as for every month as set out above.*

*For the avoidance of doubt if applications are not received from the Sub-Contractor 7 days prior to the Valuation Date then the Sub-Contractor shall not be entitled to any payment, whether or not a payment notice is served by the Sub-Contractor until the procedure set out above is repeated in relation to the next Valuation Date."*

On 22 March 2022, AVB sent interim application number 14. The application was dated the previous day, 21 March 2022, a Sunday. JBH replied on 1 April 2021, saying no further sums were due and that AVB had been overpaid. Discussions and correspondence between the parties followed during which JBH apparently treated application 14 as having been validly made: the dispute was on the detail. On 12 October 2021, AVB said that, if the sum due was not paid, they would adjudicate. In their reply, JBH's solicitors asserted, for the first time, that application 14 was not served in accordance with the provisions of the Sub-Contract. The letter did not explain why that was the case. At no time prior to the commencement of the adjudication did JBH expressly take the point that application 14 was invalid because it was issued one day late.

On 17 November 2021, AVB commenced adjudication proceedings. JBH replied that application 14 was invalid because it was served on Monday 22 March, not Sunday 21 March. The adjudicator found that interim application 14 was valid. JBH brought Part 8 proceedings against AVB seeking a declaration as to the invalidity of application 14. At first instance, the Judge agreed, holding that a valid payment application could only be made on the specific date set out in Appendix 6. Therefore, AVB's application 14 was one day late and invalid. The Judge also rejected AVB's secondary submission that there had been a variation or a waiver of the date of 21 March 2021 for a number of reasons including the parties' contemporaneous treatment of application 14.

Coulson LJ noted that the Judge's approach was simple: the date of 21 March for the relevant interim application set out in Appendix 6 was described as a "*condition precedent*" in clause 9.2, so it did not matter if that day was a Sunday or Christmas Day: the date was sacrosanct. If that date was missed, the entire application was invalid and AVB had no entitlement to make any claim for that monthly cycle. However, Coulson LJ thought that the position was more "nuanced" than that.

The reference to interim payments in clause 9.4 being "*at regular intervals calculated from the date when the first payment was due*" suggested a certain flexibility. If all the dates in Appendix 6 were rigidly fixed, then the interim payments would only be due on those specified dates, not (as clause 9.4 provided) "*calculated from the date when the first payment was due*". Appendix 6 was plainly designed to allow for flexibility in the interim valuation/payment timetable. Appendix 6 expressly talked about payments becoming due "*beyond the dates set out in the schedule*" and allowed for (different) due dates continuing to occur "at the same intervals" set out in the table. That was contrary to the general suggestion that the dates for valuation and payment were inflexibly set in stone as per the table in Appendix 6.

The position was this: the valuation date was 31 March 2021. Seven days prior to that was 24 March 2021. In accordance with the paragraph in Appendix 6, the interim application had to be made no later than 24 March 2021 if AVB did not want to drop into the next payment cycle. It was an agreed fact that the application was sent and received on 22 March 2021. On that basis, therefore, application 14 was within the time limit set out in that paragraph of Appendix 6. The primary dates which AVB had to meet were those set out in column A of the table in Appendix 6, namely 10 days prior to the valuation date. But, there was some leeway, as provided by the second paragraph in the Appendix, such that it was only applications made less than seven days before the valuation date that would be invalid.

That was, according to Coulson LJ: "*a sensible commercial arrangement.*"

This meant that it was strictly unnecessary to reach a concluded view on AVB's alternative case that, even if the date of 21 March 2021 was set in stone, the Judge should have found that that provision was varied and/or waived and/or that JBH were estopped from relying on the alleged invalidity. However, Coulson LJ noted that the necessary ingredients of a simple estoppel appeared to have been made out here. JBH said in their email of 1 April 2021 that they would deal with application 14 as a valid application and then proceeded to do just that. They considered the detail of application 14 and issued with their own valuation and Payment Notice. These documents assumed throughout the validity of application 14 and no attempt was made to reserve the position in respect of validity. In this way, JBH unequivocally affirmed the validity of application 14.

Throughout the period between March and November 2021, both parties were operating on the basis that application 14 was a valid application. AVB relied on that common assumption to make application 14 the focus of their Adjudication Notice. If, at any point prior to that time, JBH had indicated that they considered application 14 to have been served one day late, then AVB could have taken the necessary steps to resolve that debate by repeating the claim for the next monthly cycle (or for any month prior to the commencement of the adjudication). AVB did not do so because JBH had not taken the point. It was only after the adjudication had started that JBH said that the application had been served one day late. Therefore, if this had been a live issue, Coulson LJ would not have permitted JBH to conduct themselves in this way and that they had unequivocally represented that application 14 was valid.

## Limitation & adjudication

### LJR Interiors Ltd v Cooper Construction Ltd

[2023] EWHC 3339 (TCC)

LJR sought summary enforcement of an adjudicator's decision whilst Cooper sought a Part 8 declaration that the adjudicator's decision was void on the ground that the sum awarded was barred by limitation. Back in August 2014, the parties entered into a written contract under which LJR agreed to carry out dry lining and other works for Cooper. The Contract contained no provision for the reference of disputes to adjudication, so the adjudication provisions of the Scheme applied.

Cooper said that the works under the Contract were completed on 19 October 2014. On 31 July 2022, almost 8 years after they had finished works under the Contract, LJR submitted Application No. 4 in the sum of £3,256.58. While the sum claimed was small, LJR submitted similar applications in July 2022 to Cooper across a number of other contracts. Cooper did not respond and LJR gave notice of adjudication saying that the dispute arose "on or about 28 August 2022 when the notified sum due was not paid by the final date for payment." Amongst other adjudication defences, Cooper said that the claim was issued outside the Limitation Period of six years, in accordance with section 5 of the Limitation Act 1980:

*"For the avoidance of doubt, the 'cause of action' was either 28 November 2014 when the Respondent failed to pay the sum invoiced for by the Referring Party, or, although denied by the Respondent, on 12 March 2015 when the Respondent issued the email refusing to pay the sum invoiced by the Referring Party and provided its reasons for refusal ..."*

The adjudicator addressed the issue of limitation by saying that the general rule in contract was that a cause of action accrued when the breach takes place. The breach alleged here was the failure to make payment of a sum said to be due by the final date for payment, namely 28 August 2022. On that basis, the limitation period had not expired. Section 5 of the Limitation Act 1980 provides that: *"An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued."*

In defence to the enforcement proceedings, Cooper simply relied upon the date of the completion of the works as providing the accrual date for a claim for payment under a contract for those works.

HHJ Russen KC noted that Application No. 4 was not the typical type of application for payment. Although Cooper had described it as being the basis for a "smash and grab" adjudication, the Judge said that it was: "*perhaps better viewed as a return to an otherwise cold contractual scene long after the time when any appropriate investigations into it might be expected to have concluded.*"

The Judge referred to the Supreme Court decision in *Aspect v Higgins*, noting that the recognition of a limitation period of six years for the commencement of legal proceedings to enforce an adjudicator's decision provided reason why the decision itself should recognise any limitation defence that operates to defeat the claim advanced under the referred dispute. Otherwise, a contracting party would, through the grafting on of the discrete limitation period which applies to any action to enforce the decision, benefit from a much longer limitation period than the 1980 Act contemplated for the bringing of legal proceedings. The Judge also referred to, and agreed with, a statement in Keating on Construction Contracts (11th ed), at para.16-047, which supported this approach:

*"The Limitation Act 1980 and other enactments apply equally to adjudication in the sense that an adjudicator must treat the law of limitation as a substantive defence just as any other defence."*

Further, the Judge said that:

*"The key hallmark of a point which may operate to defeat such enforcement on a responsive Part 8 Claim ... is that it should be one which on a summary judgment application it would be unconscionable to ignore."*

The adjudicator's approach in deciding that LJR's cause of action, accrued on 28 August 2022, paid no regard to the terms of the Contract, as to when the right to payment of the balance sought by Application No. 4 accrued. It further appeared to have assumed that the absence of a pay less notice (taking the limitation defence or any other objection to payment of that sum) meant that it was unnecessary to consider whether the application itself was timely. LJR's right to payment of all sums identified in Application No. 4 was one which accrued on 28 November 2014. The unpaid balance did not somehow become "due again" for limitation purposes simply by virtue of being demanded again over seven and a half years later.

***Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.***

***Dispatch is a newsletter and does not provide legal advice.***

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
**Fenwick Elliott LLP**
Aldwych House
71 - 91 Aldwych
London WC2B 4HN