

## Construction Law Update

### Does Payment of an Adjudicator's Fees Amount to a Waiver of the Right to Challenge their Decision?

In the recent case of *Platform Interior Solutions Limited v ISG Construction Limited*, the TCC considered a number of challenges to an adjudicator's decision and also whether payment of the adjudicator's fees constituted a waiver of the right to challenge the decision.

#### Background

In January 2018, ISG Construction Limited ("ISG") engaged Platform Interior Solutions Limited ("Platform") to carry out works in relation to ISG's redevelopment of Erskine House, Edinburgh as a hotel. In April 2018, Platform's works were extended such that the contract price increased by circa £2.2mn and included for the provision and installation of partitions, ceilings, doors and associated joinery (the "Works").

Platform launched an adjudication contending that it was due the outstanding unpaid value of the Works and alleged that ISG had repudiated the contract. ISG, in its response, countered such arguments with its own valuations and contended that the contract had been validly terminated by ISG.

The adjudicator determined that Platform had unlawfully purported to rescind the contract and accordingly ISG had been entitled to terminate on the basis that Platform was in material breach of the contract. In respect of the valuation, the adjudicator found that ISG was liable to make a payment of £417,541.33 to Platform, being the difference between the 'Assumed Platform costs to complete' of £2,506,096.38 and the 'Actual ISG costs to complete' of £2,088,555.05 (the "Decision").

Following Platform's demands for payment, ISG notified Platform of its reasons as to why the Decision was invalid and unenforceable. Namely, the adjudicator had effectively reached an award based on

a method of valuation advanced by neither party and had not provided adequate reasons for doing so.

Platform subsequently issued proceedings to enforce the Decision.

#### The Issues before the TCC

##### The adjudicator's approach to valuation

ISG contended that the adjudicator had made a fundamental error in approaching clause 27(5) of the contract which provided as follows:

*"ISG shall be entitled to recover from the Sub-Contractor all losses, expenses, costs and damages suffered or which may be suffered by ISG by reason of such termination."*

ISG maintained that the effect of the Decision was to turn clause 27(5) on its head and construe it as a clause giving rise to an entitlement to Platform. ISG further maintained that *"clause 27(5) does not provide for Platform to become entitled to any saving that ISG achieved by the termination of the contract..."*.

The TCC held that the parties were in agreement on how the adjudicator should approach valuation in the event that it was determined that ISG had validly terminated the contract. However, the problem manifested when that approach produced an unexpected result.

Although ISG may have been left wishing that it had caveated the suggested approach in the event it led to Platform gaining sums from ISG, that was not a ground for holding that there had been a breach of natural justice.

In any event, the adjudicator was *"entitled to decide a point of importance on the basis of the material before*

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her, and on a basis for which neither party had contended”.

The TCC also dismissed ISG’s challenge that the adjudicator had failed to provide reasons for the Decision and found that the adjudicator had made clear in the Decision how she had arrived at her conclusion. Whether the adjudicator was right or wrong as a matter of law was not the question.

### Did payment of the adjudicator’s fees amount to a waiver of ISG’s right to challenge the Decision?

In this respect, Platform submitted that, by paying the adjudicator’s fees, ISG had waived any right to challenge the validity of the Decision and therefore ISG’s reservation was an ineffective general reservation.

Before considering whether ISG’s reservation was effective or not, the first consideration for the TCC was whether payment of the adjudicator’s fees was capable of amounting to a waiver. The TCC noted that there was strong authority for payment of an adjudicator’s fees potentially amounting to an election to treat an adjudicator’s decision as valid.

However, the TCC distinguished key factual differences between the quoted authorities and *Platform*. For example, the quoted authorities were both cases where payment of adjudicators’ fees were made in circumstances where the challenging party had not made a reservation of its position.

The TCC noted, “*where the alleged election is payment of an adjudicator’s fees, the court should perhaps be particularly careful to see whether the inference should properly be drawn that the payer intended to treat the decision as valid*” (emphasis added).

As a matter of policy, the TCC opined that it should not do anything to discourage the payment of fees for adjudicators’ work. In this case, ISG had made it clear that it regarded the Decision as invalid and unenforceable; as such, there was nothing in ISG’s payment of the adjudicator’s fees to suggest or infer

that ISG had changed its mind in this regard. The TCC therefore held that it would be wrong to infer from ISG’s payment of fees that ISG was electing to treat the Decision as valid.

### Analysis

The *Platform* case is a typical example of the TCC’s approach to the enforceability of adjudicators’ decisions. Save in matters where adjudicators act beyond the confines of their jurisdiction and/or act in breach of the requirements of natural justice, challenges to adjudicators’ decisions rarely succeed by virtue of the TCC’s robust approach to enforcement.

This case also highlights the general caution exercised by the TCC in finding an inference that parties have elected to treat adjudicators’ decisions as binding, merely from the act of paying adjudicators’ fees. Whether such an inference will be drawn is largely dependent upon the factual circumstances in which payment of an adjudicator’s fees is made.

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