

Significant TCC case on JCT Final Account Provisions

On 15 September 2021, the TCC handed down judgment in *CC Construction v Mincione* [2021] EWHC 2502 (TCC), a case deciding a number of important points about the operation of the final account provisions in JCT contracts, and on adjudication enforcement. [Gideon Shirazi](#) acted for the successful employer.

Notice of Making Good and Final Account Due Date

The JCT form clause 4.12.5 fixes the final account due date at one month after the latest of a number of events occurring. One of those events is the giving of a Notice of Completion of Making Good (“NCMG”). An NCMG is given by the employer at the end of the defects liability period (“DLP”), once the notified defects have been corrected. The issue of the NCMG is linked to the final account due date and the release of the retention.

What happens if no defects are notified during the DLP? This question arose in this case because the employer had taken possession of most of the works, leaving only a small portion outstanding, and there were no defects notified for that small portion. The judge concluded that, if no defects are notified, then there is no requirement for an NCMG under the contract, and the final account due date is to be calculated by reference to the latest of the other events in clause 4.12.5.

This decision means that employers need to take particular care in circumstances where no defects are notified. If an employer fails to notify any defects, the final account is likely to be due earlier and the contractor might be in a position where the sum set out in its Final Statement becomes due by default (a “smash and grab”) and the employer misses the deadline in clause 4.12.6 to avoid that sum becoming conclusive.

Conclusivity of the Final Account

The JCT form clause 4.12.6 says *“Except to the extent that prior to the due date for the final payment the Employer gives notice to the Contractor disputing anything in the Final Statement..., and subject to the clause 1.8.2 [an adjudication started no later than 1 month after the final account due date], the relevant statement shall upon the due date become conclusive as to the sum due under clause 4.12.2 and have the further effects stated in clause 1.8”*.

In this case, the employer sent a letter to the contractor before the final account due date stating that he disputed everything in the Final Statement. The contractor argued that this was insufficient because (a) the contractor had tried to re-serve the Final Statement and the employer’s letter referred to the original attempted but defective service date, and (b) the clause required the employer not only to serve the notice but also to start an adjudication.

The judge rejected both of the contractor’s arguments. The judge concluded that the JCT contract was clear in giving the employer two options to avoid conclusivity – the employer can either serve a notice disputing the Final Statement or start an adjudication, but does not need to do both; and the notice served in this case was clear.

This ruling is likely to provide some reassurance to employers who are commonly in a position where they dispute the final statement but do not wish to immediately start an adjudication.

Adjudication enforcement and Part 8 claims

In this case, the contractor started adjudication enforcement proceedings and the employer started a Part 8 claim on the same date. The TCC made an order that the two actions be heard together and gave both parties liberty to apply. The contractor did not make an application but, instead, at the hearing argued that the Part 8 claim should not be heard because of the *Hutton* approach and because of disputed facts.

The judge held that it was impermissible for the contractor to raise a *Hutton* complaint in this manner when the TCC had made an order giving liberty to apply and setting down court time to hear the case, but that the Part 8 claim could proceed only on the basis of the allegations on which there were undisputed facts.

This ruling gives some helpful clarity to parties dealing with parallel adjudication enforcement and Part 8 claims. It is no longer open to parties to wait until the hearing and seek to argue that the TCC should have made a different order when listing the matter rather than making an application contemporaneously. However, it remains open to parties to argue that claims are unsuitable for Part 8 where there are disputed facts and so cannot be determined at this stage.

Adjudication enforcement: failure to take into account defence

In the adjudication, the contractor claimed that the sum set out in its Final Statement had become due on a “smash and grab” basis. One defence run by the employer was that he was entitled to set off liquidated damages. In his decision, the adjudicator said that he was not considering this defence because “*it is not part of the dispute I have been asked to decide*” (in the Notice of Adjudication). The employer resisted the enforcement of the adjudicator’s decision on the basis that this was a deliberate failure by the adjudicator to consider a defence.

The judge held that the employer was right so that the adjudicator’s decision was not enforceable. The judge invited the parties to provide further submission on severability but indicated that his initial view was that he would be willing to sever the decision so that the contractor could recover the balance. However, this tentative conclusion on severability should be read with caution, given that the judge invited further submissions indicating that he was still unsure as to the correct approach.

This decision serves as a stark reminder to parties that, where an adjudicator does not consider and decide an issue raised in an adjudication, then that adjudication decision is likely to be unenforceable. Parties, and their advisors, would be well advised to encourage adjudicators to consider all defences raised on their merits rather than trying to persuade an adjudicator that a defence is out-of-scope. The latter approach is likely to lead to an unenforceable decision.

Gideon Shirazi acted for the employer