

BRIEFING

ADJUDICATIONS:  
FRAMING THE DISPUTE

JULY 2017

- SHOULD INTEREST BE PAID ON LIQUIDATED DAMAGES UNDER THE LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1998?
- CAN A DECISION IN AN EARLIER ADJUDICATION LIMIT JURISDICTION OF LATER ADJUDICATION?
- PARTIES SHOULD ENSURE THAT THEY DEPLOY ARGUMENTS AND EVIDENCE TO COUNTER CLAIMS AT THE APPROPRIATE TIME.



In two recent decisions arising out of the same dispute<sup>1</sup>, the Technology and Construction Court (the “TCC”) has provided useful guidance concerning cases involving multiple adjudications, and confirmed its power to overturn adjudicators’ decisions in relation to interest. The TCC has further clarified that a defending party cannot unilaterally restrict the scope of the dispute before an adjudicator by limiting the issues addressed in their response.

“A DEFENDING PARTY CANNOT UNILATERALLY RESTRICT THE SCOPE OF THE DISPUTE BEFORE AN ADJUDICATOR BY LIMITING THE ISSUES ADDRESSED IN THEIR RESPONSE.”

#### Background

In December 2013, Mailbox Birmingham Ltd (“Mailbox”) entered into a contract with Galliford Try Building Ltd<sup>2</sup> (“Galliford”) to develop a mixed-use retail space in Birmingham (the “Contract”). The Contract was based on JCT Design and Build (2011), with amendments, and divided the works into sections, with each section having its own possession date, completion date and rate of liquidated and ascertained damages (“LADs”).

In the course of the project Galliford applied for several extensions of time and Mailbox served notices seeking LADs. Thereafter, in March 2016, Mailbox purported to terminate Galliford’s employment, relying on, among other grounds, Galliford’s alleged failure to proceed regularly and diligently with the performance of its obligations under the Contract.

<sup>1</sup> *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC) and *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd* [2017] EWHC 1405 (TCC).

<sup>2</sup> Formerly Galliford Try Construction Ltd.

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“GALLIFORD ASKED THAT THE ADJUDICATOR CONSIDER ONLY THREE LIMITED DELAY EVENTS FOR THE PURPOSES OF THE FIRST ADJUDICATION, ON THE BASIS THAT IT WAS FINALISING ITS FULL EXTENSION OF TIME SUBMISSION AND INTENDED TO COMMENCE SEPARATE PROCEEDINGS IN RESPECT OF THAT CLAIM.”

### The First Adjudication

In August 2016, Mailbox served a notice of adjudication on Galliford that identified the dispute between the parties as being “Mailbox’s entitlement to LADs under the Contract” (the “First Adjudication”). Galliford’s response referred to its earlier applications and argued that it had been delayed by a number of relevant events that gave rise to an entitlement to an extension of time. However, Galliford asked that the adjudicator consider only three limited delay events for the purposes of the First Adjudication, on the basis that it was finalising its full extension of time submission and intended to commence separate proceedings in respect of that claim.

Mailbox took issue with Galliford’s approach and the adjudicator agreed, concluding that “the scope of the adjudication was determined by the matter stated in the notice and referral and that [Galliford] could not unilaterally restrict the scope merely by limiting the issues upon which they chose to run their defence”. Similarly, when considering Galliford’s limited claim for an extension of time, the adjudicator concluded that “... [Galliford] had complete freedom to mount their defence... and were not obliged to address all of the matters raised in Mailbox’s referral... However, Mailbox did not agree that [Galliford] could unilaterally reduce the scope of the adjudication by merely limiting the grounds upon which they mounted their own defence”.

The adjudicator held that Mailbox was entitled to over £4m in respect of LADs, together with interest on the sums awarded pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 (the “Late Payment Act”). Section 1(1) provides that it is an implied term of any contract to which the Act applies that any qualifying debt will carry simple interest at the rate of 8% above the Bank of England’s official base rate. Section 3(1) provides that a qualifying debt is an obligation to pay the whole or any part of the contract price.

### The First TCC Decision – Interest

Mailbox sought to enforce the decision before the TCC (which considered various issues regarding Mailbox’s right to bring the First Adjudication that are not covered here). In relation to whether Galliford should be ordered to pay interest, and if so, the rate and period for such interest, Mailbox and Galliford had agreed that Mailbox’s entitlement to LADs was not a qualifying debt for the purposes of the Late Payment Act. It was therefore held that the adjudicator did not have jurisdiction to decide that Mailbox was entitled to interest under the Late Payment Act.

However, under the Senior Courts Act 1981, the TCC can award simple interest at a rate the court thinks fit or as the rules of court may provide in the case of recovery of a debt or damages. The period during which interest accrues is all or part of the period between the date when the cause of action arose and the date of judgment and as regards an adjudication enforcement application, it has been held that the cause of action arises on the failure to pay the sum awarded by the adjudicator<sup>3</sup>.

Mailbox therefore asked the TCC to award interest at the rate of 8% above base rate (i.e., the same rate as that set out in the Late Payment Act) to penalise Galliford for not making payment following the adjudicator’s decision. Failing that, Mailbox said the TCC should either award 5% above base rate, alleging it was the contractual rate

<sup>3</sup> *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38 and *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd* [2007] EWHC 2507 (TCC).

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“THE TCC DECIDED THAT IT WAS NOT UNREASONABLE OF GALLIFORD TO CHALLENGE THE JURISDICTION OF THE ADJUDICATOR AND, AS SUCH, IT WOULD NOT BE APPROPRIATE TO PENALISE IT BY APPLYING THE 8% RATE.”

of interest, or alternatively 2% above base rate, being the usual Commercial Court rate. Unsurprisingly, Galliford argued that the 2% rate should apply.

The TCC decided that it was not unreasonable of Galliford to challenge the jurisdiction of the adjudicator and, as such, it would not be appropriate to penalise it by applying the 8% rate. It also noted that the contractual rate of 5% was not expressly stated to apply to “any sums due to the employer”, and there was therefore no basis for applying this rate to Mailbox’s claim for LADs. In those circumstances, the appropriate rate was the usual Commercial Court rate of 2% above base rate.

#### The Second Adjudication

Meanwhile, in April 2017, Mailbox commenced proceedings seeking declarations that the adjudicator’s decision in the First Adjudication determined the totality of its entitlement to LADs and Galliford’s entitlement to extensions of time arising out of the Contract, and that Galliford was prevented from bringing a subsequent adjudication seeking any extension of time because the subsequent adjudicator would have no jurisdiction.

On the same day, Galliford commenced a second adjudication concerning the lawfulness of the termination of the Contract on the basis that it had proceeded regularly and diligently with the performance of its obligations (the “Second Adjudication”). It argued that this issue also required the adjudicator to consider the contractual completion date and any extension of that date as well as whether it was entitled to a significant extension of time that went well beyond that considered and granted in the First Adjudication.

#### The Second TCC Decision – LADs

The TCC held it was “beyond argument” that Mailbox was entitled to retain all the LADs awarded in the First Adjudication (subject, of course, to a successful challenge of that claim in court) and that Mailbox’s entitlement “cannot be reduced or modified either under the contract or in a subsequent adjudication”. Any alteration to the amount awarded would breach section 9(2) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 and contravene the principles set out in *Quietfield*<sup>4</sup>, *Harding*<sup>5</sup> and *Brown*<sup>6</sup>. The TCC also rejected Galliford’s submission that Mailbox’s entitlement to LADs had been decided only on an interim basis and that Mailbox’s entitlement could be reopened at the final account stage.

#### The Second TCC Decision – Galliford’s entitlement to an extension of time

The TCC reiterated that “a contractor’s claim for an extension of time under the JCT standard forms of contract is defensive. An extension of time acts simply as a defence to a claim that the employer might otherwise bring for liquidated damages due to delay”. Accordingly, “in a case as here, where the employer’s entitlement to [LADs] has been fixed, a claim for extension of time [is] redundant”.

The TCC then considered whether the dispute referred to the adjudicator in the First Adjudication involved all of Mailbox’s entitlement to LADs and Galliford’s complete

<sup>4</sup> *Quietfield Ltd v Vascroft Contractors Ltd* [2006] EWCA 1737 in which the Court of Appeal said that “... more than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided”.

<sup>5</sup> *Harding v Paice* [2015] EWCA Civ 1231 in which the Court of Appeal said that “Parliament cannot have intended that if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, future adjudication about the other matters is prohibited”.

<sup>6</sup> *Brown v Complete Building Solutions Limited* [2016] EWCA Civ 1 in which the Court of Appeal said that “[*Quietfield* and *Brown*] indicate that the starting point is the adjudicator’s view of whether one dispute is the same or substantially the same ... it is important to give due respect to the adjudicator’s decision”.

entitlement to extensions of time, and thereby prevented further extension of time claims being considered in the Second Adjudication. The TCC noted Galliford's lengthy applications for extensions of time before the Contract ended, and particularly the fact that its applications related to delays on all the late sections of the work and "certainly were not limited to just three events". Accordingly, as the crystallised dispute before the adjudicator in the First Adjudication concerned responsibility for all the delays, "[Galliford] were not entitled to seek to defend themselves by reference to just a few of the potential relevant events, and keep others back for another day"<sup>7</sup>. For that reason, Galliford was not entitled to seek further extensions of time in the Second Adjudication.

The TCC added that there was nothing inherently unfair with an employer forcing a contractor to make its extension of time claims before the contractor was ready. First, the right to adjudicate at any time meant that "there is always a risk that the defending party is caught on the hop by the claiming party's notice of adjudication... this is simply a feature of the rough and ready world of construction adjudication". Further, Galliford had had some five months between the termination of the Contract and the commencement of the First Adjudication to formulate its extension of time claim. Moreover, nothing prevented it from raising matters in court proceedings challenging the adjudicator's decision in the First Adjudication and there was no risk of its substantive rights being affected.

### **The Second TCC Decision – Termination of the Contract**

While the TCC accepted that all issues relating to LADs and extensions of time had been dealt with in the First Adjudication, it could not be said that termination issues had been addressed. As such, it would be wrong to hobble Galliford and the adjudicator from considering the termination issue by ruling that it could be considered only by reference to the First Adjudication findings and Galliford was entitled to take any points it liked about its regular and diligent performance of the contractual works, irrespective of whether those points were the same or similar to points that it may later rely on in any court proceedings. Nevertheless, that would not affect Mailbox's financial entitlement arising from the First Adjudication.

### **Conclusion**

These decisions will be of interest to parties involved in adjudications as they clarify the extent to which an earlier adjudication may affect a subsequent one. Parties should take care when drafting contractual correspondence and formulating extension of time claims as those documents will inform any consideration of what falls within the crystallised dispute. They should also ensure that critical evidence and arguments are deployed at the appropriate time. As the Court said in the Second TCC Decision, relying on attempts to retrospectively limit the adjudicator's decision is a "potentially risky approach" and may result in otherwise meritorious claims or defences falling by the wayside.

As to the decision on the Late Payment Act, it is disappointing that the court did not determine whether payment of liquidated damages is a debt or not. The resolution of this question would have been particularly interesting as, although the Late Payment Act does not strictly apply to the recovery of damages, at clause 2.29.2.1, the JCT DAB 2011 provides that liquidated damages can be recovered as a debt, to which the Late Payments Act would apply.

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**"PARTIES SHOULD TAKE CARE WHEN DRAFTING CONTRACTUAL CORRESPONDENCE AND FORMULATING EXTENSION OF TIME CLAIMS AS THOSE DOCUMENTS WILL ULTIMATELY INFORM ANY CONSIDERATION OF WHAT FALLS WITHIN THE CRYSTALLISED DISPUTE."**

<sup>7</sup> See *Working Environments Ltd v Greencoat Construction Ltd* [2012] EWHC 1039 (TCC).

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Another consideration is that the Late Payment Act will not apply if the parties have agreed in the contract a rate that will apply to late payments, provided that the amount is sufficient to compensate and deter, and if it is fair. The wording in the JCT DAB 2011 is that the contractual rate of interest is said to apply to a sum or any part of it “due to the contractor under these conditions by the final date for its payment”. It is arguable whether this would cover liquidated damages due and parties may wish to consider amending this provision to make it clear that the contractual rate of interest will also apply to liquidated damages or payments to the Employer.

As it is, the decision of the TCC shows that it has no issue in deciding that an adjudicator was wrong to award interest under the Late Payment Act in respect of payment of liquidated damages. Parties to an adjudication should think carefully about the rate of interest that they claim should apply to the late payment of liquidated damages, keeping in mind that the current position under English law is that a liability to pay liquidated damages is a liability for damages, not debt.

## FOR MORE INFORMATION

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