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This week's update revisits a noteworthy case: Flexidig Ltd v M&M Contractors (Europe) Ltd [2020] EWHC 847 (TCC)

[Flexidig Ltd v M&M Contractors \(Europe\) Ltd \[2020\] EWHC 847 \(TCC\)](#)

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Key Words:

Adjudication Enforcement, Jurisdiction, Proper Forum, Service of Process, Contractual Interpretation, Pay Less Notice, Scope of Adjudicator's Powers, Natural Justice

Summary

Flexidig Ltd sought enforcement of an adjudicator's decision awarding them £223,597.21 plus VAT from M&M Contractors. M&M resisted enforcement, citing jurisdictional and adjudicator overreach objections. The court addressed and dismissed these objections, upholding the adjudicator's decision.

Key Themes:

1. **Enforcement of Adjudication Awards:** The case highlights principles governing the enforcement of adjudication decisions in construction disputes.
2. **Jurisdictional Challenges:** The dispute involved parallel proceedings in Northern Ireland and England, requiring the court to decide the appropriate forum.
3. **Interpretation of Contractual Provisions:** The judgment examined subcontract clauses on adjudication, notices, and payment terms.
4. **Scope of Adjudicator's Powers:** The court considered the adjudicator's authority to make a positive award despite a valid "pay less notice."

Background

Flexidig and M&M subcontracted civil works for a Virgin Media underground infrastructure project in Louth, Lincolnshire [2]. The project, completed in 2018, led to disputes over defects and payments. Following three prior adjudications, the current dispute arose from Flexidig's Application for Payment No. 70 (AFP), which sought £2.5 million. M&M had paid £1.742 million, leaving £673,374 outstanding [18].

M&M issued a notice disputing the amount and claiming a set-off for defect rectification costs [18-19]. Flexidig argued the notice was invalid due to insufficient cost breakdowns, while M&M maintained its

validity by referencing prior documentation [19-30].

Flexidig commenced the fourth adjudication, seeking the outstanding amount [16, 19-22]. The adjudicator found M&M's notice to be valid but reduced its claimable set-off to £449,776.98, awarding Flexidig the remaining balance of £223,597.21 [35-40]. While M&M sought to declare the adjudicator's decision unenforceable in Northern Ireland [44], Flexidig applied for enforcement in England [44].

Legal Issues and Analysis

A. Jurisdiction

M&M argued that the English court lacked jurisdiction, citing a clause specifying Northern Irish courts and M&M's domicile in Northern Ireland [8-10, 4-9]. Flexidig countered that England was the proper forum due to the contract's performance location and M&M's significant business presence in England [55-59]. The court ruled in favour of England as the forum, considering the project's location, M&M's activities, the convenience of prior hearings in England, and the potential for further adjudications related to the project [55-62].

B. Timeliness of the Referral

M&M claimed Flexidig's adjudication referral was untimely based on the notice of adjudication's date [72-73]. The court rejected this, ruling that the relevant date was when the notice was received or deemed served, which was within the contractual timeframe [76-80].

C. Adjudicator's Power to Make a Positive Award

M&M argued the adjudicator exceeded jurisdiction by awarding Flexidig a sum despite finding M&M's "pay less notice" valid [70(2)]. The court disagreed, referencing Section 111(8) of the Housing Grants, Construction and Regeneration Act 1996, which permits awards exceeding the sum specified in a "pay less notice" [82-83].

The court held the decision was within the scope of the notice of adjudication [88-89] and adhered to natural justice principles [93-98]. It clarified that the adjudicator assessed only the maximum amount M&M could withhold, leaving defect claims open for further adjudication or agreement [94].

Conclusion

The court dismissed M&M's jurisdictional objections, confirmed the timeliness of Flexidig's adjudication referral, and upheld the adjudicator's authority to make a positive award despite a valid "pay less notice." It ordered M&M to pay the awarded sum to Flexidig.

Key Takeaway:

The judgment highlights the pro-enforcement stance of English courts toward adjudication decisions. It affirms that even with a valid "pay less notice," adjudicators can determine the allowable withheld amount, ensuring fairness. It also emphasises the importance of contract performance location and business presence in jurisdictional considerations.

Ratio Decidendi & Obiter Dicta:

Ratio:

1. England as the Proper Forum:

- **Place of Performance:** The contract was performed in England, with ongoing defect rectification work [55-56].
- **M&M's Presence in England:** M&M's significant business activities in England outweighed its domicile in Northern Ireland [56-58].
- **Practical Considerations:** The case had already been argued in England, avoiding inconvenience or duplication [59-61].

2. Timeliness of Referral to Adjudication:

The court ruled that the relevant date for the referral was when the notice was received or deemed served, within the contractual timeframe [72-80].

3. Adjudicator's Power to Make a Positive Award:

- **Statutory Provision:** Section 111(8) of the Housing Grants, Construction and Regeneration Act 1996 supports adjudicators awarding sums exceeding a "pay less notice" [82-83, 89].
- **Scope of the Dispute:** The decision fell within the notice of adjudication's scope [88-89].
- **Natural Justice:** The adjudicator adhered to natural justice principles, ensuring all relevant information was considered [93-98].

Obiter:

1. **M&M's Conduct:** The judge criticised M&M's pre-emptive Northern Ireland legal actions as tactical manoeuvres [49-50].
2. **Language in Adjudication:** The judge preferred "going off course" over "frolic of his own" for describing adjudicators exceeding their jurisdiction [92-93].
3. **Catch-All Clauses:** Catch-all provisions in notices should not grant unlimited power beyond the dispute's scope [90-92].

Parting Thoughts - Navigating Legal Technicalities: A Matter of Context

This case underscores the primacy of substance over procedural technicalities in construction disputes. The court rejected M&M's attempts to exploit legal formalities, focusing on practical considerations and ensuring Flexidig received the payment it was due. It serves as a reminder that prioritising substantive resolution leads to fairer and more sustainable outcomes.