

## Legal Briefing

### Ted Lowery considers a case in which the adjudicator carried out his own delay analysis

*RGB P&C Ltd v Victory House General Partner Ltd [2019]*

*EWHC 1188*

Before Mrs Justice Jefford DBE

In the Technology and Construction Court

Judgement delivered 10 May 2019

#### The facts

During 2015 Victory House engaged RGB as a design and build contractor for a hotel project in Leicester Square. Practical completion took place in September 2017 some 16 months late. In April 2018 RGB submitted a final statement claiming an adjusted contract sum of over £11m including loss and expense based upon an extension of time of 67 weeks. Victory House rejected the extension of time claim and assessed the contract sum at less than £6m, taking into account their entitlement to liquidated damages.

RGB commenced adjudication in October 2018. In the adjudication both parties relied upon expert programming evidence. Victory House submitted that the delay analysis provided by RGB's expert was flawed because it relied upon subjective and post completion changes to the baseline programme logic. As part of a series of questions put to the parties, the adjudicator asked for further details as to the logic links that RGB's expert had introduced into the baseline programme.

Regarding quantum, Victory House alleged that several of the sub-contractor claims included within RGB's adjusted contract sum were suspicious, demonstrating no evidence of actual costs and appearing to have been manufactured with assistance from RGB where each claim included an Emden formula calculation and was fronted by a similarly worded letter. Although Victory House argued that these sub-contractor claims were manufactured, they did not specifically allege fraud.

In his decision the adjudicator awarded RGB an extension of time of around 46 weeks. Based upon his own review of the facts and the parties' responses to his questions the adjudicator determined that the impact of late information release was significantly greater than had been suggested by either expert. The adjudicator made reduced assessments for the sub-contractor claims ranging from around 20% to 50% of the claimed amounts. He made no direct reference to the allegation that the claims were manufactured but did note that the supporting material was unsatisfactory. Having identified an adjusted contract sum of £9.7m the adjudicator ordered the balance of £1.16m to be paid to RGB.

Victory House contended that the adjudicator had acted in breach of natural justice, firstly by undertaking his own delay analysis without allowing the parties an opportunity to comment and secondly by failing to address the key aspect of their defence that sub-contractor claims had been fabricated and appeared fraudulent.

#### The issue

Was RGB entitled to summary enforcement?

#### The decision

The judge observed that where the parties had argued over the validity of the baseline programme, the logic links, critical paths and time impacts of events, it must have been self-evident from the adjudicator's questions that he was seeking to interrogate the logic underpinning the programmes and had in mind modifying and/or impacting these programmes if he thought that the experts had got it wrong. Having raised questions on these issues, the adjudicator reached his own conclusion and ascertained the impact of the relevant events as he had found them. This did not amount to some wholly unrelated delay analysis but was well within the adjudicator's jurisdiction bearing in mind the nature of the dispute referred to him.

The judge noted that whilst the decision did not directly reference the allegation that the sub-contractor claims were manufactured, the obvious inference was that the adjudicator had considered this issue when making his assessments and characterising the supporting materials as being unsatisfactory. This was therefore one of those cases in which the adjudicator had properly decided the dispute

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referred to him even if he had not considered every sub-issue or articulated his reasoning on every sub-issue.

The judge reiterated that parties should not scrutinise decisions with a fine toothed comb searching for matters on which the adjudicator could have said more but did not.

Finally, where Victory House's submissions in the adjudication did not include a clear and particularised allegation of fraud, the adjudicator could not be criticised for having failed to address fraud directly.

### Commentary

Whether an adjudicator has breached natural justice by failing to put a new case to the parties or by failing to address key elements of the submissions will always be a question of fact and degree. This judgment confirms that the substantive facts and the degree of materiality must be exceptional in order to offer any prospect of challenging enforcement.

Here, the judge concluded that the adjudicator's approach to the question of delay was not beyond the pale of the parties' submissions and that his assessment of the sub-contractor claims took into account the evidential weaknesses of those claims.

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